

**SUPREME COURT OF NOVA SCOTIA**  
**(FAMILY DIVISION)**

**Citation:** Children's Aid Society of Inverness/Richmond v. C.S.L, 2009 NSSC  
207

**Date:** 20090630

**Docket:** SFPACFSA-053721

**Registry:** Port Hawkesbury

**Between:**

Children's Aid Society of Inverness/Richmond

Applicant

v.

C.S.L, D.R. and E.R.

Respondent(s)

<b>Editorial Notice</b>
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Identifying information has been removed from this electronic version of the judgment.
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**Restriction on publication:** 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:

“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 subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or relative of the child.”

**Revised Decision:** The original decision has been corrected on July 6, 2009, and replaces the previously distributed decision.

**Judge:** The Honourable Justice Moira C. Legere Sers

**Heard:** December 8, 9, and 10, 2008, and June 3 and 4, 2009, in Port Hawkesbury, Nova Scotia

**Counsel:** Lindsay McDonald, for the Applicant  
Tracey Sturmy, for the respondent D.R.  
M. Louise Campbell, for the respondent E.R.

## **By the Court:**

### **Introduction**

[1] This protection application began on July 5, 2007. The child, J. (born February \*, 2007), was taken into the care of the agency on July 3, 2007, at 5 months of age. She is now 2 years and 5 months old.

[2] At the time of this application her mother C.S.L. (born September \*, 1989) was 17 years old and having difficulty getting social assistance because of her age and because of the lack of available housing.

[3] Although single at the time of the application, the father, D.R. (born March \*, 1983) is now in a common law relationship with S.A. He is employed.

[4] During the course of these proceedings the father and his partner had a baby born to them. This child resides in their home without agency intervention on condition the father is never left alone to bear sole responsibility for the child.

### **Issues**

1. Has the agency provided the best plan of care for this child in accordance with the *Children and Family Services Act*.

2. In making this determination, have they complied with their duties in accordance with *Children and Family Services Act*?

3. Is there authority to allow for an extension of the time limits set out in Section 45 of the *Children and Family Services Act* when the Court requires more evidence?

4. In placement decisions does the “best interests test” stand alone and in priority to other sections of the *Children and Family Services Act* prior to a final disposition or must this test be read in the context of the objectives of the legislation.

### **Legal History**

[5] The *finding in need of protection order* is dated October 1, 2007, with first disposition on December 10, 2007. At that stage, the agency supported a temporary care and custody order with emphasis on more hands on parenting opportunities and counseling services for the mother. They awaited the parental capacity assessment to formalize their plan.

[6] The assessment was prepared by L. Elaine Boyd , a licenced psychologist with 22 years of professional experience. She was qualified as an expert in the preparation of parental capacity assessments. The report was available to the parties on May 5, 2008, some seven months before the date for final disposition as required by Section 45 of the *Children and Family Services Act*.

[7] Her recommendations were as follows:

1. That consideration be given to placing J. in the care of Ms. S.A. and Mr. D.R. under CAS supervision with the understanding that it is Ms. S.A. who would be the primary parent in terms of problem solving and much of the necessary decision making. I do not believe that Mr. D.R. could parent J. without her presence in the home or the presence of some other individual who could support him adequately;
2. That Ms. S.A. participate in supervised access visits with J. and Mr. D.R. before any change in J.'s current residence is initiated. This would allow her to form a relationship with J. and CAS staff to observe her parenting;
3. That Ms. S.L. continue to have supervised access with J. until such time as CAS and/or her primary care givers are confident that she would not place J. at risk if not supervised.
4. If J. is placed with Mr. D. R. and Ms. S.A., Ms. C.S L. should be given therapeutic support to help her deal with the situation.
5. Ms. S.A. and Mr. D.R. may need therapeutic support to help them deal with Ms. C.S.L. if J. is placed in their care"

[8] The agency rejected these recommendations. On June 9, 2008, the agency filed a revised plan of care seeking an order for permanent care with the intention of placing this child for adoption.

### **Maternal Grandparents Application**

[9] On June 9, 2008, the maternal grandparents, with counsel, applied for leave to be added as parties to this proceeding. The mother supported their plan. Their application was contested and ultimately dismissed on October 15, 2008.

### **Paternal Grandmother**

[10] On the June 9, 2008, the paternal grandmother, Ms. E.R., also appeared before the Court to seek party status. Until court intervention she never formalized her plan. She indicated she wanted to make application and present a plan to the Court. She was self represented. She had been advised to seek counsel. She was unsuccessful in obtaining approval for Legal Aid.

[11] A transcript of the conversation on July 2<sup>nd</sup> 2008 between the agency worker and the father was entered into evidence. Mr. R. informed the agent Ms. Delorey that his mother's first language was french and she had difficulty hearing so she could not put forward a plan herself. He informed the worker that his mother did not qualify for legal aid and could not afford private counsel. When the worker asked him for clarification he said "she can't do it herself".

[12] She testified at the final hearing. She was present as a witness and supportive of her son and his partner and prepared to assume a significant role in the care of this child.

### **Final Disposition**

[13] Due to the availability of counsel and the Court, the trial dates for the final disposition were set commencing December 8, 2008. The 10<sup>th</sup> of December was the final date for disposition in accordance with Section 45 of the Children and Family Services Act. All parties consented to the scheduling at this time.

### **The Mother Withdrew**

[14] The mother left the jurisdiction prior to the final disposition hearing. She was provided ample time and notice to reconsider. On August 18, 2008, her

counsel advised the Court he had one weeks notice of her move to Alberta. He sought and received permission to withdraw as counsel.

### **Plan of Care**

[15] The agency affidavit of May 22, 2008, attaches the agency Plan of Care. They sought a permanent care order with the objective of placing the child for adoption. The rationale for the Plan of Care relates somewhat to the fact that time has run out. It also identified that the reason the agency did not support placement of the child with D.R. and S.A. is as follows:

Among the factors which weigh significantly against such an arrangement the agency knows the following:

- (1) The continuing instability of the D.R./S.A. household including frequent relocations and financial insecurity:
- (2) continuing hostility and antagonism between C.S.L. and Ms. S.A. and Mr. D.R. - including alleged incidents of C.S.L. following D.R. and including the recent charges of uttering threats and assault brought by C.S.L. against D.R.;
- (3) S.A.'s current and possibly high risk pregnancy.

### **Options**

[16] Without the maternal grandparents application, this left the Court with the agency and the father's plan as the only options available under section 42 (1) of the Act. This option would not allow for conditions on the final order.

### **Facts in Support of the Agency's Assessment of Risk regarding the Mother**

[17] I have included in this decision the evidence relating to the agency concerns regarding the mother even though she is not present. I have done this to establish findings on the evidence presented by the agency and to establish a record in the event there are future court proceedings.

[18] On April 15, 2007, the police made a referral to the Emergency Duty Line. They had been called to intervene in a family dispute due to a physical fight

between the mother and her sister. The infant child was present. According to the sister, the mother punched her in the face while holding her infant child in her arms. Her sister alleged that the mother roughly grabbed the child from the high chair and kned her sister in the stomach. The mother left the home and her child remained with her sister. The sister's two children, aged seven and eight, were present, crying and scared.

[19] The mother denied these allegations. She admitted to a physical fight and alleged that her sister punched in the jaw. The RCMP later accompanied the mother and the baby to the hospital. There was no obvious injury.

[20] The sister informed the agency that her sister (the mother of the child) moved in and out of their own mother's home and lived on the streets. She reported that the mother has taken the child to a home and partied where people were smoking drugs.

[21] The agency discovered there was prior child welfare involvement with the mother and her family of origin.

### **Voluntary Services**

[22] With no residence, a history of domestic violence and a familial history of child welfare involvement, the agency determined this situation to have a high level of risk. In April, 2007, they decided to set up voluntary services for the mother.

[23] In May, 2007, the mother was offered personal counseling and parenting services with her child present.

[24] The mother signed an 'In Home Support Agreement' and promised to engage in a parent education program with a family support worker. She agreed to attend counseling services with a clinical psychologist, Dr. Hartley, to address attachment issues.

[25] On May 4, 2007, the agency received an anonymous referral that people were in and out of the mother's apartment and that friends were staying there. The child was present while drugs were being smoked and drinking was ongoing. The source alleged that the mother was getting and using drugs and alcohol from a local

bootlegger who had given her drugs and alcohol in the past. She was no longer allowing the child's father into the apartment.

[26] The mother denied the allegations and advised that when she was going out with friends, she made appropriate babysitting arrangements.

[27] On Friday, May 11, 2007, a child protection worker attended the home as a result of an anonymous call reporting that the landlord issued a warning to the mother due to a loud party at her apartment. The worker checked the cupboards and found them to be stocked with food and supplies.

[28] On May 23, 2007, the family support worker met with the mother to discuss an overview of the Parent Education Program. During the visit the agency worker observed that the mother did not respond to any of the baby's cues.

[29] The mother missed the first scheduled meeting on May 30, 2007, due to a court appearance.

[30] The mother made various allegations about the father. She alleged that he had pushed her and that a door was slammed hitting her in the face, leaving a mark.

[31] On May 25, 2007, the agency determined that service provision at a high level was warranted due to the young age of the child and the mother and because of concerns of attachment and bonding. They were concerned that the mother was passing the child over to others to take care of her.

[32] Again on May 30, 2007, a protection worker visited the mother's apartment to discuss their concerns. The mother informed the worker that the child was staying at a friends home and had been there for a couple of nights.

[33] The access facilitator drove the mother to an appointment on June 5, 2007. During the course of the drive, the facilitator became concerned because of a discussion between she and the mother as to the care arrangements, the handling and the state of dress of the child in 22 degree weather. The mother suggested she was going to take the child to the beach and buy a floatation device for the baby. The child was being left with various caretakers. The mother was involved in underage drinking.

[34] The mother overslept and missed the June 6, 2007, meeting with the family support worker.

[35] Again, on June 6, 2007, the agency contacted the mother. Once again the child was not with her. The agency set up and advised the mother of the next appointment dates with the family support worker and with Dr. Hartley.

[36] The mother informed the agency that the child had spent the weekend with her father.

[37] The mother attended the June 13, 2007, parent education session.

[38] The agency referred the matter to Dr. Susan Hartley for psychological intervention to assist the mother . Transportation was provided and she was first seen in June, 2007. Her services were terminated on the 29<sup>th</sup> of July, 2008, when the mother relocated to Alberta.

[39] On June 26, 2007, the agency received information from a third party who witnessed men going in and out of the apartment. It was alleged that the baby was being left in the livingroom for long periods of time in a car seat and that the mother was involved in exchanging sex for money.

[40] The allegation from the third party indicated the home was dirty, other people were sleeping there and that the mother was frequently leaving the child with other people.

[41] The worker conducted an unannounced visit. Upon arrival, the mother got up from the bed where she was lying with the child. The kitchen was cluttered with dirty dishes in the sink and on the kitchen counter and small objects were lying about, accessible to the child.

[42] The mother adamantly denied the allegations that she was exchanging sex for money and denied allegations that she was leaving the child for long periods of time in a car seat. She had positioned the baby's swing in the room. She believed that others were attempting to cause her difficulties by phoning in malicious allegations.



[43] On June 27, 2007, a parent information support worker contacted the agency and reported the mother showed very little interest in the parenting session and had informed her that she had not returned to the Family Place Resource Centre.

[44] From June 28<sup>th</sup> to July 2<sup>nd</sup> the baby was to spend the weekend with the father and S.A. The parents agreed that the child was to be returned at 9:00 a.m. on Monday. The mother was to meet them at the '\* Concert'.

[45] The father and his girlfriend, S.A., reported to the agency that they met the mother at the \* Concert and observed her to be under the influence of alcohol and/or drugs. The mother was acting in what they described as a "wired" manner "smelling like weed and very high". This was confirmed by the paternal grandmother.

[46] They determined she was not in a condition to take the baby home with her that evening. They suggested to her, and she agreed, that they would keep the child overnight and they would return the child the next morning at 9 o'clock. When the child was not returned by 9:00 a.m., the mother contacted the police and went to A. to pick up her child.

[47] The agency received a referral directly from S.A. on July 3, 2007, early in the morning. She advised that they had the baby since June 28, 2007. The father got called out to work early in the morning and she was looking after the child. She informed the mother that as soon as she had access to a car, either through the father or the father's mother, the child would be immediately returned.

[48] S.A. also advised they had received no supplies from the mother except for one bottle with two inches of dried powder in it and eight diapers. The child appeared very hungry. She ate so fast that she vomited.

[49] A second caller phoned the agency shortly after and confirmed that the baby was being left with neighbor's and was not being cared for properly and that the mother was high at the Canada Day celebrations.

[50] In retaliation, the mother decided to seek supervised access for the father.

### **Formal Agency Involvement**

[51] As a result of a Risk Management conference on July 3, 2007, the child was taken into care.

[52] The father was served that afternoon with the Notice of Taking into Care. It was explained to him that the child would be placed in an approved foster home and the matter would be brought before the Court. He was encouraged to contact Legal Aid as soon as possible. The father indicated that he was happy that the child would be safe that night.

[53] Ms. Delorey (Hallett), the child protection worker originally involved in this case, had difficulty serving the father due to D.R. not being at home and being at various places of employment.

[54] S.A. contacted the agency on July 6, 2007. She explained that D.R. became very upset at the apprehension. She advised that once they found out whether he was the father that he intended to pursue custody. He was confused and very upset that this child was in foster care. She advised as follows:

“We have already been told that J. is staying in foster care or going with (the mother’s sister). We were told that by (her) so apparently we are going to court for no reason. We wanted J. to come live with us until we found out the paternity-that’s not possible like you said-she’s staying in foster care or wherever.”

[55] When the father was originally served with the application, S.A. confirmed to the child protection worker that which she confirmed to the Court, which is:

“I don’t think her child should be taken away for good because no mother should lose her child. She just needs to learn how to look after J.. That’s the only reason we ever called because we want her to raise her child properly. We don’t want any Court papers delivered here-she is not going to Court, I’m not going to Court, none of us are going to Court.”

[56] The worker cancelled the fathers arranged access visit.

[57] L.M.G., the mother’s sister, called the agency and asked if the child could live with her until everything was over. The agency did not consider this an appropriate placement.

### **The initial (5 day) hearing**

[58] D.R. did not attend the first hearing. He couldn't tolerate having the baby returned to foster care. He had received calls from the mother and her friend blaming him for having the child taken away a result of his referral to child protection.

[59] The agency worker was advised that there was a place for J. at their apartment, that it was clean and that she ate well when she was with them.

[60] The first appearance resulted in an order dated July 10, 2007. It stated:

- “1. That the child, J., shall remain in the care and custody of the applicant agency.
2. That the respondents shall have supervised access with the child on terms and conditions at the Agency's discretion.
3. That the respondents shall cooperate with and participate consistently with such services, assessments, treatment, counseling as are deemed appropriate and/or arranged by the applicant, including but not limited to random substance testing, attachment assessment and parenting education.”

[61] The matter was adjourned to September 4, 2007, and for the protection hearing to October 1, 2007.

### **Finding Hearing**

[62] A consent order for finding was made on the **1<sup>st</sup> of October, 2007**. The terms of the finding order remained the same as the initial order. At this time, all parties were present and represented by counsel.

[63] The mother was provided with random testing for substance abuse, parent education and individual therapy. A parental capacity assessment was ordered.

[64] On October 10, 2007, in her final reporting letter, Dr. Hartley confirmed that:

the focus of the therapy was to assist the mother in recognizing those aspects of her life and ways of thinking “that compromised her ability to form healthy relationships and to be successful in her life”. Progress towards this goal was apparent in C.S.L.’s reflections and observations and some behavioral change was reported in terms of the choices she was making in her life. However, C.S.L.’s limited capacity for insight and limited tolerance for addressing highly emotional material made significant psychological change unlikely.

[65] Dr. Hartley advised that before she could address the stated object of the referral, it was apparent that the mother needed individual therapy. Dr. Hartley reported to the agency that she was concerned about the interaction between the mother and the child.

[66] She informed the agency that the mother planned to move to Alberta.

[67] The access facilitators reports indicate that the mother was attentive and loving to her child and noted that her child recognized her.

[68] The agency affidavit sets out the deficiencies in the content of the access between the mother and the child. The agency worker met with the access facilitators on August 7, 2007, and instructed them to take a more active role in the access interviews between the mother and the child with respect to handling of the child.

[69] The mother responded favorably to this. However, there were continuing difficulties regarding the mother’s ability to show interest in parent education and accessing services.

[70] There is ample evidence in the affidavits and assessment to confirm that the child was at substantial risk of harm in the care of her mother given her personal and lifestyle issues and her age.

[71] The mother offered no evidence at final disposition. The significant concerns about her current capacity to parent have not been addressed and she has withdrawn from the proceedings.

[72] Her absence from the child’s life and failure to cooperate with services to address these issues means that change is impossible within the time frames of the legislation.

[73] The agency has met the burden of proof regarding their concerns regarding the mother's capacity to parent. Placement with the mother is not a viable option.

### **The Father's Involvement**

[74] At the time of the protection application, the father was not certain as to his status as a possible father of the child. He had no prior relationship with the mother. The mother informed him there were other possible fathers.

[75] Due to the father's limited financial resources, paternity testing was deferred until the agency became involved. He advised, through counsel, that if he is found to be the father he was prepared to work with the agency, would be consenting to the agency application, and agreed to abide by the terms, conditions and recommendation for any services required.

[76] The agency knew from the beginning that this father was present in this child's life. They saw him present and assisting the mother and the baby. They knew the child spent a week in the paternal grandmother's household. He testified he was contacted by the mother on a few occasions to provide childcare and he agreed. He and S.A. had this child in their care on different weekends and for up to one week intervals prior to agency involvement.

[77] Even when he was uncertain whether he was the father, D. R. was present in his child's life, either helping the mother to set up her apartment, taking her briefly into his mother's home when she had no where to live or exercising access to his child when the mother was agreeable. He confirmed in Court that he was interested in and wanted to be present to protect the baby.

[78] The agency faults the father for his failure to become involved initially. The decision to apprehend was made on July 3, 2007. While initially reticent to appear before the Court for first appearance on August 7, 2007, the father contacted the child protection worker and asked to have his access reinstated and he also asked to have his girlfriend attend. He was denied this request until after the assessment.

[79] He did indicate initially he thought the baby should be returned to the mother and that he would be comfortable being an access parent on weekends.

D.R. was prepared, at that time, to do anything to ensure that his child was removed from foster care.

[80] On the next day, S.A. told Ms. Howlett that they would be fighting for custody of J..

[81] After a risk management conference, on August 8, 2007, the father was offered supervised access once per week. This is not an adequate schedule for an involved and concerned parent.

[82] To a certain extent, he was also constrained by his own schedule. His choice was either to visit more during work hours as that was the time available for his access and lose his job or accept what he could achieve without putting his employment in jeopardy.

[83] The father had difficulty providing the agency his work schedule in order to arrange the appointments. Arranging access was difficult as he worked on an on call basis. He was advised by his employer that if he was not available for work, he will not be called anymore. He was not provided with much notice of his work schedule. His employer testified and confirmed the irregular nature of his employment and the importance of being available for call. However, his employer was prepared to set aside a certain time during work hours for access once a week.

[84] D. R. had not attended the August 14, 2007, visit. The agency worker considered this a breach of the agency access policy that D.R. had signed.

[85] D.R.'s explanation to the Court was that he had been injured. He had burst a blood vessel in his eye at work and was unable to attend. He contacted the agency and had been referred by automated phone message to another location to another worker's voice mail. He did not leave a message as he does not like leaving messages on the phone.

[86] The agency facilitated the plans of the mother to have the child baptized. D.R. contacted the agency as he was concerned because he had not been allowed or invited to the baptism. He was not informed. The worker's position that they simply facilitated the mother's wishes did not address this father's right to be treated with the same consideration, particularly since the child was in care.

[87] The agency worker then facilitated the scheduling of the paternity testing.

[88] In **August of 2007**, the agency worker advised the respondent father that the agency did not support returning the child to either the mother or the father at that time, pending the parental capacity assessment.

[89] The agency worker raised her concern with the him regarding the hostility that was exhibited between the mother and the father.

[90] The agency affidavit dated September 26, 2007, also identified their concern that the father's partner, S.A., "had interfered in telephone communications" between the case worker and the respondent. To support this, the worker referred to a conversation in her case note of September 17, 2007. The behavior that is referred to is in a phone conversation between D.R. and the case worker. The case activity notes state as follows:

11:25 am TC to Mr. D.R. . Mr. D.R. informed this worker that he spoke to his lawyer and that the paternity results were received and that he is the biological father of J. Mr. D.R. expressed to this worker that "now that I am the father S.A. can come to the visit with me this afternoon". The worker explained that access does not work that way. This worker explained to Mr. D.R. that may be discussed in the future but at this moment in time we need to focus on his time with his daughter and getting parenting classes up and running. Mr. D.R. explained to this worker that now that he knows he is the father, he is wondering if he can take the child from foster care and have her live with him. Worker explained, once again to Mr. D.R., that the process does not work in that manner and there are a number of concerns relating to his parenting as well and this is the time he needs to focus on that and work with the agency to overcome those concerns. Throughout this phone call Mr. D.R.'s girlfriend was in the background screaming and talking over Mr. D.R. At one point in the conversation, Mr. D.R. said to worker "I am so confused right now because she is talking too".

[91] The worker explained that his girlfriend's behaviour on the phone was unacceptable and "we" would not allow visits to anyone demonstrating such anger and hostility if she wants to be part of this child's life.

[92] The conduct of S.A. in relation to the protection proceeding could not be said to be a risk to the child or to the process. While there may have been an expression of anger, frustration, fear and concern, certainly that human dynamic

could not be used to conclude that S.A. was a risk or a concern to the protection proceedings.

### **Services Offered to the Father**

[93] He was encouraged by the agency to be in contact with the case worker and to advise of any additional request for services.

[94] D.R. agreed to attend parent education. He agreed to participate in the parental capacity assessment to be conducted on the parties. He has participated and cooperated throughout.

[95] D.R. continued to ask that his girlfriend, S.R., be included in the access visits with him. He was informed that the agency expected to accommodate this request in the future. They would first require a meeting with D.R. and S.A. to ensure that the conduct during access was appropriate.

[96] The original referral for assessment was received on August 7, 2007. Only in late October, 2007, was the assessment expanded to include S.A.

[97] On March 3, 2008, the father's counsel advised that the father had some difficulty understanding the system. However, after reviewing the agency affidavit with her client, he consented to the terms and conditions of the Order.

[98] After the recommendations of the assessor were known to the parties, a pretrial was held on June 9, 2008. The father expressed concern that his fiancée was still not included in the access despite the fact that she participated in the assessment.

[99] The pre-trial hearing focused on discussions about the possibility of a settlement conference and the difficulties in including S.A. in access. The agency remained unwilling to introduce other individuals to the child or increase access.

[100] The Court suggested that the agency reflect on their position and look at the possibility of settling the access issue. A contested access hearing would be problematic before the trial dates in December, 2008.



### **Family Skills Services for the Father**

[101] The agency required the respondent, D.R., to attend at a family skills session with a family support worker. Ms. DeCoste was to provide parenting education to the father.

[102] The family skills intake referral was dated August 21, 2007. The commencement of this service awaited the results of the paternity testing. On September 4, 2007, the blood testing was done and on September 13, 2007, the result indicated D.R. was the biological father.

[103] These educational sessions were provided to D.R. between October 4, 2007, and April 7, 2008.

[104] S.A. was only invited to one session on December 20, 2007.

[105] D.R. had begun exercising access with J. on August 20, 2007, under the agency's supervision. The referral notes indicate:

“D.R. has limited knowledge of the practical hands-on tasks of parenting a child. The worker recommends intense parenting on a weekly basis with Mr. D.R.”(emphasis mine)

[106] On September 28, 2007, the family skills worker met with the agency worker and was advised to review the Nobody's Perfect parenting program with D.R. and then do observations of his interactions with his daughter J.

[107] On October 1, 2007, the case worker introduced D.R. to the family skills worker. The details of the parenting program were introduced. He advised the family skills worker that he had nieces and nephews and he babysat them; he was comfortable around babies. He advised he didn't see much of J. until it was determined that he was her father.

[108] In the father's sessions , they reviewed the Nobody's Perfect book and discussed various topics. The worker concluded as follows:

Mr. D.R. appeared to understand the concepts discussed and was able to give appropriate responses to questions posed by FSW. For homework, this worker

asked Mr. D.R. to observe J. during his visit to see instances of her demonstrating some of the items we discussed for her age range.

[109] The next visit was cancelled due to an agency scheduling problem.

[110] The next meeting on November 1, 2007, was at his home. He had completed his homework. It was observed that D.R. was fairly tired; however, the family skills worker noted as follows:

Mr. D.R. appears to understand the concepts discussed. The worker gave Mr. D.R. the book on Body to be reviewed on the next visit.

[111] The November 7, 2007, session was missed. D.R. advised he was at his mother's home at 9:34 a.m. The worker advised she had not been at the office, did not get his message until after the appointment time scheduled for 1:30 and; thus, had not been able to advise the family skills worker who arrived at D.R.'s home to find he was not there.

[112] The November 15, 2007, session was cancelled and rescheduled due to the family skills worker's schedule.

[113] On November 22, 2007, they met at D.R.'s home. D.R. confirmed he did his homework and made observations of his visit with his child. One of the toys that he had purchased for his child was not age appropriate and that was reviewed with him. The worker concluded by saying:

Mr. D.R. appeared to understand the concepts but had difficulty answering questions before the concepts were explained. He had never heard of impetigo, croup, colic and had no idea children could get worms. He was able to identify some of the symptoms that would indicate that a child might be sick. This worker gave Mr. D.R. the book, Behavior, to review for the next visit.

[114] The next visit, on November 29, 2007, was postponed because the father was in the process of moving. It was rescheduled to December 6, 2007.

[115] He advised that he plays with his daughter, reads to her, speaks french to her, sits on the floor with her and he also advised that he was still looking for a new place to live and was presently living with his mother. He advised that he could not make the next scheduled appointment because he had surgery scheduled

and would be in Sydney. The worker observed that he had a cold and he was very tired.

[116] On December 20, 2007, the sessions continued.

[117] Behaviour management was the subject matter of the January 17, 2008, session and as well they reviewed a book on Safety. She concluded:

Mr. D.R. was able to give appropriate responses for safety concerns for kitchen, bathroom, livingroom and bedrooms. She noted Mr. D.R. appeared very tired.

[118] On January 29, 2008, the agency worker spoke with the family skills worker and advised that the father was now working and his only day off would be Monday. Visits had to be rescheduled.

[119] The Family Skills worker met him on February 4, 2008. They completed reviewing the Nobody's Perfect safety book, identified safety concerns around the house and outside and identified other issues. She concluded:

Mr. D.R. was able to give appropriate responses to her regarding questions on choices. Mr. D.R. advised that his job was now finished but he hopes to get his drivers license and go back to work again.

[120] The next visit took place on February 28, 2008, at his home. When asked about his failure to be present the week before, D.R. advised that he had been in and out of his home because the furnace wasn't working. He agreed to finish the course in April.

[121] On April 7, 2008, they were able to get together and review the booklet on Parents covering the topics of self-care, money, stress, handling stress, anger, handling anger, feeling sad, depressed, how to get help, child care and child abuse. She concluded:

Mr. D.R. appeared to understand the concepts discussed. Mr. D.R. stated he was happy with his partner's pregnancy and is looking forward to having a baby.

[122] In her concluding report, the family skills worker said as follows:

To date Mr. D.R. has completed the parenting program. Family support meetings were initially scheduled to take place weekly; however, for a variety of reasons it was impossible to maintain that schedule and it was agreed with Mr. D.R.'s to meet bi-weekly. Place of meeting was changed to the CA office in A. to the CA office in Port Hawkesbury to accommodate Mr. D.R.'s living arrangements and work schedule. **Mr. D.R. appeared interested in the material and appeared to understand the same. However, he had some difficulty applying concepts.** For example, he purchased a toy for a two year old when J. was only nine months old and appeared to have difficulty understanding why the toy was inappropriate. When reviewing the topic of temper tantrums and the methods of managing same, Mr. D.R. continued to state that he would give in to a temper tantrum. Recommendation: It is recommended that family support services be discontinued from Mr. D.R. at this time and that the case worker complete a new referral should the need/request for family services arise in the future. Elizabeth DeCoste FSW

[123] The family skills worker discussed with the agency worker the possibility of introducing the child into the sessions in order to expand on the parenting educational aspect and to follow up on the application of the principals to an actual fact situation. The agency worker **did not agree** to set up visits with the family skills worker with the child present.

[124] Both before and after the application for protection intervention, the mother had been provided individual parenting sessions with her child on a number of occasions to provide more hands-on instruction and advice. The family skills worker was not authorized to provide similar services to D.R.

[125] The explanation offered by the agency worker in Court was that this interaction between father and child was being observed by the access facilitators and thus was not necessary. This Court has heard the job description of an access supervisor and it differs significantly from a family skills worker responsible for providing parent education.

[126] The explanation provided by the agency does not address the fact that there was some perceived weakness in D.R.'s application of the concepts being taught given that the child was not present. It follows that the child should have been included to enable the family skills worker to make a determination whether or not the father had difficulty translating the learned concepts to practice.

[127] A specific direction ought to have been given to the access facilitators to engage in this kind of educational activity rather than simply a supervisory activity.

[128] This is a weakness in the agency's response in assessing and providing services to D.R. to investigate, assess and, if possible, ameliorate the father's application of parenting practices.

### **Missed Visits and Sessions**

[129] Throughout the proceeding, much emphasis is given to missed visits by D.R. These missed visits do not form the bulk of his access visits.

[130] There are also times when the agency has to cancel due to weather conditions or sessions had to be cancelled because of the understandable conflicts that arise in scheduling.

[131] There were various attempts to organize other visits. Problems arose when the respondent had to move from his home or because he was called in to work and had to be available to work or face losing his job. D.R. tried to balance his access with his child and save his job. This essentially restricted his access. The family skills worker made efforts to accommodate D.R.'s difficult schedule.

[132] D.R. has worked over the last eight years on a seasonal basis. His employer has bent over backwards to allow him at least one access visit per week in order to facilitate his continued employment.

[133] D.R. has struggled with severe stress of attempting to meet that agency's needs and maintain his job to allow him to support his family. In spite of his cognitive difficulties, he has been able to maintain both his job on a consistent basis and a relationship with his employer and his access visits with his child.

[134] In the absence of a clear pattern of missed visits or failure to comply, I make no negative conclusion concerning missed visits.

### **Safety Concerns**

[135] In paragraph 12, page 3, of the December 6, 2007, affidavit the following statement occurs:

That despite parent education and intervention by access facilitators, both Respondents continue to demonstrate limited appreciation of basic child safety issues.

[136] Although this referred to the respondents globally, the conclusion is not quite accurate. The degree of intervention by the access workers with the father did not match that with the mother. There was no counseling offered to the father and no other service offered. The evidence supporting the agency's conclusion related largely to the mother.

[137] Further, the results of the family skills worker indicate that D.R. was able to absorb the concepts after discussion and, despite the family skills worker request to incorporate visits with the child to determine how he was able to apply these principals, the agency did not identify this as an appropriate service and did not offer that to the respondent.

[138] Except for his cognitive difficulties, the evidence largely supports frailties related to the mother.

[139] In Paragraph 8 of the agency's affidavit dated February 26, 2008, supporting the continuation of the temporary care and custody order, the worker indicated that despite the attendance at parenting programming, "it is not apparent either is able to incorporate and apply consistently what has been taught". That particular reference is contained in the affidavit relating to the mother, not with respect to the father

[140] The agency identifies "continuing concerns with respect to the respondents most basic parenting skills in their ability to exercise sound judgment with respect to the child's care".

[141] There is no evidence that the father was given an opportunity to have his application of the parenting skills to his child supervised by a family skills worker, as that service was not made available to him.

[142] There is no evidence to support that the same instruction was given to the father's access supervisors, that they were to adopt more than a supervisory role, that is, they were to adopt a teaching roll. Quite simply, this service was not addressed because the father's plan was not being considered.

### **Changes of Residence**

[143] The agency expressed concern that D.R. moved three times in the last few months and had not kept the agency adequately informed or updated for the purposes of collecting him for transport.

[144] Each move has been explained by the respondent and his partner and all of the moves are understandable in light of the accommodations they had, the availability of affordable accommodations in the area and their concerns about providing an adequate place for their child to visit.

[145] The moves were all done to ensure that the place where the child was welcomed would be an appropriate place. The relocations did not take place as a result of poor conduct. The relocations have more to do with the lack of adequate low rental housing.

### **Conflict**

[146] The agency affidavits tend to associate D.R. with the mother's conduct and the criticism relates largely to the mother's conduct. For example, the agency affidavit dated December 6, 2007, indicates that both respondents continue to display immaturity and irresponsibility in their conduct and choices. Of the criticisms that could be made of D.R., that criticism is not founded in evidence.

[147] While the mother lived in the area, there was occasional conflict between the mother and the father. It appears largely instigated by the mother's conduct. On the totality of the evidence, D.R.'s conduct can not be said to be antagonistic or aggressive. Quite the contrary. His relations with any of the individuals is peaceable and sometimes passive. The mother had the father charged with uttering threats. The charges were withdrawn.

[148] Most, if not all, of the child protection concerns identified in the application and affidavits related to the mother and her conduct. There was concern about

possible conflict between the mother and the father but no conclusion could be made on the evidence that the conflict was caused by D.R.

[149] The mother's conduct ought not to be a factor which would negatively affect the father's proposal unless the father's conduct, or lack of strategy to remove himself from the conflict, were part of the problem.

[150] In paragraph 28 of the affidavit of February 26, 2008, Ms. Howlett states as follows:

That it is the position of the agency that despite apparent cooperation with the agency and with services, neither respondent is demonstrating progress in addressing child welfare risk related to immaturity and volatility in relationships. The issues and events identified in this affidavit are only some examples of the Respondents conduct and presentation which causes the agency concern as this proceeding continues.

[151] This conclusion, as it relates to the father, is not founded in fact. There are concerns relating to the father's capacity to parent but they can not be said to relate to his immaturity and volatility in relationships. There is volatility in his relationship with the mother and it largely comes from the volatility of the mother's behaviour and his inability to deal with her behaviour.

### **Services**

[152] The affidavit notes that the respondents have received agency supports and services since at least July 5, 2007. While it can be said that the agency bent over backwards to address the mother's issues and to facilitate the provision of services despite her lack of interest, it cannot be said that the respondent father was seriously supported as a parent, a father, or a potential placement.

[153] The father needed certain accommodation because his reading skills and his comprehension skills are intellectually limited as noted in the parental capacity report.

[154] Adequate services were not identified and put in place to determine or address whether he could, in fact, parent this child on his own or with the support of his family and community.



[155] Other than the parenting course (without benefit of having his child present), the supervised access visits, and his participation in the parental capacity assessment, no services were offered to the father in order to determine if this child could be placed in his care.

[156] The worker indicated it was the father's responsibility to identify the services necessary. She relied on Section 13 of the *Children and Family Services Act* to support this belief. Although, it is certainly open to the respondents to ask for services, that traditionally is the role of the agency since it is the role of the agency to investigate and assess what is needed to address the child protection risks identified by them and their referral sources.

[157] Section 13 of the Act states:

where it appears to the Minister or the agency that services are necessary to promote the principle of using the least intrusive means of intervention and in particular to enable a child to remain with the child's parent or guardian or be returned to the care of the child's parent or guardian , the Minister and the agency shall take reasonable measures to provide services to families and children that promote the integrity of the family.

[158] Since the agency is the instigator and the one presenting the application, one might reasonably conclude the agency workers trained in child protection issues should have a clear idea of what the concerns are and what services might be recommended to address these concerns. It would be reasonable to conclude that this would be articulated to the parents and they would be aware of the case they have to meet.

[159] The affidavit of May 7, 2008, submitted by Ms. Howlett, indicates that on March 10, 2008, she picked up D.R. and drove him to his residence to conduct a home visit. She has seen the home. There are no indications in her evidence that there is any concerns related to this home although it is not the home in which he currently resides.

[160] The concern that the worker raised with D.R. related to his conduct in the access visits. While attending the mall, D.R. tended to spend the time walking up

and down the mall with the child in the stroller instead of interacting with her, talking to her and showing her things.

[161] Ms. Howlett advised in the affidavit of May 7, 2008, that the agency had received the assessment report from Ms. Boyd and were going to be attending a risk management conference to determine their position and to determine whether there would be any changes to their Plan of Care. They anticipated filing a revised Plan of Care, although in that affidavit of May 7, 2008, there was no indication what their position would be.

[162] On May 22, 2008, the revised Plan of Care was to seek an order for permanent care and custody.

[163] The final disposition date as calculated in accordance with Section 45 of the Children and Family Services Act would result in a final disposition date of December 10, 2008.

[164] The agency had some serious concerns about the parental capacity of the father, which do not relate to conflict, violence, or a lack of motivation. They clearly relate to capacity.

### **Parental Capacity**

[165] The father suffers from significant cognitive limitations. If there is to be an evaluation of his strengths and weaknesses it must be restricted to the one factor that impairs his ability to parent alone; that is his cognitive deficits.

[166] D.R. partially completed grade 11. The testing of his academic achievement indicates that his IQ is in the extremely low range. He scored in the moderately low range of the Peabody Picture Vocabulary Test, a measure of receptive vocabulary and this is positively correlated with overall intelligence. His score was a grade equivalent of 6.3 and age equivalent of 12 years and 3 months. The assessor indicates that there is a weakness in his ability to understand the meaning of verbally presented information given his chronological age of 24.

[167] He scored in the extremely low range in the Wechsler Adult Intelligence Scale, a test of an individual's ability and cognitive strengths and weaknesses. He scored in the extremely low range in the verbal score, a measure of acquired

knowledge, verbal reasoning and comprehension of verbal information. The performance score provides an indication of an individual's non verbal reasoning, spacial processing skills and attentiveness to detail and visual motor integration. D.R. scored in the extremely low range.

[168] He scored in the borderline range for the Perceptual Organizational Index, a measure of non-verbal and 'in the moment' reasoning. He scored in the extremely low range for the working memory index, which assesses an ability to memorize new information, hold it in short term memory, concentrate and manipulate that information to produce some results or reasoning process.

[169] He scored in the extremely low range in the Processing Speed Index, which assesses skills focusing attention and quickly scanning, discriminating between and sequentially ordering visual information.

[170] The results of this WAIS 3 suggests that the father has significant deficits in cognitive functioning which are likely to interfere with his academic achievement, his ability to learn new information, other than that presented in a very concrete fashion, his ability to generalize skills and information, and his ability to solve problems effectively.

[171] In the Wide Range Achievement Test Revision, his sentence comprehension was grade equivalent 4.5, spelling grade equivalent 5.9, math computation 3.8.

[172] The assessor concluded that the Wide Range Achievement Test Revision the WRAT-4 scores are not consistent with academic functioning at a grade 11 level and are indicative of a significant deficit in academic achievement. He is likely to have difficulty with educational information presented in a written format (the access contract, which he was required to sign by the agency before entering into an access process, is a four and a half page written document).

[173] On the basis of the data, it may be reasonable to assume, in accordance with the test conclusion, that D.R. is exhibiting psychological dysfunction of mild to moderate severity.

[174] The Minnesota Multiphasic Personality Inventory -2 (MMPI -2) is an assessment of the psycho pathology and personality characteristics of adults. He

was found to be generally frank and open. He is regarded to be likely a problem oriented rather than defensive personality.

[175] There was some concerns about his ability to understand the questions and the testing and, therefore, his scores have to be regarded with some flexibility.

[176] The assessor noted that, although test items were read to D.R. and his inquiries about the meanings of words and items were addressed, that he may experience some difficulty because of the level of his comprehension.

[177] D.R.'s family doctor confirmed he had been a patient of his for 24 years. He did not identify any concerns regarding D.R.'s mental health, ability to parent, or substance abuse.

[178] The assessor indicated that he appeared willing to provide information to the best of his ability and, although he had difficulty with abstract concepts and with understanding the circumstances that his child found herself in, he engaged with the assessor.

[179] The assessor concluded that there did not appear to be any danger of D.R. harming himself, others, or property during the course of contact with him.

[180] Clearly, the test results indicate that there is a low potential for change in cognitive limitations.

[181] During one of his interviews, the assessor noted that he was presented with a number of parenting scenarios. His responses were indicative of caring and concern for children but very concrete. She found his explanations and expectations were age inappropriate.

[182] Ms. DeCoste confirmed for the assessor that he seemed to understand the information she was providing but sometimes had trouble. She described him as very positive, willing and cooperative during his sessions. She thought he might have to work on emotional and developmental issues of the child and she said that he was willing to learn with a hands on approach, as she suggested. She said that she had no real concerns, but D.R. might have difficulty in setting rules.

[183] The access supervisor, Ms. Carrigan, reported to the assessor that she had no troubles with D.R. and that he was very polite.

[184] The mother's sister, L.M.G., advised the assessor that she was a friend of D.R. She said he was a good person, he would do anything for anyone, he was so good with kids and always has time to play with them. The mother's sister confirmed that D.R. had always tried to get along with C.S.L. but she can be difficult when things don't go her way. The sister had no concerns regarding anger, violence or substance abuse for D.R. Indeed, the evidence does not support any concern in this area.

[185] D.R.'s sister-in-law, S.R. spoke with the assessor. She has known D.R. for 15 years. He was described as "having a heart of gold and would do anything for anyone. He is a good, nice guy and he is excellent with my son". She said that if he is not sure of what to do, he will ask for help. S.R.'s mother-in-law testified before the Court and spoke with the assessor as well.

[186] During the course of the assessment and in conversation with the mother, she admitted that she had no problem with leaving the baby with D.R. and S.A. in the past when he was living with his mother; she had no problem with his sister-in-law and mother looking after J. She made various allegations, including that he had the potential to be violent. There is no evidence of that, in fact, there is evidence to the contrary.

[187] The uttering threats and assault charges have been withdrawn and are of questionable credibility.

[188] At the time of the assessment D.R. was living with his mother. His mother advised that he had been around kids all his life. His nephew lives in her home and D.R. is very good with him, taking him places and buying him toys.

[189] When asked to describe D.R.'s anger, she said that he would walk away, he wouldn't argue. If he has to resolve problems, he asks for help or advice.

[190] The assessor observed their home was clean and roomy enough to accommodate the child.

[191] It is a fair conclusion on the evidence that D.R. cannot parent on his own. It was not proven that he could not participant as an access parent under the strict supervision of a family member.

### **S.A., the Father's partner**

[192] The assessor said S.A. was cooperative and willing to provide information. She advised that S.A. is functioning in the average range and there are no major weaknesses in her ability to understand. In Court, she was quite able to respond to questions and to communicate information.

[193] She raised her own child. There is no indication that she would be unable to be a primary parent. She does have some medical difficulties and had just given birth to their child. She was found to be essentially well functioning, normal, with no major personality disturbances. She was presented with a number of parenting scenarios and her expectations and interventions were age appropriate.

[194] Given the reluctance of the agency to include S.A. in a timely fashion, the time during which her participation could have been assessed passed without an opportunity to fully investigate this aspect of the father's plan. Due to her medical circumstances, the high risk pregnancy and the relative short term (2 years) of their relationship, placing the child with her in her sole care created uncertainty.

[195] The only concern of note is S.A.'a occasional Facebook discussions with the biological mother when she really has no history of connection with this mother. It is unwise to do so as this was the potential future conflict that concerned the agency. S.A. does not seem to understand it is better for D.R. if contact is severed. In addition, prematurely she began to ask the child to call her "mommy" when she was advised not to do so. Perhaps she believed that had the agency followed the assessors recommendations this would be the case. However it was not wise to move prematurely in this regard.

### **Multiple Foster Homes**

[196] Prior to foster care, this child was being handed around by the mother to various care givers. In July, 2007, at 5 months old at apprehension, this child was placed in one foster home up to September, 2007. She was moved from that home to another where she remained until September, 2008. In the second foster home,

the foster mother became ill and the child was once again moved in September, 2008, to the current foster home.

[197] On more than one occasion, the mother became upset because the child had been scratched and because the child had a sunburn and fly bites. The Court was informed by the child protection worker that these issues were addressed with the foster parent.

[198] Thus, by May of 2008, when the Plan of Care was provided, the child had already lived in three different lifestyle arrangements.

[199] In December, 2008, I was informed that the third placement was not a long term placement and adoption outside of this placement will be the consideration in the event that the Court grants a permanent care order.

[200] From the date the agency received the report and made their decision, they resisted any increase of access to the father, any investigation of the father's plan, any serious investigation of the paternal grandmother's offer to house the child and rejected the recommendations from Ms. Boyd.

[201] Once they determined that the plan was to be for permanent care, they no longer focused on the objects of the legislation nor did they await the Court's determination to begin to gradually implement a strategy of moving towards permanent care. This strategy would no longer consider the father or his family or community in looking at a Plan of Care for this child. That does not accord with the objective clause of the *Children and Family Services Act*.

### **Access Facilitators Observation Reports**

[202] There were concerns raised initially about the father's inexperience, naivety and inability to make decisions about purchasing toys that are age appropriate.

[203] There are some indications that the father had to be directed to address some aspects of supervision, eating, etcetera, although he corrected these once he was instructed and immediately complied with direction. There is no evidence the child was at risk in a supervised setting.

[204] The progress noted in the access facilitator observation reports, particularly in the latter part, indicate a father who is interacting with his child and is able to interact such that the access notes indicate appropriate and positive affectionate interaction, albeit in a supervised setting.

[205] The notes indicate that the father has made progress with his interactions with his child and they are positive statements of connection between the child and the father. Indeed, the child has some connection with S.A.

[206] While the evidence supports that the father cannot be a sole parent, it does not support he ought to have no contact in appropriate circumstances.

[207] One factor against adopting the father's plan with S.A. as the primary parent is the lack of history to this relationship. In addition, if the child was placed there and S.A. was the primary parent, in a household with the father and two very young children, the added strain, coupled with the commitment to ensure the father is always supervised, would be a significant burden on one fully functioning parent.

[208] There is a reasonable likelihood that the condition of supervision in the household would be too onerous a responsibility for one person.

[209] As of May, 2008, had the agency followed the recommendations of Ms. Boyd, the child **could have been placed** in the home of the father and S.A. under supervision, with appropriate resources. This would have allowed them time to determine whether this placement could address the child's needs in accordance with the dictates of the legislation.

[210] If the agency was concerned about moving the child's placement without a reasonable guarantee of success, (a legitimate concern), they could have increased supervised visits and included the child in their critical assessment during parenting sessions.

[211] In accordance with the object section of the legislation, this would give the agency the opportunity, within the time frame, to provide services as directed in the objects clauses.



[212] It would give the agency sufficient opportunity to observe, supervise, and ameliorate the circumstances in the household. It would establish, under supervised circumstances, the possibility of a bond between S.A., D.R., and the child.

[213] It would protect against any conflict that may have occurred as a result of the presence of the mother in the community. It would have given this family and this child seven months of a supervised plan that may have allowed this child to remain within its family, with extended family support. It would have respected her cultural and linguistic community.

[214] I do not have clearly articulated sustainable reasons why the agency decided to reject the recommendations of the assessor and file a revised Plan of Care proposing permanent care when seven months remained available for assessment and services. This was not a case where the father or his family had a history of child protection involvement, as had the mother.

[215] I presume the father's cognitive deficits, the close community, the age of the child and the desire to find a permanent placement were a priority.

### **Extension of Final Disposition Hearing**

[216] The final disposition hearing commenced on December 8 and concluded on December 10, 2008; the last day of the statutory time limit. The Court had passed the final disposition time.

[217] The total duration of all disposition orders as contained in Section 41(1) of the *Children and Family Services Act*, including any supervision order where the child is under six (6) years, shall not exceed 12 months.

[218] The hearing was adjourned with a finding that evidence was missing that would allow the Court to fulfill the directives under the *Children and Family Services Act*.

[219] The Court concluded after hearing the paternal grandmother testify that she ought to have been considered as a placement option.

[220] By letter to counsel dated December 11, 2008, the Court identified the deficiencies in evidence and suggested a three month stay to mediate the assessment of the grandmother. The letter to counsel stated as follows:

Dear Counsel:

I await receipt of your submissions.

After both parties concluded their cases yesterday, I became concerned that the Section 45 deadlines had arrived and there has been no real investigation or consideration of placement with Mr. D.R.'s mother as a joint or sole parent as a means of addressing parenting concerns and long term placement for this child.

I have considered this matter and possible resolution to allow for an additional period of time to consider the appropriateness of placement in the paternal grandmother's home.

Would the parties consider consenting to the appointment of a mediator to facilitate appropriate investigation and consideration of the paternal grandmother's home as an intermediate placement under supervision and conditions agreed upon by the agency and the grandmother.

This may be possible under Section 21 of the Children and Family Services Act should the parties agree.

Kindly consider this and advise immediately.

Moira C. Legere Sers, J.

[221] The agency was not prepared to consent to such a stay.

[222] The grandmother was present throughout and the evidence from the final disposition hearing that there was a realistic possibility that family placement which would address this child's cultural heritage was available and appropriate.

[223] While the mere presence of a grandparent or available family member may not always attract a duty, in this case her presence was more compelling.

[224] While the father could not function as a sole parent, a joint parenting arrangement with the paternal grandmother or a sole custody order with the

grandmother ought to have been considered as reasonable alternatives before third party placement.

[225] Barring agency intervention or enquiry, the Court, once aware of her intentions, availability and presence, could not ignore the spirit and intent of the legislation.

[226] I was satisfied that placement at that time with S.A. and the father was problematic given the lack of history and lack of supervision as recommended in the assessor's report. S.A. was not a party to the proceeding.

[227] Reflecting back to Section 42, the Court was limited to the agency plan and the father's plan.

[228] On December 19, 2008, by oral interim direction the Court ordered a supplementary assessment of the paternal grandmother as a possible placement. This increased the time from first to last disposition by approximately 5 months.

[229] The direction to seek a supplementary assessment contained the required finding that this extension was in the best interests of the child.

[230] The Court then issued the interim direction to have the assessor prepare a supplementary assessment of the paternal grandmother.

[231] The agency did not consent to the extension nor did they consent to the Court's attempt to create further time by effecting a stay to mediate a supplementary assessment and an agreement between the parties.

[232] However, they did not oppose the preparation of the supplementary report.

### **The Law regarding Extension of Time**

[233] Does this extension contravene Section 45?

[234] While our Courts have interpreted the time limitations strictly, there are cases that support an extension of time where the extension is found to be necessary to address "the best interests of the child". (*M.J.B. v. Family and Children Services of King's County*, 2008 NSCA 64)

[235] In *Children's Aid Society and Family Services of Colchester County v. H.W.* [1996] N.S.J., No.511, 155 N.S.R. (2<sup>nd</sup>) 334 (C.A.), the Court endorsed the approach adopted by Judge Levy, JFC:

If there is unavoidable conflict between the best interests of a child and the time limits the best interests considerations must govern. The time limits are not a stand-alone imperative, they exist to serve the child or they exist for no reason at all.

[236] In Justice Freeman's,(C.A.) words:

When that (conflict) occurs , the legislation must be given a construction consistent with the best interests of the child . In my view the ordinary meaning of the legislation creating the time limits cannot be ascertained from looking at the sections containing those specific provisions standing alone, they must be read in light of the Preamble and s.2.

and further:

Because their meaning varies with their context from case to case , depending on whether there is a conflict with s.2, I would consider the time limits provisions to be not mandatory but strongly directory, to be obeyed to the fullest extent possible consistent with the best interests of the child.

[237] The Honourable Justice Freeman concludes that while an error in extension beyond the time limits may be in the circumstances, an error in law, it would not result in a nullity.

[238] In this case, had there been a loss of jurisdiction, the child would be returned to the mother or the father. This would clearly not have addressed the serious unresolved risk issues related to such a placement.

[239] I determined in this instance that I could and must hear this critical evidence outside prescribed limits to allow me to determine the most appropriate disposition. I specifically read the statutory time limits within the context of the *Children and Family Services Act* in total, including the principles stated within it.

[240] It is also clear that the legislature contemplated extensions such that the duration of the proceedings can in fact exceed Section 45 time limits. I am specifically referring to a stay of proceeding under Section 21(2) and (3).

[241] This would effectively delay disposition for an additional three months bringing us to, in the case of a child under 1, March 10, 2009. The agency could not agree to that delay.

[242] I recognize there was a difficulty with delaying final disposition to March 10, 2009. The child would be in excess of two (2) years old as of February 6, 2009. It is well known that decisions regarding final placement ought to be made with respect to infant children as early as possible prior to the eighteen month period. Thus the support for legislating adherence to time limitations.

[243] In this circumstance, this child has been in three different foster placements in addition to the unstable placement with the mother in her early months.

[244] The child has developed a connection and an affection that is evident in the access facilitator observation reports for the father and S.A.

[245] The Court, in accordance with the legislation, must be satisfied that less intrusive alternatives have been examined before moving into a permanent placement.

[246] In my view, it would be a miscarriage of justice and it would be contrary to the spirit and intent of this legislation, to arbitrarily accept a limitation imposed when there has been a failure to adequately review the possibility of placement with the extended family.

**The paternal grandmother:**

*Legal representation*

[247] There was evidence that the paternal grandparent was an unsophisticated litigant who supported her son and was prepared and able to assist. She had been available throughout. In addition, while she understood English, it was not her first language.

[248] After she appeared before the Court to apply for custody, she was encouraged by the Court to obtain counsel. She attempted and did not qualify for Legal Aid. It was clear to the agency she was still interested in supporting her son and prepared to play a significant role.

[249] Without legal representation, it was my belief she could not properly articulate her potential claim by filing the correct legal documentation.

[250] It is the Court's duty to ensure a fair hearing. The grandmother's effective participation to overcome the legal procedural hurdles required representation and an extension of time. ((**New Brunswick (Minister of Health and Community Services ) v. G.(J)**, 3 S.C.R. 46). While in the referenced case, the Supreme Court of Canada referred to parental participation, in this case I required evidence from and about the grandmother

[251] Without extending the time lines and without providing the grandmother with legal representation, I concluded I could not achieve her effective participation. This was essential to determining the best interest of this child.

[252] The Court initially experienced difficulty ensuring the grandmother obtained legal representation to assist her in putting forward a plan. Although her income was minimal it exceeded legal aid guidelines.

[253] The Court sought initially pro bono services from Ms. M. Louise Campbell, Q.C., to provide legal advise once the assessment was completed. Subsequently, the court administrator obtained the assistance of Legal Aid to continue her representation given the best interests of this child were at stake.

### **Following the Interim Direction**

[254] Ms. Boyd filed her updated report dated February 24, 2009.

[255] She concluded that Mrs. E.R. has the parenting skills and resources to parent J. adequately.

[256] The assessor recommended that *should the child be placed in her care:*

1. Mrs. E.R. needs a more detailed plan about access with J. for the mother and her family. She will need to be made aware of any CAS concerns /directives about contact and identify who would supervise access. ...
2. Mrs. E.R., Mr. D.R. and Ms. S.A. should develop a “risk management” plan concerning the potential conflict with the mother and her family....
3. The concerns about D.R. parenting independently should be reiterated to Mrs. E.R. and agreement secured again that she will not place him in that role with J.
4. J. and Mrs. E.R. should be given the opportunity to develop a more familiar relationship before J. is placed in her primary care, Mrs. E.R. would need support in helping J. develop a secure attachment with her and in supporting J. through separation from her foster family.

[257] Unfortunately, there was no opportunity for the assessor to observe Mrs. E.R. in a parenting role. Her contact at the time of the assessment was minimal.

[258] The extension, commenced by order dated January 8,2009, continued through the preparation of the report in February, 2009, and for a trial period thereafter to observe the grandmother with the child. There was limited access to facilitate the introduction of the child to the grandmother.

[259] In the end, the agency would not support this placement. The matter was set down and concluded just in excess of five months past the outside time limit.

[260] The agency acknowledges they did not enter into any discussions or offer any assistance to the grandmother around these recommendations because they did not approve of the grandmother’s plan and they did not consider they had a duty to assist.

[261] They resisted extensive visits in the grandmother’s home and limited access to minimal inclusion of the larger family to avoid introducing the child to multiple extended family members. While their intentions were clearly directed to their assessment of the best interests of the child this amounted to passive resistance of the court’s direction.

### **The Paternal Grandmother**

[262] Mrs. E. R., the father's mother, is from a french community, is French speaking and understands and speaks English as well.

[263] I have considered her evidence as to the close family relationship. She is a single mother, her husband having died after 24 years of marriage as a result of a tragic car accident in \*. D.R. is the youngest of the four children. He was 11 years old when his father died.

[264] This grandmother is more comfortable in the French language but spoke English in Court. She has eight grandchildren. She is actively supporting one grandchild in the home, along with another son's ex-wife.

[265] The assessment suggests she *may* possibly have a learning disability although not such that would interfere with her parenting. The assessor could not be definitive on this point. Combining these factors, and her obvious presence and intention to support the child, it seems obvious that there could have been some assistance and enquiries to bring her forward as is usually the case.

[266] There are three persons who gave evidence supporting the paternal grandmother's plan. Her daughter in law, her sister, and the grandmother herself.

[267] I was impressed by E.R. E.R. has lived a life which apparently exemplifies supporting family. There was no contrary evidence to cause me to conclude that she would be unable to draw on the resources of her extensive family to assist her in her care for J.

[268] Life has not been easy for the paternal grandmother. After the loss of her husband, she raised her children within her community. She was employed for 16 years in the fish processing industry; unemployed for a few years and in receipt of social assistance for some of those years; employed for the last three in the fish processing industry and self employed doing \*. She has survived cancer and has high blood pressure. Dr. M., her family doctor for 25 years, also provided information that in his opinion there were no health related concerns that would impair her ability to care for this child.

[269] The paternal grandmother is 59 years old. She lives in a close family within a small community. Her 36 year old daughter-in-law has been living with her for more than 10years. They live in a four bedroom home owned by the



grandmother, her son and daughter-in-law. They share household duties to support one another, and both share, in an agreeable fashion, payment of the household bills. The grandmother helps provide child care for her 10 year old grandson and is able to administer his asthma medication and care for his needs.

[270] Her daughter-in-law separated from the grandmother's son two years ago. The son moved out of the grandmother's home. To effect some repairs on the house and to allow his son to continue to live within this home around his mother and grandmother, the three adults secured a mortgage and are responsible for that that mortgage. They have lived within the community sharing parenting time without the need for a formal agreement. This 10 year old lives within this family having the support of his grandmother, his mother and his father frequently. The large extended family members support one another, see one another frequently and are loyal to and attentive to the needs of the other, helping out whenever possible.

[271] The grandmother hopes to apply for Canada Pension on her 60<sup>th</sup> birthday. This will further supplement her income; although she does not intend to cease working altogether. She has enquired into subsidized day care for two (2) days per week and has the commitment of her daughter-in-law and S.A. to supplement any additional child care time needed. She has her sisters living close by and they have committed their support at well.

[272] They believe by pooling their resources, the needs of the child can be met. They testify that the 10 year old has everything he needs and sometimes more. They are hard working people striving to make a living and they manage to live within their means. Among themselves they find ways to meet their needs and adjust to life's inevitable challenges. While the child will be within the smaller family unit, there is a larger supportive community one can say is present and supportive in word and deed.

[273] The child, if placed with the grandmother would be in a small community, exposed to both the French and English languages according to her cultural origins. If there is one sentiment that rings through this family it is unconditional love.

[274] The grandmother has been having limited access to the child since Christmas, twice weekly at the agency access house. The access reports and one of the access facilitators spoke to this contact describing it as appropriate, loving and

affectionate. Only two weekly visits were allowed per week and, due to the agency's position that they did not support the grandmother's plan, they did not allow home visits. I do not consider the lack of access as a negative against the grandmother's plan.

[275] I accept that the grandmother does not openly acknowledge her son D.R.'s academic and cognitive deficits and sees him in the most positive light as can be expected of a mother.

[276] However, she has hands on day to day experience with her son that would cause me to conclude that she would not allow her grandchild J. to be in a position of risk and that she would be always available to D.R. in the event he needed her.

[277] She works consistently and hard to provide a living for herself and her family. Her annual income is estimated to be \$18,000.00 plus a spousal allowance.

[278] S.R. is employed. The relationship between E.R.'s son and daughter-in-law has functioned very well.

[279] When the child J. was first born, the grandmother brought her and her mother into her home until the mother could find her own residence.

[280] For an interim period, she has invited her son, D.R., into her home, as well as his partner, S.A., and their newborn child. They have since moved out to their own premises.

[281] It appears from submissions and information given by the agency to the assessor (page 14 of the assessment report on E. "B". R.) that the only significant concerns the agency can articulate is that:

1. Mrs E.R. did not initiate contact with Children's Aid Society and in spite of indicating she wanted the child in her care did not pursue matters in any other way other than to determine that she could not afford a lawyer; and
2. There had been no opportunity to observe her because of her limited contact with the child. The worker has resisted increasing access for the father and his partner and resisted having supervised access in the grandmother's home. The rationale for this is that they did not want to introduce the child to another person who may not be a part of her life in the future.

[282] Child protection matters would be unwieldy if interested grandparents applied for status at the beginning of every action. Indeed, it is usually discouraged until it is obvious placement with parents is not an option.

[283] In these matters, it is not unusual for grandparents to appear and indicate their support but to avoid any action that might sabotage their child's possibility of successfully obtaining the return of their child.

[284] Only when the grandparents take a stand contrary to their own child's interests do we usually see contested applications for leave. This grandparent cannot be faulted because she did not vocalize her strong desire to keep this child within the extended family unit until it became clear that the agency would not adopt the assessors recommendations.

[285] Indeed, the grandmother, the son and his partner were bolstered by their erroneous belief that the son's plan would be considered because it was recommended by the first report of the assessor.

[286] I find no fault with the fact that the father, through his counsel, tried to articulate alternate plans. While the agency was of the belief that this evidenced a lack of clarity and solidity to the father's plan, in this case I conclude that the grandmother and the father were determined to present options to the agency and were prepared to agree to any formation that kept this child within their greater community. That is a reasonable approach.

[287] They not only were prepared to agree, I conclude they intended to live up to their agreement to comply.

[288] It was clear to the Court that the grandmother supported the father's plan throughout. Her participation and support were articulated in the father's plan of care filed August 12, 2008. Her support was also articulated in her affidavit and testimony in the final disposition prior to the extension of the hearing.

[289] It was equally clear that she came into the Court after their plan of care indicated that the agency would not support either parents' plan. At that time (June 9, 2008) she indicated she wished to put forward a plan. On August 18, 2008, the father advised that the grandmother was not proceeding. Both he and his mother

noted the reasons for this were her inability to qualify for Legal Aid and inability to afford private counsel. She certainly made it clear to the Court she wanted to participate and could not retain counsel.

[290] Perhaps the Court erred in failing to address earlier in the proceeding, her lack of representation.

[291] At times, the grandmother attended outside the Court to support her son, and while not always visible to the Court, she was certainly available and visible to the agency worker. The agency workers admitted they saw her and spoke to her when she appeared.

[292] She testified in support of her son and indicated she was prepared to offer her support and more.

[293] The agency had been in her home and, if not clear, it ought to have been clear she was available and willing and did not want to sabotage her son's plan. She was not an absent player, although she was not a party.

[294] The agency admits access between the grandmother and child went well. The child was comfortable with the paternal grandmother during access.

[295] When she became a part of the son's plan, even that should have triggered some investigation to determine her suitability to support. Instead she was ignored because she did not submit a written Plan of Care.

[296] At some point, it ought to have been obvious that she may be a possible placement, more so when the agency had difficulty with the child's foster placement as a new born, and had to move this child three times while in foster care.

[297] Concerns about her financial security were raised. Financial security is certainly a consideration in custody and adoption matters. In and of itself, financial security has not played a significant role in child protection matters. In this day and age, in a child protection proceeding, a parent ought not to be discounted outright from being a parent due to low income.

[298] The financial concerns articulated considered only the grandmother's income. The household incomes (the grandmother and her daughter-in-law) would be approximately \$43,000.00. This relationship between the two has existed for 10 years and it is working. There have been no missed mortgage payments. While they have no savings, there is not any specific physical need that exists that hasn't and can't be met.

[299] The message in the legislation is very clear as to the duty to consider family placement before placement with strangers, to respect the child's need to be connected to their community and to address the principles that intervention proceeds in sequence from least intrusive to more intrusive.

[300] The agency relies on the fact that the grandmother did not produce a written formal plan as a result of the Court's direction. The agency worker indicates that they do not solicit family plans. Family members must come forward themselves. Part of the reason for this is the belief that soliciting family members creates undue stress on family members. This stress might result in creating expectations and pressure on the family members to participate which ultimately break down when they cannot live up to these expectations. This could result in the possibility of another loss to the child.

[301] Failure to give full consideration for family placement contravenes the spirit and intent of the child protection legislation. It avoids adequate consideration of the cultural linguistic background of the father's family. Failure to investigate possible options does not incorporate an understanding and empathy with respect to the obstacles to presenting a written plan to a Court by a person who is unfamiliar with and unsophisticated regarding court procedures.

[302] The agency was aware that E.R. was unable to obtain counsel. In this area, absent access to Legal Aid, the Court hears time and time again what obstacles exist for parties who are involved in child protection matters when they try to obtain private counsel. Lawyers are not prepared to become involved in protracted child protection matters on certificate, let alone when the client has limited resources.

[303] Time and time again the parties reappear before the Court to indicate that their search for lawyers must be expanded to Antigonish, New Glasgow, Truro,

Halifax and Sydney to find a lawyer prepared to take on representation of a party in child protection matters.

[304] The cost of private counsel, in a child protection matter to this grandmother, would have been prohibitive.

[305] The Court is conscious of these difficulties a party to a child protection action, such as this one, has in accessing justice and obtaining legal representation to articulate their cause in these difficult matters.

[306] The agency did not address any of the issues brought to their attention by the assessor after the supplementary assessment was completed even though some of these were issues they had identified in their own risk assessment. For example, the assessment wanted the agency to address a back up plan should the child be placed with the grandmother.

[307] The agency admits it was because they did not accept her various proposals for care. They did not accept the assessors conclusion that the grandmother could parent this child. They refused to implement a plan of integration to address the risks. They concluded this plan was not in the best interests of the child.

[308] The proposition that they would address this after the decision was made does not account for the fact that, if the Court placed the child with the grandmother, their involvement would cease altogether.

[309] There are concerns about no medical benefits. While preferred, the absence of this has not been shown to be a problem.

[310] The agency weighed the grandmother's plan as equal to all other possible third party adoptive placements. That is an error. Understandably, the agency wishes to choose the best possible placement. To do that, they wanted to access the entire range of possibilities, including third party placements.

[311] While well intentioned, they believed they could find a better placement, which would provide long term financial stability. Given their concerns about potential future conflict should the mother return, a third party placement would likely remove this child from the close community, wherein existed the possibility of conflict should the mother return.

[312] The legislation is clear, the policy objectives are clear, family is a preferred placement before the agency **or** the Court may consider strangers. Family placement must be considered before third parties.

[313] Section 13(2) requires a serious consideration of family connection , continuity of race and a consideration of the child's cultural, racial and linguistic heritage.

[314] The agency admits they offered no services to address any of the identified concerns. They did not consider this a part of their legislated duty given they rejected any of the possible options offered by the grandmother that would, either by a joint custody arrangement or sole custody, keep this child within the able and loving confines of her extended family.

[315] After a permanent care order, they would be able to search for a home with a better financial base, less conflict and that, in their estimation, would provide a greater certainty for the child's future.

[316] The agency set about addressing the best long term interests of the child. That allows for a greater emphasis to Section 2(2) by disregarding the legislative directives in the entire legislative piece.

[317] The agency strenuously argues that they have no duty to investigate any and every placement proposal. They rely on ***Children's Aid Society of Peel v. M.J.W. and W.W.*** (1995), 81O.A.C.56;23 O.R.(2d) 174 (C.A.) At p.190[O.R.] wherein it was said:

The C.A.S. (I.e.) the agency is not required to investigate every placement proposal. It is the interests of those advocating a competing plan to advance the most persuasive alternative that they can formulate...

It may well be that a plan or placement proposal different from that advanced by the C.A.S. will require further investigation and perhaps the preparation of a home study report. However, not every placement proposal will require such a response.

[318] Further they rely on the comments of Sanders, J.A. in *T.B. v. Children's Aid Society (2001)*, 194 N.S.R. (2d) 149, wherein he discussing the relationship between Section 42(3) and 42(1)( C):

Once the maximum time limit is reached , s.42(3) can no longer be determinative since temporary placement with a relative, neighbor or other extended family is no longer available. At the end of the time limits, once the agency establishes that the child remains in need of protective services, and subject to the court's authority to extend the time in the rare circumstances, I have described in 56 infra., the determination for the Court becomes one of what final or terminal order is in the child's best interests. At that stage during such a proceeding consideration of family relationships is required only because it is one of several factors which are to form part of the child's best interests as defined by s. 3(2) of the *Act*, not because s. 42(3) continues to require such consideration.

[319] And further the agency relies on Saunders, J.A. wherein he speaks in paragraph 30:

Justice Cromwell's words should not be interpreted as imposing upon the agency or the Court a statutory burden to investigate and exhaust every conceivable alternative, however speculative or fanciful. He spoke of reasonable family or community options. Neither the agency or the court is obliged to consider unreasonable alternatives. Their statutory obligation is nothing more than to assess the reasonableness of any family or community alternatives put forward seriously by their proponents, by "reasonable" I mean those proposals that are sound, sensible , workable, well conceived and have a basis in fact.

[320] And again at paragraph 31:

The onus of presenting such a reasonable alternative must surely be upon the person or party seeking to have it considered. It is hardly the responsibility of the agency or the Court to propose the alternative, provide the resources for it's implementation or shepherd the idea through to completion.

[321] That case is distinguishable on the facts . The Honourable Justice Saunders, J.A., spoke about T.B's offer and her willingness to assist. He described that, at best, her willingness to assist was no more than an offer to help. She had done nothing to demonstrate to agency staff any serious commitment to provide a lasting and permanent home for the child. The type of assistance required by the agency in that case, as described by Justice Saunders, was assistance to embellish or solidify the proposal and arranging for legal counsel.



[322] Cromwell, J.A., for the Court in **CFS v. B.D.**, (1999) 177 N.S.R. (2d) 169, adopted the statements of Osborne, J.A. speaking for the Ontario Court of Appeal, in **Children's Aid Society of Peel v. M.J.W. and W.W.** (1995), 81 O.A.C. 56: 23 O.R.(2d)174(C.A.), at p.190 [O.R.], para.[20]:

...It may well be that a plan of placement proposal different from that advanced by the CAS will require further investigation and perhaps the preparation of a home study report. However not every placement will require such a response....

[323] And at para [21]:

... the judge stated that in order to justify the further delay that would inevitably be caused by this last minute proposition, he would require some basis in fact to believe that the potential benefit of arresting the process to consider the evidence would outweigh the harm done to the children's best interests by the delay...

[324] E.R. presented herself to the Court, and prior to that, to the agency. She was always a part of the support for the father's plan. She had asked and been denied visitation with the child until the Court directed an assessment.

[325] The agency criticized her plan because it appeared as if she and her son were simply proposing plans in the alternative. She cannot be faulted because she waited to see whether the agency would adopt the recommendations of the first assessor before stepping forward to identify herself.

[326] She was present in her son's life before the action commenced. Her alternate plan, in the event the son's plan was not accepted, was to be the custodian. What she needed assistance with was how to articulate that plan before the Court. Absent counsel, she was at a disadvantage. The agency did not and does not have to bolster her plan. They simply needed to recognize it as a reasonable alternative capable of assessment and modification. They have identified concerns that could, with some effort, be addressed. These concerns related more to information, estate planning for the possible incapacity of the grandmother, a back up plan and a strategy to address conflict if the mother came back to the area and conflict arose.

[327] The authorities speak to the duty of the agency and the Court to take reasonable measures to provide services and share the responsibility to see that reasonable family or community options are considered.

[328] After hearing the evidence regarding the father's plan and the grandmother's testimony, I was convinced this was a reasonable alternative that had not been investigated.

[329] The agency declined to consider this option, just as I find they declined to assess or investigate the placement within the father's community as proposed by the assessor, and the availability of the grandmother to support a placement when that option was clearly available.

[330] Thus, I find on the basis of the evidence, that reasonable steps were not taken to assess these options.

[331] Removing a child from their biological heritage is an onerous life altering decision. It must be supported on the facts of each case in accordance with the spirit and intent of the legislation. Placement outside the family forever alters a child's life and associations

[332] Decisions relating to custody of children are more than an evaluation of past history and findings of fact relating to the conduct of parents and capacity to parent. They are prospective in nature. They involve an element of uncertainty because the child's future circumstances are unknown. It is a somewhat artificial weighing of the best interests of a child within undefined future possibilities.

[333] Before moving in that direction, the agency and the Court, independent of one another, must with due diligence seriously consider the factors outlined in Section 3(2) within the context of the objects of the *Children and Family Services Act* before handing this child over to the agency for placement in the global community.

### **Conclusion**

[334] In this case, I was satisfied that the grandmother presented a reasonable option.

[335] I was satisfied that very early on, the agency refused to provide services to the father, access to the father and his family to properly consider the options. I was satisfied that they resisted other opinions regarding the possibility of placement with the grandmother. I was also satisfied that the grandmother would have benefitted by assistance in overcoming the systemic obstacles to obtaining legal advice which was necessary to articulate her position.

[336] It was clear to me that neither before or after a final disposition order would the agency consider the grandmother a realistic placement. The agency rejected both assessment reports that presented realistic and reasonable options to consider.

[337] Reference the rules of interpretation Sullivan and Driedger on the *Construction of Statute*, Fourth Edition by Ruth Sullivan, page 358, subparagraph 2, *Implicit Intention*. The author discussed the principles of interpretation when there are different statutes with apparently conflicting objectives. She quotes from the opinion of Kerwin, J. in **R. V. Williams**, {1944} S.C.R. 226, 231:

In construing statutes and orders in council, the courts have from time to time adopted particularized rules and maxims but these must not be used in such a manner as to lose sight of the fundamental object, which is to ascertain and give effect to the intention of Parliament and the Governor in Council.

[338] The intent of The *Children and Family Services Act* is expressly stated:

The family exists as a basic unit of society and its well being is inseparable from the common well being. The rights of children are enjoyed either personally or with their family. Parents and 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. Social services are essential to prevent or alleviate the social and related economic problems of individuals and families.** The rights of children, families and individuals are guaranteed by the rule of law and intervention into the affairs of individuals and families so as to protect and affirm these rights must be governed by the rule of Law.

**The preservation of a child's cultural, racial and linguistic heritage promotes the healthy development of the child.**

**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. 1990, c. 5, s. 2.**

Section 2(1) and 2(2) are not inconsistent . Nor can section 2(2) be read with out regard to section 42(2).

### **Disposition Order - 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.

The agency intervened in this child's life when she was five months old. At that time, the father had access to this child and was left in a parenting capacity on an intermittent basis as determined by the mother.

We are reminded by this Act when considering the best interest of a child to consider the following:

3 (2) (a) the importance for a 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 relationship with relatives;

(c) the importance of continuity in the child's care and the possible affect on the child of the disruption in that continuity;

(d) the bonding that exists between the child and the child's parents or guardian;

.....

(g) the child's cultural, racial and linguistic heritage;

[339] The functions of the agency as described in paragraph 9 include :

(a) protect children from harm;

**(b) work with other community and social services to prevent, alleviate and remedy the personal, social and economic conditions that might place children and families at risk;**

**(c) provide guidance, counseling and other services to families for the prevention of circumstances that might require intervention by an agency;**

.....

**(e) develop and provide services to families to promote the integrity of families,** before and after intervention pursuant to this Act;

.....

(i) provide services that respect and preserve the cultural, racial and linguistic heritage of children and their families;

(j) take reasonable measures to make known in the community the services the agency provides;

#### **Services to promote integrity of family**

13 (1) Where it appears to the Minister or an agency that services are necessary to promote the principle of using **the least intrusive means of intervention** and, in particular, **to enable a child to remain with the child's parent or guardian or be returned to the care of the child's parent or guardian, the Minister and the agency shall take reasonable measures to provide services to families and children that promote the integrity of the family.**

#### **Types of Service**

13 (2) Services to promote the integrity of the family include, but are not limited to, services provided by the agency or provided by others with the assistance of the agency for the following purposes:

**(a) improving the family's financial situation;**

- (b) improving the family's housing situation;**
- (c) improving parenting skills;**
- (d) improving child-care and child-rearing capabilities;**
- (e) improving homemaking skills;**
- (f) counselling and assessment;**
- (h) child care;**
- (j) self-help and empowerment of parents whose children have been, are or may be in need of protective services;**

**Placement considerations**

20 Where the Minister or an agency enters into an agreement pursuant to Section 17, 18 or 19, the Minister or the agency **shall**, where practicable, in order to ensure the child's best interests are served, take into account;

(a) the maintenance of regular contact between the child and the parent or guardian;

.....

(c) the child's need to maintain contact with the child's relatives and friends;

(d) the preservation of the child's cultural, racial and linguistic heritage.

**Interim Hearing - Placement considerations**

39 (8) Where the agency places a child who is the subject of an order pursuant to clause (e) of subsection (4), the agency shall, where practicable, in order to ensure the best interests of the child are served, take into account:

(a) the desirability of keeping brothers and sisters in the same family unit;

(b) the need to maintain contact with the child's relatives and friends;

(c) the preservation of the child's cultural, racial and linguistic heritage.

[340] While every effort was made to accommodate and rehabilitate the mother, very little effort was made to assess the father's ability to parent either alone or with the assistance of his family.

[341] The father was restricted in his access to his child which inhibited the development of a strong bond. He co-operated throughout, save for his initial introduction to the litigation process.

[342] Once the initial assessment report was tendered, a decision was clearly made to run contrary to the assessors recommendations. Most serious efforts to assist the father ground to a halt.

[343] Minimal access was allowed because the agency had already decided, and in truth, because the time available for access would, if followed, mean the loss of his employment.

[344] More importantly, there was no positive attempt to assess an obvious available option, the grandmother.

[345] The ultimate authority to reject a plan of care which requires assessment and evaluation of available appropriate family members rests with the Court, not the agency. If the agency is determined to move away from a consideration of least intrusive, the agency must provide proof that the principles of the *Children and Family Services Act* have been addressed and bring to the Court the only remaining option of third party placement.

[346] That is not to suggest the agency had a positive duty to undertake *unreasonable* searches to determine who might possibly be a viable option without regard to practicality and cost.

[347] However, where there is, in the face of the agency and the Court, an obvious family member that has expressed their interest and has a realistic chance of success, they have a duty to enquire and to assist, if necessary, to make the connections that are necessary to keep this child within its extended family. That duty is independent of the Court's responsibilities.

[348] It would be improper to reject family because this might not be the best possible arrangement, the most ideal placement within the global community, without paying more than lip service to the express intent of the legislation to preserve the family where possible.

[349] This grandmother is 59 years old. She has no prior child protection history. There is nothing in her history which would detract from her ability to parent. The testing confirmed she operated in the low average range and there was no evidence of cognitive deficits that would significantly impair her ability to parent. She functions on a concrete level and may have difficulty with abstracts.

[350] The assessor noted "Care should be taken to ensure that E.R. understands information being presented to her." There was some suggestion, not verified without further testing, of a learning disorder. She has a grade seven (7) education

[351] When presented with parenting scenarios, the assessor noted that her responses suggest that she has knowledge of child development and her interventions were age appropriate.

[352] The physical layout of her home presented no difficulties. The notations in the report are quite positive. Her daughter-in-law lives in and contributes to her household.

[353] The grandmother, now represented by legal counsel, submitted an application to the Court for an order granting her party status and attaching her Plan of Care. She promises to provide supervised access to the father and to follow the directions of the agency regarding any access to the mother or her family. She has indicated that she will abide by a no access order.

[354] The plan includes the father's partner who is now looking after their young baby. S.A. will care for the child during the day and the grandmother will care for the child when she returns from work.

[355] The grandmother is also prepared to place the child in day care for two days a week if she can obtain a subsidized placement. That provides the possibility of objective eyes to evaluate the child's state of being.



[356] Her family doctor of 25 years noted no concerns about mental health, substance abuse, or ability to parent.

[357] The assessor noted, and I concur, that E.R. is a relatively unsophisticated individual whose life revolves around her work and family. According to the assessor, her cognitive functioning does not necessarily present a barrier to her parenting adequately.

[358] The assessor dismissed the suggestion that she may have a personality disorder as she does not meet the diagnostic criteria; although she does exhibit some of the personality characteristics described.

[359] The parties had two days, June 3 and June 4, 2009, to address the evidence pertaining only to this second assessment, to cross examine the assessor and to respond to the agency position regarding their refusal to consider the grandmother as an appropriate placement.

[360] All three parties had ample opportunity to address their evidence regarding the agency plan and the first assessment, as well as provide their own plan.

[361] I conclude there was an error in process that did not address the best interest of this child including the possibility of placement within its community of relatives.

[362] I have taken into consideration the evidence of the father's employer who has known D.R. for 10 to 15 years, worked as his supervisor for about eight years. He testified that D.R. is an employee he is prepared to work with and to continue to support such that he has tried to preserve for D.R. his seasonal work.

[363] I also conclude that while there is no question on the evidence, and in the history of these matters before the Court, that the agency provided to the mother extensive services and opportunities to assist her in engaging as a parent in these circumstances; the plan of the father, his deficits and his need for accommodation was not considered on an equal basis to the mother.

[364] He accepted the immediate indication of the agency without contest; although he did not agree with supervised access and the decision not to place the

child with him and his mother. He did not apparently initially understand that he had the right to contest that and present a plan himself.

[365] Because he was an access parent and a putative father coming into the proceedings, he was not accorded equal and serious consideration. Perhaps his cognitive difficulties ousted him from consideration. Possibly because he was overwhelmed by the Court proceedings, he determined he had no ability to succeed before the Court.

[366] The paternal grandmother approached the Court, understanding that English was her second language, feeling somewhat inadequate without counsel. She was deterred by her inability to retain private counsel and was finally ousted from access to justice because initially she was not afforded Legal Aid.

[367] There are individuals who come before the Court who are well equipped, well knowledgeable of how to access services and obtain assistance in an unending fashion and there are others who defer without question to the agency and the Court's authority. In this instance, E.R. deferred to the sophisticated process and what she perceived to be the authority of the agency to demand that she comply with the Court's requirement to file a plan.

[368] The Court has to be vigilant to address disabilities or vulnerabilities that are evident to ensure that all persons, including those made vulnerable by disabilities, have and appear to have access to justice.

[369] The agency has an independent obligation, under the legislation, to seriously look at maintaining a child within the child's extended family and this was not done.

[370] In the final event, I was not satisfied that less intrusive measures, which may have been available, were properly investigated. Family placement would have maintained a relationship with a loving father, albeit one with significant cognitive difficulties, and the possibility of a long term relationship with her father's fiancée.

[371] This child would be in a community of its own linguistic and cultural background with an extended family that offers much love to this child. The child

would be raised in a home with an experienced grandmother and supportive extended family.

[372] I concur with the assessors conclusions. I conclude the father is unable to parent on his own. The access facilitators observation reports indicate an abundance of love and affection between the father and his child. They do, however, demonstrate that the father needs hands on direction on appropriate safety measures, supervision, and age and stage of development information about his child.

[373] He must not be responsible for this child's health and safety without constant supervision.

[374] I am not able to place this child with the father without tying the father's care with the care of another adult.

[375] For reasons stated, placement with S.A. and the father lacks the necessary level of certainty and stability due to, among other things, the presence of a new baby which will require S.A. to be very diligent if she wishes to keep the child in her care. Placing another child with her will potentially destabilize the household.

[376] The grandmother is prepared **to be the sole parent of the child**. She has a supportive environment. She will abide by the directive that there shall be no contact between the biological mother and her family. She is prepared to ensure that the child's life will not be marred by conflict with the mother's family. She will be solely responsible to make decisions relating to this child.

[377] The grandmother has discussed the future of the child with her daughter-in-law, S.R., and she has agreed to be the child's guardian in the event the grandmother no longer is able to act. The child will be living with S.R. and the grandmother. If the grandmother is unable by reason of illness or other cause to continue to act as parent this will be a logical plan.

[378] In accordance with Section 42 of the *Children and Family Services Act* I dismiss the agency's application for permanent care and place this child in the sole care and custody of the paternal grandmother with no access to the mother and with supervised access to the father.

[379] The grandmother **shall not** delegate her parental responsibility for the sole care of this child to the father and S.A. either while she is living or as part of her estate plan.

[380] The grandmother shall abide by her intention to place this child for at least two (2) days in a proper and appropriate day care facility, subject to appropriate subsidies. This will allow for third party observation of the child's progress.

[381] The grandmother shall allow no access to the mother and is under no obligation to allow access to the maternal grandparents. Their plan of care was heard and dismissed by the court.

[382] This leaves the grandmother with the sole responsibility for the care of this child and with all the rights and responsibilities inherent in that role.

[383] I order that the grandmother advise the agency in writing of any action, whether formal or informal, started by any person to change the terms of care and custody or access.

[384] Counsel for the agency shall prepare the dismissal order in consultation with counsel of the paternal grandmother who will prepare the private custody order.

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Moira C. Legere Sers, J.

**Citation:** Children’s Aid Society of Inverness/Richmond v. C.S.L., 2009 NSSC  
207

**Date:** 20090630

**Docket:** SFPACFSA-053721

**Registry:** Port Hawkesbury

**Between:**

Children’s Aid Society of Inverness/Richmond

Applicant

v.

C.S.L, D.R., and E.R.

Respondent(s)

**Judge:**

The Honourable Justice Moira C. Legere Sers

**Heard:**

December 8, 9, and 10, 2008, and June 3 and 4, 2009, in  
Port Hawkesbury, Nova Scotia

**Counsel:**

Lindsay McDonald, for the applicant  
Tracey Sturmy, for the respondent D.R.  
M. Louise Campbell, for the respondent E.R.

**Erratum:**

At page 40, paragraph 260, line 3, where it reads “...and they did consider they had...”, it should read “...and they did not consider they had...”.

At page 42, paragraph 271, line 2, where it reads “...although she does not intent to cease...”, it should read “...although she does not intend to cease...”.

At page 47, paragraph 309, line 1, where it reads “ They are concerns about no medical benefits.”, it should read “There are concerns about no medical benefits”.