SFSNCFSA13037

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: CAS v. N.D. and R.M., 2003 NSSF 019

BETWEEN:

THE CHILDREN'S AID SOCIETY OF CAPE BRETON-VICTORIA

APPLICANT

- and -

N.D. and R.M.

RESPONDENTS

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on September 25, 2008.

D E C I S I O N

HEARD: Before the Honourable **Justice M. Clare MacLellan**, at Sydney, Nova Scotia

DATES HEARD:

HEARINGS/APPLICATIONS:
November 2, 2001, November 27, 2001, January 8, 2002, January 28, 2002, April 30, 2002, May 29, 2002, June 11, 2002, June 18, 2002, October 7, 2002, December 9, 2002, December 13, 2002

PERMANENT CARE HEARING:
January 6, 2003, January 10, 2003, January 23, 2003, January 24, 2003, February 3, 2003, February 5, 2003 and February 13, 2003

DECISION: February 20, 2003 (oral decision)
May 27, 2003 (written decision)

COUNSEL: Robert Crosby, Q.C., Counsel for the Applicant
David Campbell, Q.C., Counsel for the Respondent N.D.
David Raniseth, Counsel for the Respondent R.M.
Doug MacKinlay, Counsel for Mr. L. and M.L.

M.C. MacLellan, J.

[1] The matter before the Court is the Permanent Care Application for four (4) children. The first child is S.M., born [in 1997] - she is 5 ½; the second child is D.D., born [in 1999] - she is 4; the third child is O.D., born [in 2000] - she is 3; and the fourth child is A.D., born [in 2001] - he is 2 (at the time of written decision).

[2] As indicated, the children range from approximately 5 ½ to about 2 years of age and they are the offspring of three (3) or four (4) fathers. All three (3) children, except A.D. have, according to the Applicant's evidence, displayed some form of special needs or developmental delay. These needs are being addressed in their current placements.

[3] The three (3) younger children have been in temporary care; S.M., has been in supervised care of her paternal grandparents. The children have been out of their mother's care since December, 2001. A.D. was approximately nine (9) months old at the time of apprehension.

[4] The chronology of Agency involvement with N.D. and R.M. is as follows:

[5] The parents had informal involvement with the Agency since approximately March, 1996. The referral dealt with problems of money, food shortage, and housing.

[6] There was one (1) child, K.D., born to N.D. and R.M., who tragically died at fifteen (15) months when she contacted a bacterial infection. Due to her death, the police made a referral to Children's Aid when N.D. was expecting her second child, S.M.. There is no more information on this referral. It appeared to be based on caution, given the actual cause of K.D.'s death was never determined.

[7] The child, S.M., lived with her biological father, R.M., and her grandparents (the L.s), shortly after her birth and a custody order was granted to the biological father, R.M..

[8] S.M. lived with R.M. and the L.s, or with the L.s alone, for approximately one-half of her short lifetime. This was a back-and-forth again arrangement from birth. I believe she was with the L.'s for approximately eleven (11) months, after which she was with them on-and-off for a time, and finally from July, 2001 to the present. S.M. lived with her mother and father on-and-off during their various periods of cohabitation. They were a couple for somewhere between four (4) and six (6) years. The parents describe their personal relationship as being one of on-and-off again. The custody order to R.M. was not altered until a Supervision Order was granted by this Court last year.

[9] N.D. gave birth to a third child, D.D., [in 2001]. The child was premature. The Agency received a referral in relation to D.D. seeking assistance with items needed to care for a newborn infant. The referral also alleged that N.D. had been harassed, shortly after D.D.'s birth, by an ex-partner while still in hospital.

[10] On March 1, 1999, N.D. agreed to work with a Family Skills Worker and a Parent Aid. R.M. was part of the plan at that time. The Parent Aid and N.D. dealt with several matters from basic feeding, to late hours outside the home by the mother and father, to the need to be receptive in learning to parent.

[11] N.D. gave birth to another baby girl, O.D., [in 2000]. D.D. was approximately thirteen (13) months old at the time that O.D. was born. Shortly after O.D. was born, N.D. returned to work. She was working back-shift hours. This complicated her involvement with the Children's Aid Parent Aid because N.D. was often tired when the Parent Aid appeared for training sessions.

[12] In June, 2000, the Family Skills Worker reported that all seemed well with N.D. and the babies. In August, 2000, the police reported that N.D. had been badly assaulted by her current boyfriend. His name was T.I.. N.D. confirmed the assault took place. At the time of the assault, R.M. was babysitting. He recalled that D.D. was present and saw T.I. grab her mother by the throat.

[13] On December 19, 2000, R.M. advised the Applicant that N.D. was neglecting the children. He and S.M. were living with N.D. at the time he made this complaint. As of December 20, 2000, the Parent Aid services ended. Family Skills continued to visit the

residence approximately once a week. At that time, R.M., N.D. and the three (3) baby girls appeared to be doing well.

[14] In January, 2001, R.M. made another referral to the Applicant against N.D.. Children's Aid decided, in a case conference, that risk to this family would be increased if R.M. was no longer living in the home. On January 20th, according to the Protection Application and Affidavit, C.B. (who lived with N.D. and R.M.) complained of N.D.'s treatment of the children. In close proximity to that time, Mrs. L. called to make a similar complaint, as did R.M.. All complaints related to a slap one of the girls was alleged to have received from N.D..

[15] On January 20, 2001, R.M. again complained to the Children's Aid Society that N.D. was not taking O.D. to the doctor when she should (O.D. had diaper rash). On January 16, 2001, the Children's Aid provided transport and money to secure O.D's diaper rash lotion, as well as a product to deal with the children's infestation of head lice.

[16] On February 7, 2001, R.M. and N.D. separated again. N.D. lacked some essential provisions for the children. On February 16th and 19th there were similar complaints that N.D. was short of basic provisions and heating oil.

[17] On February 19, 2001, Dr. Myatt advised the Agency verbally that he had concerns. Dr. Myatt's complaints, at paragraph (49) of the Protection Hearing Affidavit were:

(a) the Respondent's children are not always bundled up properly;
(b) the Respondent, N.D., misses appointments regularly;
(c) she blames everyone but herself;
(d) the child's rash was due to the child not being looked after properly, that the skin was very dry and there had been some cold exposure;
(e) he had prescribed some antifungal and anti-inflammatory and that the rash was fifty percent better than the last time he saw it;
(f) he was concerned about the conditions in N.D.'s home and asked her to contact Community Services in regards to oil.

[18] On March 1, 2001, R.M. advised that the children O.D. and D.D. were poorly clothed for March weather and both were still infested with head lice.

[19] On March 8, 2001 the Children's Aid received a phone call from Dr. Myatt expressing concern re N.D's parenting practices. The doctor wrote two (2) letters to the Children's Aid Society on this problem (attached to the Protection Application). The first letter dated March 5, 2001 (although the date is obscured), is in relation to O.D., who was not yet one (1) at the time.

> **I have grave concerns for this child. The child did not show up for appointment. We had suspicious concerns lately and have been following her closely. I was wondering if VON could go into the home and I will make an appointment with Dr. Abenheimer.**

[20] His next letter dated March 6, 2001, states as follows:

> **I saw O.D. today and she continues with the rash. I find out from N.D. today that her temperature in her house is from 10 to 15 degrees!**
>
> **Clearly this is unacceptable and I d appreciate consideration for provision for more financial assistance for oil. It may be more appropriate that she move into an apartment.**
>
> **I have a referral in to Dr. Abenheimer to also assess O.(D.).**
>
> **Because of the continued rash, she has been unable to receive her booster needle. I ve also advised N.(D.) to keep the temperature in the house at 20 degrees. I appreciate your assistance.**

[21] On March 13th, 22nd, and April 5, 2001, either N.D. or her mother called the Children's Aid for assistance in relation to securing diapers and filling prescriptions. [In 2001], N.D. gave birth to her son, A.D.. The Children's Aid assisted obtaining the basic provisions for the new baby. Affidavit material alleges hospital staff were concerned that N.D. wished to call her son "L.". At hearing, N.D. indicated she was joking with friends and did not have a discussion with nurses re calling A.D. "L."; but rather, the nurses overheard this discussion she had with her friends.

[22] On April 30, 2001, N.D. and R.M. reunited. The Applicant's first visit was on May 11, 2001, and was positive. The next visit of May 20, 2001, was reasonably positive. On June 20, 2001, N.D. advised the Applicant she did not need any help in the form of a Parent Aid or a Family Skills Worker.

[23] On July 17, 2001, the workers were advised by R.M. that the children again had head lice. R.M. advised he was the principle caregiver. N.D. confirmed the children had head lice infestation from time to time. She maintained the reasons were beyond her control given that she treated the children, but other people in the home were not treating their head lice, and the cycle of infestation continued.

[24] The protection affidavit chronicles that in September, 2001, workers went to N.D.'s home and heard some babysitter allegedly yelling and cursing at the children. Neither parent was in attendance at that time. No evidence was tendered in support of the allegation.

[25] On October 19, 2001, R.M. advised Children's Aid that N.D. was neglectful and using corporal punishment as a method of disciplining the children. R.M., in his evidence, does recall making this referral but denies saying there was an assault on the children. R.M. indicated to Children's Aid in October 2001 that he planned to move out of the residence. By this time, S.M. was already living with her grandparents, the L.s.

[26] The Children's Aid began a Section 32 *Children and Family Services Act* Supervision Application on October 21, 2001. This application chronicled the history as set forth above and concluded in paragraph 82:

THAT on October 22, 2001, a Risk Management Conference was convened; present were Director, Mairi MacLean, Family Skills Worker, Annette Murphy, worker Nora MacDonald and this worker (which would be Lisa Robinson); the case history was reviewed and the following decisions were made:

a A protection application would be made to the Court under Section 32 of the Children's Family Services Act;
b (N.)D. will participate in a parental capacity assessment and a psychological assessment as soon as one can be arranged;
c (N.)D. will comply with all recommendations of the Children's Aid Society;
d (N.)D. will attend anger management counseling;
e (N.)D. will cooperate with the Agency Family Support Worker;
f (N.)D. will agree to meet with Agency Protection Worker and will permit this worker to meet with children;
g (N.)D. will attend to all medical appointments for the children and any other necessary appointments.

[27] The first part of the Section 39 hearing was held on November 2, 2001, and proceeded on affida evidence. The Court added a clause prohibiting any form of physical punishment to the children. Par of the Section 39 hearing was completed on November 27, 2001. A Supervision Order was issued remedial measures for N.D. were outlined.

[28] Prior to the Protection Hearing, a five (5) day Review of the Section 39 Order was applied for by the Agency seeking apprehension of the three (3) children and the continued placement of S.M.

with the paternal grandparents, the L.s. The application was granted based on affidavit evidence of Agency workers Carrie Evely and Jessica LeBrun. Extensive materials were filed by the Agency for the Review Hearing. Research of the file indicates that the

affidavits were never tendered, but were filed and discussed in Court. Carriage of the file was transferred to Paul Moore.

[29] After that point, due to illnesses, snowstorms and competing court dockets, the Protection Hearing was not held until January 28, 2002 and the Protection finding was made in relation to N.D. only. The Protection Hearing proceeded by consent pursuant to Section 40(3). The transcription in relation to that hearing reads as follows:

> **MR. CROSBY: Yes, My Lady I apologize for the late start, but counsel and myself...well Mr. Raniseth and myself had matters before Justice Wilson but in the interim we entered into discussions with...among all three counsel and can indicate that there is consensus that the finding be entered under 22(2)(b) pursuant to Section 40(3) and that finding is made with respect to the Respondent, N.D., and on the basis of the risk...the substantial risk to the children caused by the failure of the parent to supervise adequately.**
>
> **We're also in a consensus position that the matter be adjourned for Disposition Hearing, that during the adjourned period of time, the three children, D.D., O.D. and A.D. will continue to remain in the Temporary Care of the Applicant with access to both Respondents. The Respondent, N.D., has twice weekly access with the children and (R.)M. has once weekly, that also acts as sibling access for S.M..**
>
> **Given the children's schedule it's difficult to increase the number of access visits, but we will be increasing the duration of the access visits. The Order will also provide that the child S.M. remain in the supervised care of the Respondent, R.M.. The Order will also provide that both Respondents will cooperate with the completion of a Psychological and a Parental Capacity Assessment and that a general costing clause be included in the event that either Respondent identifies any service in the interim that they may feel may be a benefit and they wish to access. The other thing I'll put on the record is that there will also be consideration given to moving the supervised access visits out of the Agency Office and into a more comfortable circumstance in the Respondents home.**
>
> **THE COURT: Mr. Campbell?**

MR. CAMPBELL: Yes, My Lady those terms have been gone over with (N.)D. and she's aware of them all and she informs me that she s prepared to consent to them.

THE COURT: Okay, you may be seated. (N.)D. you heard what Mr. Campbell said?

(N.)D.: Yes I did, Your Honor.

THE COURT: And do you agree with what he said on your behalf?

(N.)D.: It's not...it wasn't exactly worded the same as what Mr. Campbell said to me, but I guess it's pretty much the same, so yeah.

THE COURT: That your children are in need of protective services and that the three will remain in the care of the Agency and the older girl...or the younger...the youngest will remain in the supervised care of (R.)M.?

(N.)D.: Actually it's the oldest, Your Honor.
THE COURT: I read it backwards, sorry.

(N.)D.: That's alright.

THE COURT: The oldest will remain with (R.)M. and there will be an assessment performed and access will be arranged and the access will be moved to a more comfortable location.

(.N)D.: Yes, Your Honor.

THE COURT: That's pretty well what Mr. ... if I change(d) around Mr. Campbell s words that's basically it. So do you agree with that?

(.N)D.: Unfortunately yes, Your Honor.

THE COURT: At this time, okay. Alright and (R.)M.....Mr. Raniseth, the finding is not in relation to him, but he's in agreement with the placement?

MR. RANISETH: Ah, yes. I've had discussions with Mr. Crosby about the access as he's already indicated and he is agreeing to be a part of the Parental Capacity Psychological Assessment as well.

THE COURT: Okay, that s fine then. Anything further?

MR. CROSBY: No, My Lady.

> **THE COURT: Alright, Mr. Campbell if there's any remedial measures that your client feels she needs to help her on the way, that the Agency is not giving her forthwith and they're reasonable, just bring the matter back and I will re-examine it. Okay, thank you.**
>
> **MR. CROSBY: Thank you, My Lady.**
>
> **THE COURT: So we will set for Disposition and make a consensual finding against...in relation to (N.)D. alone on the failure to supervise ground only, in relation to the four children. The rest of the relief will be as specified by Mr. Crosby as I'm satisfied in the representations made by the parties and the affidavit material.**

[30] On April 30, 2002, the assessment ordered was not completed and so all parties agreed the matter would be adjourned to May 3, 2002 for Disposition to allow the Assessment to be completed.

[31] The Court heard from Mr. Bryson on May 31, 2002, who conducted the assessment on all the parties except S.M.. Mr. Bryson's qualifications were questioned by Mr. Campbell. After reviewing his experience and training, he was accepted as a witness capable of giving opinion evidence in the area of parental capacity. It was unclear why S.M. was not part of that assessment. There are comments made by Mr. Bryson in the report that relate to S.M's interaction with her mother.

[32] I have reviewed this report many times and have some comments to make. It is unclear when one looks under the heading, "N.D.'s mental status", why it was necessary for the assessor to chronicle whether or not she had tattoos and the nature of the tattoos. I

am at a loss to see how that would have an effect on any determination that I have to make, or that he had to make.

[33] In reviewing N.D.'s medical history, Mr. Bryson noted that as a teenager she was diagnosed as having Conduct Disorder and Oppositional Defiant Disorder. He goes through her history of [...] [group home]. He noted her anger in general and in particular with the Children's Aid, who had monitored her since her first child, K.D., passed away. He indicated that N.D. held out to him that she basically did not have too many parenting problems with her three (3) children and that they were generally satisfactory, but that her oldest child, S.M., exhibited challenging behaviors. Much of the Assessment contains derogatory, saucy or rude quotes that Mr. Bryson attributed to N.D..

[34] In relation to the objective testing overall, N.D. performed well on the tests - the Child Abuse Test and the Child Stress and Substantive Abuse Test. The results of the MCMI-3, were acceptable as well. Mr. Bryson concludes:

> **N.D.'s personality style are indicative of individuals who are behaviorally rigid and constricted, conscientious, polite, organized, meticulous, punctual, respectful, often perfectionistic, formal, prudent, over-conforming, cooperative, compliant with rules, serious, moralistic, self-righteous and self-disciplined, efficient, and relatively inflexible. They place high demands on themselves. They are emotionally controlled. They are socially conforming and prone toward a repetitive life-style, as a result of engaging in a series of patterned behaviors and rules that must be followed. They have fears of social disapproval and are a model of propriety and restraint. They show excessive respect for authority but may treat subordinates in an autocratic manner. They operate from a sense of duty that compels them not to let others down, thus risking the condemnation of authority figures. They thus show an anxious**

> **conformity. They strive to avoid criticism but expect it because of what they perceive to be their personal shortcomings. They fear making mistakes because of expected disapproval. Their behavior stems from a conflict between a felt hostility which they wish to express and a fear of social disapproval should they expose this underlying oppositional resentment. This circumstance forces them to become over-conforming, thus placing on themselves high demands that serve to control this intense anger, which occasionally breaks through into their behavior.**

[35] As outlined later, these character traits or personality traits as put forward in the objective testing, do not conform with Mr. Bryson's objective observation of N.D.. Overall, as was stressed by her lawyer, N.D.'s objective tests, excluding Mr. Bryson's observations, which are also objective, show her to have average, or at least acceptable, character traits. Mr. Bryson believes, however, due to her "L" Scale evaluation in the MMPI (another test) that her readings are unreliable, but in oral evidence he agreed that overall she was average in the objectives test portion of the assessment. N.D.'s parental stress index has an average score but Mr. Bryson noted under cross- examination that it was elevated in relation to her dealings with S.M.. However, S.M. was not assessed at all. Any behaviors that S.M. might manifest that could cause an elevation in this scale were not provided to Mr. Bryson and were not considered.

[36] Mr. Bryson concludes during his *viva voce* evidence that N.D. cannot parent on the long-term; that she cannot put her children first; that she does not, and has not had positive relationships. N.D. is resistant and it will take a long time for her to improve. He finds that she loves her children, but she loves herself more. He concludes that she

has poor impulse control, cannot supervise and has problems communicating with her children. When asked by Mr. Raniseth (counsel for R.M.) to advise how he arrived at his conclusions, Mr. Bryson stated:

> **MR. RANISETH: O.K. and I take it you do that summary after the completion of the interview?**
> **MR. BRYSON: No this summary would be done at the completion of the report.**
> **MR. RANISETH: O.K.?**
> **MR. BRYSON: So it s not specific to any specific interview. It s after reviewing all of the materials including collateral information, the Applicant s files, the psychological testing, then I do a summary or discussion based on all the findings.**

[37] Mr. Campbell (counsel for N.D.) continued on this theme while he is cross-examining the elevated "L" Scale in the MMPI:

> **MR. CAMPBELL: Okay. Now the second last paragraph says she obtained a slight five code type. This code type is relatively infrequent and occurs more in women than men. These individuals are very comfortable with themselves and their behavior. As a consequence they report mainly emotional distress and are relatively free of any disabling anxieties or guilt. They are in good physical health. They report they do not abuse substances, isn't that a positive?**
> **MR. BRYSON: I think I would view it more positive if the fact that the L scale which is known as the Lie Scale was not elevated.**
> **MR. CAMPBELL: But I am suggesting to you that if you were to take any parent anywhere on Cape Breton Island and submit them to the battery of tests you ve done, that there isn't one that would pass with flying colors and you say this person must parent. Everyone would have their faults?**
> **MR. BRYSON: No, actually in my experience I have found some parents that have done very well in their scores on this one in particular have come up with what's called a W.N.L. profile.**
> **MR. CAMPBELL: Okay, can you tell us how many studies you've done, what percentage of success you've had and can you...or are you aware of any population studies across the country that give some indication of how many parents would pass something like this?**

MR. BRYSON: **No, I'm not aware of those.**
MR. CAMPBELL: **There are no studies on it, that's why, isn't it?**
MR. BRYSON: **I'm not aware of any.**
MR. CAMPBELL: **Yeah, you just do it on an individual case by case basis, there are no statistics to guide us are there?**
MR. BRYSON: **All I can go by is my experience and that there have been parents I've'assessed who have not had the same profile.**

[38] He was subsequently questioned about the W.N.L profile by Mr. Crosby on re-direct. Mr. Bryson referred to it as a form of code.

MR. CROSBY: **You made reference to a W.N.L. finding...**
MR. BRYSON: **Right.**
MR. CROSBY: **...maybe I'm just being curious. What, what, what does that stand for?**
MR. BRYSON: **Okay. W.N.L. - I'm not sure the exact words it represents - I believe it's just a code itself. It's for someone who has been found to be quite open and honest in completing the M.M.P.I. 3, that...or M.M.P.I. 2, that they do not appear to have any social skills deficits, there are no indications of any significant personality issues or deficits and appear to be quite happy and quite well functioning in all areas of their life.**

[39] However, in his conclusion, Mr. Bryson describes N.D. in harsher terms. On cross-examination he advised the only way to safely return the children to N.D. was to have a person in her home full-time to help her raise the children, make sure they got to school, were properly fed and supervised. Overall, N.D.'s objective tests yielded average results. At the end of the day, Mr. Bryson did not explain the discrepancy between the objective tests and his objective observation (with the exception of the one elevated

validity test in the MMPI), nor was he able to satisfactorily answer Mr. Campbell's questions in relation to these points.

[40] The MMPI-2 has recently come under scrutiny in *Stahl, P.M., Conducting Child Custody Evaluations: A Comprehensive Guide, Sage Publications, Inc., 1994.* Dr. Philip Michael Stahl has a Ph.D. and is a psychologist in North Carolina. He has worked with families of divorce for fifteen (15) years. He did his original doctoral thesis on attitudes and beliefs about joint custody. He has been doing such evaluations - custodial evaluations - and has performed approximately six hundred (600). He is a past president of the Michigan Inter-professional Association on Marriage, Divorce, and the Family. He is currently a member of the National Board of Directors of the Association of Family and Conciliation Courts and Co-Chairs a private practice and a number of Custodial Evaluation Committees.[1] He states at page (55) of his text:

> **One of the very important issues associated with psychological testing is that most of the psychological tests used for purposes of custody evaluations were**
>
> **designed for a different purpose. One of the most widely used tests in custody evaluations, the Minnesota Multiphasic Personality Inventory (MMPI), was designed for hospital use in diagnosing severe psychiatric disturbances. The recently updated MMPI-2, although it has been normed over a broader population, has been described by many psychologists as significantly flawed outside the hospital population. [emphasis added]**[2]

1 Stahl, P.M., Conducting Child Custody Evaluations: A Comprehensive Guide, Sage Publications, Inc., 1994 at pg. 261

2 Stahl, P.M., Conducting Child Custody Evaluations: A Comprehensive Guide, Sage Publications, Inc., 1994, at pg. 55

[41] Further, he goes on to discuss the positive aspects of the Parenting Stress Index to the evaluation and on page (56) wrote:

> **The MMPI and similar computer-scored objective tests are useful for providing a rough assessment of personality dynamics, defensiveness, affect, ability to deal with hostility, and aggression, which is important in a complete understanding of the person's psychological functioning.**[3]

[42] Finally, he concludes that Chapter at page (57):

> **Finally, with the careful use of psychological testing, we can gain insight into some of the psychological dynamics of each individual and the role that these dynamics play in the overall assessment.**[4]

[43] The responses from Mr. Bryson provides the Court with no insight as to why a young woman, who is basically healthy and passed the majority of her psychological tests, acts in the manner she does. Nor, are the recommendations particularly helpful. If she is non-receptive to learning and putting the children first, what good is a full-time caregiver in the home?

[44] I could not, at the end of the day, having spent substantial time on this report, understand, based on Mr. Bryson's report and his testing as quoted, how he arrived at the conclusions he did when one looks at his own basic decision making practices. It consists of gathering information and objective testing. When all steps are taken, the

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3 Stahl, P.M., Conducting Child Custody Evaluations: A Comprehensive Guide, Sage Publications, Inc., 1994, at pg. 56

4 Stahl, P.M., Conducting Child Custody Evaluations: A Comprehensive Guide, Sage Publications, Inc., 1994, at pg. 57

conclusion is forthcoming. When I examined his own methodology, I was at a loss to understand how he came to his conclusion (as exhibited at the Disposition Hearing). Page (34) states as follows:

> **N.D. presented as an angry, aggressive, impatient, defiant, moody parent with very low frustration tolerance, highly impulsive behavior, and very little insight. She is unable to maintain lasting and meaningful relationships. When others, including her children, place demands on her, she is likely to react in an abrupt and explosive manner. Her personality structure, which was well formed as a child and is consistent with her current presentation, finds her to be a defiant and oppositional person who values shocking others. She has a profound lack of insight into her responsibilities to her children, minimizing or denying her parenting deficits. N.D. is not motivated to make changes, as she appears to genuinely believe that others are responsible for her difficulties. It is highly unlikely that she would co-operate with the Applicant if her children were returned to her care. By not taking responsibility for the neglect of her children, they would be at significant risk of neglect or harm if they were returned to her care.**

[45] As indicated, Mr. Campbell cross-examined Mr. Bryson rigorously as to why the objective tests were acceptable, but the objective input from Mr. Bryson was less so. Mr. Bryson’s conclusions are not supported by the objective tests and this discrepancy remains unexplained.

[46] His conclusion appears to be based on N.D.'s outspokenness and on substantial portions of the Children's Aid file. C.A.S. materials were not vetted and were not subject to cross-examination.

Secondly, his conclusions in relation to her behavior, e.g., whether or not she could have a lasting relationship, whether or not she had a short temper, whether or not she was committed to raising her children - are conclusions that a Court, with properly presented evidence, can make without opinion evidence.

[47] Mr. Bryson's description of how the children reacted to N.D. as opposed to R.M. during access was helpful, but this is also material that could have been presented through a Family Skills Worker, an Access Supervisor, or any objective lay witness.

[48] In any event, I find his conclusion re parental capacity is not borne out by the data he presented. I find that he has discrepancies between his objective testing and his office interviews. He has been unable to explain or reconcile his own conflict within his own report. Secondly, I find that he relied to a substantial degree on the material in the Agency file, which was not subject to cross-examination. The Agency file is an internal document. It was not meant as the ultimate document of truth and does not have any of the safeguards. Perhaps the most glaring example is the reference to N.D.'s loss of her child through possibly a dirty baby bottle. It was clear at the end of the day that there was never evidence of this allegation. This is a highly prejudicial comment to consider in the absence of proof.

[49] The use of this type of speculation and the basis that an opinion witness is able to use background material, is a very important issue. It has been referred to by many Courts. I think it is particularly important in Children's Aid cases, where the Agency

staff, by their mandate, have to take unsubstantiated complaints people make and look into the allegations. The Children's Aid Society staff dismiss them or validate them or continue their investigation until they complete a risk assessment. This is a running file - it is not a truthful chronology - it is a working document for an Agency who is given the obligation to look into matters. They obviously looked into an allegation about illness and death associated with a dirty baby bottle. The allegation was never substantiated, but is referenced in the protection affidavit. It is in Mr. Bryson's assessment, and it is in Dr. Hann's assessment.

[50] The decision of Justice Sopinka in **R. v. Lavallee (1999), 55 C.C.C. (3d) 97,** in assessing a similar problem, critiques four (4) features of the controversial case of **R. v. Abbey, [1982] 2 S.C.R. 24**, and he says:

> **Upon reflection, it seems to me that the very special facts in *Abbey*, and the decision required on those facts, have contributed to the development of a principle concerning the admissibility and weight of expert opinion evidence that is self-contradictory. The contradiction is apparent in the four principles set out by Wilson J. in the present case, *ante*, pp. 127-8, which I reproduce here for the sake of convenience:**
>
> 1. **An expert opinion is admissible if relevant, even if it is based on second-hand evidence.**
> 2. **This second-hand evidence (heresay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based.**
> 3. **Where the psychiatric evidence is comprised of heresay evidence, the problem is the weight to be attributed to the opinion.**
> 4. **Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.**

> **The combined effect of Nos. 1, 3 and 4 is that an expert opinion relevant in the abstract to a material issue in a trial but based entirely on unproven hearsay (e.g., from the mouth of the accused, as in *Abbey*) is admissible but entitled to no weight whatsoever. The question that arises is how any evidence can be admissible and yet entitled to no weight. As one commentator has pointed out, an expert opinion based entirely on unproven heresay must, if anything, be inadmissible by reason of irrelevance, since the facts underlying the expert opinion are the only connection between the opinion and the case.**
>
> **The resolution of the contradiction inherent in *Abbey*, and the answer to the criticism *Abbey* has drawn, is to be found in the practical distinction between evidence that an expert obtains and acts upon within the scope of his or her expertise and the evidence that an expert obtains from a party to litigation touching a matter directly in issue (as in *Abbey).***[5]

[51] Further, he states at page 643:

> **Where, however, the information upon which an expert forms his or her opinion comes from the mouth of a party to the litigation, or from any other source that is inherently suspect, a court ought to require independent proof of that information. The lack of such proof will, consistent with *Abbey*, have a direct effect on the weight to be given to the opinion, perhaps to the vanishing point. But it must be recognized that it will only be very rarely that an expert's opinion is entirely based upon such information, with no independent proof of any of it. <u>Where an expert's opinion is based in part upon suspect information and in part upon either admitted facts or facts sought to be proved, the matter is purely one of weight.</u> In this respect, I agree with the statement of Wilson, J., *ante*, p. 130, as applied to circumstances such as those in the present case.**[6] **[emphasis added]**

[52] Mr. Bryson's tests on R.M., interpreted alone and with his *viva voce* evidence, and with his objective testing, contains some consistency. The tests and the objective data bring together a coherent picture that would permit a person to give an opinion based on

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5 Delisle, R.J., Evidence: Principles & Problems, 5th Ed., 1999 Thomson Canada Limited at p. 643

6 Delisle, R.J., Evidence: Principles & Problems, 5th Ed., 1999 Thomson Canada Limited at p. 643

something more than what the lay person could discern. However, I was still left with the conundrum that I did not know the extent the objective data was influenced by, by the review of the Agency file and input from various untested collateral sources. At page 34, Mr. Bryson concluded:

> **R.M. presented as an egotistical, narcissistic, self-absorbed male who is driven by his desire to be in a sexual relationship with N.D.. When he has become intolerant of her behavior, he has left the relationship, leaving the children in her care. Concerned with his belief that the children were being neglected and harmed, he admits to contacting the Applicant. When the Applicant investigated, and found that a risk of neglect or harm did exist for the children, the children were removed from the home. During the Assessment, R.M. indicated that he contacted the Applicant in error. He no longer believed that the children were in need of care.**
>
> **He claims that N.D. has offered herself to him if he helps her in having her children returned to her care. This is the N.D. who petitioned the Applicant to deny him access visits with the children. That there is a long history of conflict between R.M. and N.D. that is not disputed by either. That they can cohabit and provide care in the best interests of the children is doubtful. Even if the couple could put their needs aside, they both lack the necessary parenting skills. R.M. has clearly said that he does not have any parenting deficits, and is now saying the same about N.D.. R.M. has very little insight into the needs of the children. Similar to N.D., he has a driving need for attention.**

[53] There is not the same discrepancy between the testing data, the independent observation and the summary conclusion in relation to R.M.. Some weight can be given to the assessment of R.M., but at the end of the day, his conclusions may well have been made without the recourse to opinion evidence.

[54] Mr. Bryson's summary of R.M. did withstand scrutiny during the cross-examination by counsel.

PAUL MOORE

[55] Children's Aid Protection Worker, Paul Moore, who had carriage of the file, indicated that it was the Agency's plan, up until April 2002, that the family would be reunited as soon as possible. The concerns he outlined were problems with the mother regarding lack of supervision of very young children, consistent lack of food in the home, a lack of money to run the home, cleanliness in the home and with the children, and her absence of family support.

[56] The Children's Aid placed a fair amount of emphasis on the Bryson Report as a negative element against the return of the children to N.D.. The Bryson Report caused the Applicant to take a more intense look at R.M.'s parenting practices. The Agency, via Mr. Moore, did acknowledge that S.M. had a strong attachment to the L.s and she has an attachment to her father. It was his view that S.M. should remain with the L.s and with R.M., under the Children's Aid Society's guidance. He indicated as well, it was his view that the three (3) youngest children must be placed in permanent care, to be adopted with no access to the parents.

[57] Mr. Moore advised the Court that a Family Skills Worker had been with the family for years with no noted success. Mr. Moore indicated that it was his belief that N.D.'s chronicle neglect of the children constituted a danger which could result in

physical harm. He gives one example when one of the children was vomiting, and N.D. took the child to the hospital. The doctor ordered a CatScan, but N.D. would not have the CatScan performed at that time. He indicated as well that even during supervised access with N.D., she had to be reminded to take care of the children when they placed themselves at physical risk. R..M had the same supervision deficit.

[58] N.D. later explained the CatScan incident. The doctor advised her to take the child home and she went back at a later time to have the CatScan performed, which was negative.

[59] By consent of the parties and based on the best interests of the children, it was agreed that the Disposition Hearing would not be completed and a new assessment ordered. The transcript which dealt with the new assessment contained:

> **THE COURT: Okay. And you should also examine what material, if you can discuss it, what material does the psychologist get. I have a difficulty with an independent assessment that includes the whole Agency file myself, but I ll leave that to you. If you have an independent study I think it should be just that, but anyway...okay, how long? We should notify the assessor that we want this sooner than later and you are running into summer time now.**
>
> **If there is any particular issues that the Respondents counsel want the psychologist to examine, now is the time to outline that, any particular portions of the Bryson Report that you want specific comment on, you can add that to the very broad Parental Capacity/Psychological Assessment. So whatever you want, now is the time to phrase it, and we should notify whoever...*(And then we go on to state)* Are you in agreement as to who will do the assessment? *(And the discussion continues)***

[60] The Disposition Review could not continue until the Fall because the re-assessment, or the second opinion assessment, requested and agreed to, was not prepared. In the interim, between the June 18th adjournment, the new assessment was performed, and the L.s (R.M.'s parents) were granted standing on December 13, 2002 to seek custody of S.M. and perhaps A.D., if R.M. was the biological father of A.D..

[61] Dr. Hann asked to discuss with the Court the parameters of the Assessment. A time was set up with the lawyers and myself to have a conference call with Dr. Hann to map this matter out, but at the appointed time the lawyers were coordinated, it was not possible to have Dr. Hann to attend by phone. It is my recollection at that time, that Dr. Hann wanted to see the whole Agency file and the Bryson Report. I was advised subsequently that Dr. Hann only wanted to see the Bryson Report. I interpreted the matter to be settled between the lawyers as it was communicated that it was agreed that Dr. Hann would have the Bryson Report. I am less clear whether or not the consents did or did not deal with the Agency file. I have no transcription and no memorandum of that fact, so it is left unclear. During the course of time it took to complete the Hann assessment, it was my understanding that Counsel had agreed to what materials he could examine in his re-assessment. However, during summations last week, counsel for R.M. indicated that he did not - and never did - consent to Dr. Hann reading the Bryson Report, and that he had remained opposed throughout.

[62] This confusion is odd, as 98% of matters are done by transcription or by memorandum, however, in this case, there is no record to chronicle the discussion. The Court accepts that Mr. Raniseth did not wish this material released to Dr. Hann. The purpose behind the second assessment was to give N.D. (and R.M.) a chance to obtain a second fresh opinion so perhaps there would be remedial measures or perhaps a better outcome of the assessment so that she would be able to continue to parent her three (3) children.

[63] In my view, Dr. Hann was viewed as a first time assessor. I have problems with the treatment with first time assessors. In any event, he was treated as a first time assessor and not a re-assessment. I have indicated that I have always had problems with reliance on the Children's Aid file for any assessment. It is my opinion that a protection affidavit, with serious allegations consented to in the protection finding, is very different from the whole Agency file, which is not evidence. The consent of a party to a protection finding based on a protection affidavit raises the evidentiary integrity of the protection affidavit. This is not the same status held by the entire Agency file. This is not to be seen as a condemnation of the Agency - that is not my intention. It is simply that the agency file is heresay material which was not subject to cross-examination. It contains matters that may have been resolved. It is a document that could cause erroneous impressions. The use of the agency file in this case has clearly resulted in unfounded assumptions which influenced the opinion evidence.

[64] Substantively, I have several problems with Dr. Hann's Report and with his *viva voce* evidence. However, I do not need to examine those issues in depth because of the conclusion I make in relation to the re-assessment. The dangers are apparent when an independent assessment is ordered. Ultimate fairness and balance are essential. The appearance of ultimate fairness is essential. The problems with Dr. Hann's report are: He does not state what his source documents are. He sprinkles sources throughout his Report but there are no listings of sources as Mr. Bryson and others have provided. I do not know what materials he reviewed, but I can gather from his evidence, he read the Bryson Report. He seemed to have read portions of the Children's Aid file and I believe he makes reference to medical evidence that he secured from the Agency file. This means a person on the medical staff told someone in the Agency something which Dr. Hann picked up and reproduced in his report.

> **STATING THE BASIS OF THE OPINION**
> **The general rule is that an expert may give an opinion on any issue he or she is qualified to give an opinion on. He or she must state the basis of that opinion so the trier of fact can evaluate the facts and the opinion based on those facts. Failure to identify the facts upon which an opinion is founded might result in an opinion being given little, if any, weight.**
>
> **Whether or not counsel has proven the assumptions on which an expert's opinion is based is an issue of fact to be decided by the trier of fact. The Alberta Court of Appeal has described the task as follows:**
>
> > **In the absence of any proof of the facts on which the expert opinion is based no weight will be given to it. Equally, if some proof of the hypothetical facts is offered by admissible evidence, then the question will be whether it is sufficient to meet the requirements for which it was called. Proof beyond reasonable doubt requires more than evidence intended to raise a reasonable doubt...In each case the trier of fact will consider to what extent the**

> **hypothetical question has been proven and whether in the circumstances it is sufficient.** [7]

[65] On page (3), Dr. Hann addresses the issue which was never discussed on record concerning the Court's view of what ought to be in a second opinion. He states as follows:

> **The current assessment represents the second parental capacity assessment of N.D. and R.M.. As part of the current assessment, the assessor reviewed a previously completed parental capacity assessment, which had been conducted in May 2002. Some concern was originally expressed by Justice MacLellan that the re-assessor <u>not</u> have access to the previous report and agency files. Justice MacLellan apparently expressed concern during court proceedings about the potential bias that may be created for the present assessor by reviewing the agency files and the past psychological report. It is the professional opinion of the present assessor that if the current assessment did not incorporate a thorough file review, including access to the previously completed parental capacity assessment, this would not constitute a best practice model of assessment. Psychological therapy and assessment is always potentially impacted by bias. A psychologist by nature of training and expertise continually self-monitors the potential impact of his or her bias in the assessment process. By being aware of potential issues, which could subtly or directly influence the assessment process, he or she minimizes the impact of such bias on his or her conclusions. Ignoring or not being granted access to previously conducted assessments or historical information is not an adequate solution to preventing bias. In fact, ignoring such information would represent a serious deficit in assessment practice and could potentially be considered professional misconduct. The solution to this dilemma is to conduct a thorough and multi-modal assessment, while continually monitoring the potential for assessor bias. During the current assessment, the assessor explained this rationale to both Mr. MacKinnon and Ms. Davidson. They both understood the rationale and agreed to the current assessment with the full understanding that the current assessor would conduct a comprehensive file review and review the previous assessment. The assessor also apprised the agency and agency lawyer of this and also made an attempt to discuss the matter with Justice MacLellan and counsel for the Respondents, but difficulties in coordinating a telephone consult prevented this discussion from occurring.**

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7 Chayko & Gulliver, Forensic Evidence in Canada, Canada Law Book, 1999, pg. 19.

> **It is the opinion of the examining psychologist that the present assessment results are valid and represent an accurate profile of parent and child functioning. Readers of this report are reminded that the recommendations contained herein are considered to be guidelines based upon assessment findings and clinical judgment at the time of assessment.**

[66] Sprinkled through Dr. Hann's Report is information from various collaterals, and he says on page (17) and (18)**:**

> **[1] Extensive documentation of CAS, reviewed as part of the current assessment, reveals that N.D. has been well known to the CAS of Cape Breton since March 15, 1996. A referral to CAS was made by concerned hospital staff that reported that N.D. had reported to the Cape Breton Regional Hospital at 23 weeks gestation and requested that labor be induced. Agency records reveal that N.D. was well known to hospital staff and prior to the birth of her daughter was constantly at the hospital complaining of abdominal pain. Agency records also reveal that N.D. acted in a very bizarre manner with hospital staff and that she reported that three teenage girls had threatened to take her baby.**
>
> **[2] K.D., N.D. s first child, who was fathered by R.M., was born [in 1996]. An intake by the CAS office occurred on March 19, 1996. Concerns included N.D.'s lack of resources to care for the child (e.g., no crib, limited money and chronic financial difficulties such as $1900.00 in rent arrears). N.D. and her baby, K.D. were followed by the agency until January 16, 1997. Agency records reveal that supervision was no longer deemed necessary. On June 2, 1997, N.D.'s baby died and cause of death was reported to be a staph infection, which was possibly contracted through poorly cleaned baby bottles.**

[67] In the second paragraph, there has been no evidence whatsoever before this Court to substantiate the allegations. There have been contra-indications as to why .K.D passed away, which had nothing to do with baby bottles, according to the autopsy conclusions

provided by way of *viva voce* evidence. We have that highly inflammatory statement now made by two (2) independent assessors who are monitoring their bias. It should be noted that an autopsy on this child was performed, and an investigation was performed by the police. It concluded there were no charges to be laid in relation to this child's passing. No reason for the child's death attributed to the parents was ever provided.

[68] This unsubstantiated cause of death in Mr. Bryson's Report and Dr. Hann's independent second Assessment is disconcerting to the Court. It would appear that the self-analysis that Dr. Hann discusses to remove his bias and his continued monitoring to remove the appearance of bias was not successful in the case of N.D. and R.M..

[69] In short, self-monitoring was not successful - at least it does not appear to be. It is essential that bias not be present and that bias not appear to be present. There are errors in Dr. Hann's report, while of lesser significant, make one wonder as to the caliber of the overall preparation, e.g. his comment that R.M. regularly visits his father, when R.M.'s father had passed on four (4) or five (5) years ago. That is the sort of error that makes one question the accuracy of the basic information intake.

[70] Referring again to Dr. Stahl's text on *Conducting Child Custody Evaluations, A Comprehensive Guide*, at page (149), he states the following:

Ethics, Bias and Professional Responsibility

> **Throughout this chapter and throughout this book, I have focused on the paramount issues of ethics and professional responsibility. It is clear that the evaluator's primary job is to maintain a high ethical standard in his work. If we do nothing else, by maintaining such a high standard for ethical responsibility we can educate the court and the attorneys about these critical issues. If we do *only* evaluations that are court ordered (or agreed on) and if we refuse to take cases where there is even a hint of inappropriate bias, it is harder for one of the attorneys or one of the parents to question our recommendations as unprofessional.**
>
> **For example, in my recent experience, a father continues to have a very hard time accepting the recommendations of an evaluator, in part because the mother s cousin is a psychologist who works on the same faculty as the evaluator. I do not even know if the evaluator knew this, but this was enough of a potential source of bias, at least in the father s eyes, to give him a reason to question the evaluator s recommendation that went more in the mother s favor. I will not take referrals from a close friend who is a family law attorney simply because of the potential for appearing to have a conflict of interest. Similarly, I recently knew of an evaluator who, at the end of the evaluation, 4-year-old children need mothers in that capacity. The evaluator had not informed the parents or attorneys of that potential gender bias at the start of the evaluation, and because it came out that way, the father had a hard time accepting the recommendations. In essence, it is critical for evaluators to pay attention to potential conflicts of interest and their inherent biases, know their source (research-based, theory-based, or value-based), and make them clear to the parties and attorneys before commencing with the evaluation if there is any doubt whatsoever.**[8]

[71] In conclusion, there are references to materials in the Hann Report that were never consented to by all of the lawyers, which is not Dr. Hann's difficulty, because it was my understanding that they all had consented (and my understanding was incorrect). However, Dr. Hann used material in his report that was never proven. He used this material as if it was accurate. Also it is not appropriate to refer to background material that was hearsay as necessary for historic background.

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8 Stahl, P.M., Conducting Child Custody Evaluations: A Comprehensive Guide, Sage Publications, Inc., 1994, at pgs. 149 & 150

[72] Dr. Hann's report ought to have cited his source documents. He did not. There should have been concerns as to the background material that he reviewed. It must be recognized that parents who are at risk of losing children often love the children, but they have problems - problems which result in the children being at risk. All evidence used to calculate this risk and remedial measures must be properly acquired and properly presented.

[73] It is my view that an opinion must be procedurally accurate and, as I have indicated, I find that Dr. Hann's Report in the areas cited, is not. Furthermore, Dr. Hann used portions of Mr. Bryson's I.Q. tests and did not repeat these tests. During *viva voce* evidence, he acknowledged that he placed some reliance on Mr. Bryson's report. This is not appropriate and it does not appear fair. The manner the Hann Report was prepared, and the *viva voce* evidence he gave, does not amount to properly obtained opinion evidence.

[74] Also, Dr. Hann referred to himself as a friend of the Court, however, throughout most of his examination, he tended to debate as opposed to clinically answer all questions regardless of who was asking the questions.

[75] As indicated again in the text, *Conducting Child Custody Evaluations, a Comprehensive Guide*, Dr. Stahl outlines the assessors job at page (147) as follows:

> **Our job during both direct and cross-examination is quite simple. It is to:**
>
> .1 Remain neutral, impartial, and fair to both parents;
> .2 Avoid adding to the splitting and polarization in the courtroom;
> .3 Answer all questions honestly, clearly, and succinctly;
> .4 Avoid over-explaining or getting too technical;
> .5 Avoid arguing with anyone;
> .6 Maintain our position; and,
> .7 .Be clear with the court if we do not know something or cannot be certain about an event.[9]

[76] I find that Dr. Hann did not follow the recommended behavior for the opinion witness.

[77] For all of the reasons I have given, I place no weight on Dr. Hann's report.

PAUL MOORE

[78] Paul Moore, again gave evidence on January 10, 2003 and he was still the main Children's Aid Worker on the file.

[79] The Agency staff wished permanent care for the three (3) younger children and for S.M. to remain with the L.s. Mr. Moore believes that the L.s have taken all possible steps to improve their situation for S.M.'s benefit and to learn how to deal with her very challenging behaviors so that she can improve; and, S.M. has improved.

[80] The reasons the Agency is seeking permanent care is outlined in the Plan of Care at paragraph (7).

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9 Stahl, P.M., Conducting Child Custody Evaluations: A Comprehensive Guide, Sage Publications, Inc., 1994, at pgs. 147 & 148

7. Where the agency proposes that the child be placed in the permanent care and custody of the agency:

(a) Why the circumstances justify the proposal are unlikely to change within a reasonable foreseeable time not exceeding the maximum time limits:

The Agency became involved with this family as a result of concerns with issues of lack of supervision, lack of adequate food supplies, potential hazards in the home, home cleanliness, no diapers and the unwillingness or inability of the parents to provide for the children.

[81] The Agency then goes on to discuss the Bryson Report (portion not cited). On page (3), paragraph (3) of the Plan, the Agency indicates:

The Agency has provided the services of a family support worker to address issues of parenting, budgeting and discipline. To that end, the Respondents have repeatedly expressed their belief that they are not in need of such services. They continue to experience the same difficulties that they had at the beginning of this Agency s involvement.

The children, A.D., O.D., D.D., are at ages where the coming months and years are becoming more crucial. For A.D. especially, this is a key period for child development and the permanency of a stable, nurturing home would assist in this stage of child development. The longer the time period before a permanent placement is implemented increases the risk of permanent detachment. It is the Applicant's hope to minimize the risks of permanent detachment with adoption to occur at the earliest possible time.

[82] Mr. Moore describes S.M.'s past behavior where she would bite, kick, hit and not get along with other children. All the children, except A.D., have manifested behavioural

problems and all improved in their current placements. Mr. Moore believes the L.s wish to have A.D. eventually, however, Paul Moore is not supportive of this proposal, although he is very supportive of the L.s in general. Paul Moore is not supportive of A.D. being placed with the L.s because S.M.'s behavior is so challenging that he fears that adding a new baby to this household would jeopardize S.M.'s placement and ultimately have a negative placement effect on both children.

[83] Mr. Moore stated, based on the Children's Aid experience with R.M., and the Assessments, that he believes R.M. cannot parent effectively. He stated all the telephone calls that R.M. made to Children's Aid were never on a timely basis. The reports were made well after the fact. R.M. would reconcile with N.D. and move S.M. back into that setting. This was the cycle of R.M.'s relationship with N.D.; and S.M. was often caught in the middle. Even with supervised access, Mr. Moore has advised that R.M. is not sufficiently attentive to the children's safety.

[84] The Applicant does not support N.D.'s position due to:

(1) Their long involvement with her over parenting issues, without success;

(2) Her refusal to accept services;

(3) That she has discussed with them being overwhelmed with the care of four (4) children;

(4) Her refusal to follow through on the mental health recommendation;

(5) The long-time pattern of the children poorly clothed, poorly fed and poorly supervised;

Her lengthy placement with Family Skills and Parent Aid, which was not successful;

(6) His belief that the children are emotionally neglected;

(7) That during access with the children, N.D. has to be told something as basic as removing a toy from A.D.'s mouth;

(8) That all of the children have improved in the foster care and it is now time to respect their sense of time and find stable homes for them - their need to form a lasting attachment with someone who can meet their fundamental needs.

[85] Paul Moore attributes S.M.'s improvement, while with the L.s, to their commitment to her and the L.s' commitment to work with the Children's Aid Society. The L.s have shown a commitment to work with the teachers in the use of different reward methods that are age-appropriate for curbing unbecoming behaviors of a five (5) year old. S.M. is seeing a pediatrician who has referred her to a child psychologist.

[86] Mr. Moore admitted that R.M. had legal custody of S.M. and that the Agency did not have any problems with R.M. until receipt of the Bryson Report. Although the Agency had problems with the timing of his complaints against N.D. and access supervision, Mr. Moore indicated that they felt that R.M. had a positive input in the raising of S.M. and maintaining the household in the earlier years prior to the Bryson assessment.

M.L.

[87] M.L. gave evidence on January 24, 2003. It is her wish and she believes it is her husband's wish to have custody of S.M.. They received standing in December, 2002 and

filed a custody application in February. They wish to adopt A.D. when they are ready, which would dependent on S.M.'s behavior. They wish custody of also take A.D. if it is proven he is R.M.'s child. This issue was debated for days, but the Court was not given any conclusive proof as to whether or not A.D. is the son of R.M.. There was discussion of some DNA or blood samples, which were never tendered to the Court. R.M. believes that he is the father and it seems the Agency staff may believe that as well. At the end of the hearing, I have no definitive answer as to who is the father of A.D..

[88] At the time of giving evidence last month, M.L. was fifty-seven (57) and her husband was sixty-two (62). M.L. co-operated with the Children's Aid Society, the school and with anyone who has input to assist S.M.. S.M. is close to M.L. and R.M., but M.L. holds herself out to be the principle caregiver.

[89] Mr. L. is a diabetic. M.L. first indicated Mr. L. only suffered from a heart condition, but under cross-examination indicated, "Yes, he is also a diabetic". His wife believes that he and she will be able to parent S.M., who has been with them approximately half of her life.

[90] M.L. indicates that R.M. works now and gives her money to help out with S.M., follows her directions with S.M. and helps around the house. She indicated that if she has custody of A.D. she would treat him like S.M.. She cannot remember asking for access to A.D. since December 1st, 2001, when he was taken into care.

[91] Historically, she indicated that she has seen N.D. and R.M.'s home in shambles - unsanitary, dishes on the floor, and hazards on the floor when the children were present. She indicates that she heard a "slap" while on the phone and a child cry and made a complaint to Children's Aid immediately.

[92] R.M. was with N.D. in the Fall before the apprehension and moved out approximately two (2) weeks before the children were taken. It is interesting to note that M.L. does not attribute much blame for the shape of the house or the unsanitary conditions of the children to R.M. but reflects most of the blame, if not all of it, on N.D..

[93] It is apparent M.L. and N.D. do not enjoy a good relationship. They both agree on that and they both agree it is the result of K.D.'s passing.

[94] M.L. does not want R.M. to have sole custody as she is afraid that he may reconcile with N.D. as he has in the past. M.L. indicates that R.M. has a past of putting himself first. She indicated that R.M. has changed lately. He is taking better care of himself, he is working, he is giving her money, and she hopes that he will mature. When asked if she believes he will mature, she indicated that she did not believe that he would. She viewed her experience with this couple as "R.M. and N.D. put themselves first, ahead of the children".

[95] She did not agree on cross-examination that R.M. was a good example of how she and her husband parent. R.M., as a teenager, would not listen, hung out with the wrong crowd and ended up in the Springhill Penitentiary. She acknowledges that he has approximately five (5) children from five (5) different women - only one of whom he supports financially. She has had to correct R.M.'s disciplinary practices in the past when he disciplined S.M. by having her raise and hold her hands in the air and hold them there.

[96] She and her husband will care for S.M., who will want for little. They will give her love, security, and financial security. S.M. also has friends in her neighbourhood and she is doing reasonably well in school, considering her past behaviors. S.M.'s behavior overall is improving. M.L. described the reward system, which appears to be labour intensive for a parent. It requires constant monitoring, but appears to be working according to Mr. Moore and M.L..

[97] M.L. will facilitate access with S.M. and N.D. through her mother (P.). P. and N.D. get along well. P. is seventy-six (76) years old and in good health. M.L. indicated that she never enjoyed a good relationship with N.D. but N.D. has a reasonably sound relationship with Mr. L..

[98] M.L. impressed the Court as a credible witness, whose parenting commitment was already noted by S.M.'s improved performance. It is clear that M.L. loves S.M. and will

take the necessary steps to ensure that she reaches her full potential. It is so, even though all witnesses agree that S.M. is a challenging five (5) year old.

[99] Her plan for A.D. is vague. M.L. indicates by her own evidence that she does not have a bond with the child. The fact she and her husband never sought access to A.D. since December 2001 clearly illustrates there is no effort by the L.s to establish a bond with A.D..

R.M.

[100] R.M. gave evidence on January 24, 2003 and advised that he and N.D. had an on-and- off-again relationship for approximately five (5) years. He believes he is the father of three (3) of the children - K.D. (who is deceased), S.M. and A.D.. He has had legal custody of S.M. almost from birth. He has had approximately eleven (11) residences since S.M. was born, between 1997 and the date of apprehension, December 2001. He has had approximately six (6) children from five (5) women. He financially supports S.M. in the amount of five hundred and fifty dollars ($550.00) per month and has summer visits with another one of his children. Two (2) of his other children were adopted and therefore he was not able to interact with them.

[101] S.M., as I have indicated, had been with the L.s for the first eleven (11) months of her life, then with her father at various residents on and off and then back with the L.s since approximately July, 2001. R.M. indicates that he has called Children's Aid

approximately five (5) times in the last two (2) years - twice looking for provisions and three (3) times to complain about N.D.'s care. One time he called because he heard one of N.D.'s daughters being slapped and he believed that N.D. slapped the child. At the time of trial, he no longer had the same belief. He indicated he did not see the assault but rather heard the noise and heard a baby cry. He advised that he never used threats of involving Children's Aid to keep N.D. in a relationship with him.

[102] R.M. indicated that he learned a great deal from his Family Skills counseling, except he did not follow through on all of the advice given when he found it not to be realistic or necessary. He indicated, as an example, when Annette Murphy told him he should always be in the room with S.M. when she was two (2) years of age, he did not follow that recommendation as he felt that it was not realistic. He believes that he had approximately fifteen (15) sessions with the Family Skills Worker over the years.

[103] He does want to parent A.D. and S.M. and believes he has the ability. He would like to parent all four (4) children but he knows it is not realistic. He is working full-time and he knows that his mother will help out babysitting the children while he is at work. R.M. has had DNA testing performed, indicating that it is 99% certain that he is the father of A.D.. He recalls he did have sexual relations with N.D. around the possible time of conception. No documentation was provided regarding parternity.

[104] R.M. admits he is not as active with S.M. as the L.s are, but believes he can parent S.M. better than his parents. He believes he cannot parent better than N.D.. He did call, he admitted, to complain about N.D.'s long hours at work when they were cohabiting. Some of the calls, he indicated on cross-examination, were about neglect, but not about safety. He described the calls were due to, "a reasonable amount of neglect".

[105] R.M. broke down his financial situation to advise how he can take care of two (2) children. It would appear that the idea of budgeting was a new experience for him. It is the Court's opinion that his budget is not well thought out.

[106] On cross-examination R.M. cannot recall a complaint that he allegedly made to Scott Clarke of Children's Aid regarding the baby sleeping in a crib in the closet or N.D. putting Tylenol in the baby's bottle. He did indicate that "yes", one of the baby's did have a crib in the closet and N.D. only put Tylenol in the bottle because the baby would not take the medication any other way. He indicated that he did not often think about emotional abuse the children may have suffered. If they did suffer, both he and N.D. were the cause.

J.R.

[107] J.R. was called as a witness. He is a friend of both the Respondents. He is in a long-term relationship and has a steady job. He had completed high school with R.M.

and knew N.D. for years. He is D.D.'s Godfather, and has been since June, 2001, which was six (6) months prior to apprehension. He was at N.D.'s home visiting, but more often after he became D.D.'s Godfather. He believes that the children are happy and that the parents are attentive to their needs. He does not have any children of his own, but he has indicated that he has certainly seen children who were less well cared for than N.D.'s children.

[108] He describes N.D. as patient with all of the children, but indicates that S.M. is a challenge. He found the house always to be adequate. He recalled that the parties separated often, but seemed to get along when he was present. He saw them often because he is their friend and their taxi driver. He knows very little of the Children's Aid involvement with the family.

N.D.

[109] The Court next heard from N.D. on February 3, 2003. She is clear in her wishes that she wants all the children returned to her. She has problems with access at the Children's Aid office as it is artificial and she finds her access visits awkward with people looking at her through the one glass mirror. Also, she wishes there was a television or radio available in the visitation rooms.

[110] She was concerned about the children's health and care. There were three (3) incidents chronicled when she believed the foster parents were slow in seeking medical intervention; particularly, when one of the girls bit her tongue.

[111] N.D. indicated she had tried to get help for K.D. (her deceased daughter), however both the hospital staff and with her doctor, only gave her lotions and not the medication the child needed. She and the children remain patients of the same doctor, up-to-date of apprehension.

[112] N.D. indicated that when the hospital wanted her to leave O.D. in the hospital for a CatScan after O.D. fell, she did not, due to her doctor's recommendation to take the child home, which she did. She had the CatScan performed later, which was negative.

[113] N.D. has indicated that her house was always clean, as she cleaned it regularly. Her home was never in shambles as described by M.L. and the Children's Aid workers.

[114] She indicated that she had the children with a sitter when the Children's Aid apprehended. The sitter did not answer the door because the Children's Aid were knocking at the wrong door. She denies that the two (2) year old, O.D., was left unsupervised watching the workers through the door for approximately thirty (30) minutes.

[115] N.D. explained that at the time of apprehension, December 30, 2001, the children were not clothed because the sitter was getting them ready for their bath and that children with diaper rash healed better if their bottoms were left exposed for periods of time.

[116] N.D. agreed the children have had head lice, which she feels was quite common. She tried to treat it, but other grown-ups in the house also had head lice and did not follow the treatments. Therefore, N.D. had problems keeping the head lice under control in relation to her children.

[117] N.D. indicated that she did move to a number of apartments, but she was never evicted. On cross-examination she indicated she may had been evicted once because her cheque was late. There may have been two (2) other occasions when she was the subject matter of an eviction but these evictions were against R.M. because he had not paid his rent and she happened to be cohabitating with him at that time. She indicated that she has returned to R.M. on numerous occasions because of his need for financial support to keep his car going and his insurance paid.

[118] At the time of trial, N.D. indicated that she quit her job at a local restaurant in [..] as she was told to quit or be fired. She said that she was having difficulty with people at work, who were customers. She believed these people were getting even at her because they were not able to get even with her brother. She believes that some people believe she is a bad person because of the death of her daughter, K.D..

[119] At the time of trial, she didn't have an apartment and was living with a friend. She had no income, but she has a number of job prospects she is examining. Her first plan was to obtain a home through Regional Housing, which she believes can happen quite quickly. Until that time, her friend in [...] has a house and will allow N.D. to take the children there until she has suitable accommodations.

[120] N.D. has no concerns if R.M. has custody of S.M.. Before, she had concerns because he had too many girlfriends and they all became known to S.M. as "mommy". She maintains that she has many boyfriends but describes most of her relationships as on again, off again – she indicated on examination from Mr. Campbell:

Q. Do you in fact know who the father of A.D. is?
.A Yes I do.
R. It's not R.M.?
.A No it's not.
S. Does that person appear anywhere on an official document? Did you list that person's name as the father?
.A I don't know if it was officially written down but I have told Children's Aid Workers who the father was.
T. When did you do that?
.A On several occasions actually.
U. After apprehension or before apprehension?
.A Both. When J. would come over she would look at A.D. and say, "Is he ever cute" and this and that and the other thing and we got into the conversation of who the...as bad as this is going to sound there is more than one father of my children. There's not much I can do about it.

[121] She is quite certain that R.M. is not the biological father of A.D.. She puts that certainty at 98%. But, there is a small, but remote, chance that he may have been intimate with her without her knowledge, after she had had consumed a couple of beer, however, she does not think this is likely.

[122] N.D. believes that M.L. is not really close to S.M.; however she believes, S.M. is close to Mr. L.. N.D. has no problem with Mr. L.. She believes the L.s will take care of S.M.'s necessities, but not her emotional needs. If she receives custody of S.M., she will take S.M. off all prescribed medications and cancel her current behavioural modification program. N.D. is skeptical of the improvements that S.M. has made so far, believing there is a possibility that S.M. may regress.

[123] N.D. believes that she and M.L. did not get along because M.L. felt guilty for not spending time with D.D. when she did spend time with S.M.. She also believes M.L. harbors ill feelings towards her due to K.D.'s death.

[124] She attributes her many changes of address - at least eight (8) since 1997 - to R.M. or to her landlord. She gave conflicting evidence whether or not she believed these multiple moves were not healthy for her children.

[125] N.D. indicated that she called Children's Aid several times over the years to provide food, formula and diapers. She also relied on family and friends from time to time to assist her in acquiring basic provisions. She admitted under cross-examination that she, on at least two (2) occasions, worked for cash under the table - which is cash without deductions - while accepting Family Benefits. She has had approximately six (6) jobs since S.M. was born in 1997.

[126] She believes that she is not resistant to change. She has completed two (2) six-week courses on Stress Anger Management and "How to Talk to Children". She told Children's Aid she would take whatever courses they want, "read a book", or do whatever they want. All Children's Aid did to help her was to give her two (2) courses on budgeting. She did have a Parent Aid come to the house, she recalled, but it did not work out as well, as the Aid arrived when she and the baby were resting. She advised the Family Skills worker saw her only a few times. However, N.D. agreed on cross-

examination that it was possible that the Family Skills worker made up to twenty-two (22) separate visits to her home.

[127] She indicated R.M. did report her to the Children's Aid, but this was only to get back at her and had nothing to do with her care of the children. She indicated R.M. used the threats of Children's Aid to keep her in a relationship. She remained with him after the time of apprehension. They started a business together because she believed if she did R.M. would tell Children's Aid the truth and her children would be returned to her.

[128] N.D. wants her children returned as she believes she can care for them. She believes she has never done anything to disentitle her from caring for her children. She believes that the Children's Aid are biased and are "nit-picking" because of complaints made about her. She believes that R.M. and C.B. caused her to lose her children due to their calls to Children's Aid about her slapping one of the girls. Although she did agree that her children were in need of protective services at the Protection finding, she could not explain at permanent care hearing why she agreed to the protection finding, except that she felt that she had no choice.

[129] She was unable to explain why R.M., C.B. and M.L. would all call the Children's Aid on the same day to complain that they saw or heard one of the children being slapped by N.D..

[130] Dr. Myatt, her physician, wrote the two (2) letters referred to in the Protection Affidavit. She indicated that Dr. Myatt wrote for the purpose of helping her get oil, and that he has retracted the negative portions. No evidence was provided to support her claim.

[131] She indicated that if she does not have the children returned to her, she wants all four children to remain in foster care. She does not want S.M. to stay with the L.s. She would prefer S.M. be placed in foster care. She believes that if S.M. is moved, she would be disrupted for awhile, but in her own words, “after awhile it would go unnoticed”.

[132] N.D. cannot explain why so many people have complained about her in the past - nurses at the hospital, her treating physician, Department of Community Services, R.M., C.B., the police and M.L.. N.D. has indicated she only joked about calling her son “L.”, and she was not talking to the nurses at that time. This is one of the examples that she uses for being taken out of context by service providers.

[133] She agreed the October, 2001 protection application for supervision was more serious than any of her previous Children’s Aid involvements. When asked what she did to improve her situation with the children prior to apprehension in December,2001, indicated that she tried to listen and to be patient with Children’s Aid. She appeared to agree she should not have left a broken window in her apartment when the children were

around, but she denies that her two (2) year old daughter was anywhere near the window unattended as the Children's Aid workers alleged.

[134] N.D. agrees that she had been advised to obtain counseling but would rather talk to her friends who can better relate to her problems. N.D. complained the L.s had frustrated her weekly access to S.M. in November, December and January; however, on cross-examination agreed that she cancelled some of these visits due to work or Court. She maintained the L.s at least failed to provide access for two (2) visits in a row. She did not accept the Agency records that there was only one (1) such default, nor did she accept M.L.'s evidence that the L.s had never intentionally frustrated access.

[135] She concludes that she has no deficits as a parent. Her only deficit is that she does not have her children with her.

DECISION

[136] The Agency applied for permanent care of the three (3) younger children and for custody of S.M. to be granted to the L.s. Counsel agree that the outer time for completion of this case runs from the date of this decision, February 20, 2003. Where adjournments were made to allow assessments to be prepared, all parties agreed it was in the best interests of the children, and the best interests of the parties, that the extensions were granted. Adopting this premise the maximum time period for improvement, and to assess change in the foreseeable future expires on February 20, 2004.

[137] The L.s filed an application for custody for S.M. on February 12, 2003. All parties expected the application to be made as the standing application was granted previously in December, 2002. The Agency supports this placement if Children's Aid will continue to supervise S.M.. R.M. is to have limited involvement with S.M.. A.D. is not to be placed with the L.s as this would be too demanding for the L.s and S.M. and could jeopardize S.M.'s placement.

[138] The Court finds, based on the review of all of the evidence, both N.D. and R.M. have very serious parenting deficits. I acknowledge R.M. was not part of the Section 40 Protection finding but subsequent reliable evidence shows he has serious parenting deficits.

[139] Without the assessments, the evidence is clear that all four (4) children would be at risk of harm under both Section 22(2)(b) and 22(2)(g) if returned to either parent as primary caregiver.

[140] Both parents have caused or allowed the children to experience the following:

(1) have head lice for protracted times;
(2) endure bad diaper rash;
(3) be without diapers, milk and food, frequently;
(4) miss medical appointments, to the nature that even the doctor made a report to Children's Aid;
(5) move eight (8) to eleven (11) times over four (4) years;
(6) live in houses with mice, insufficient heat, broken windows and dangerous items on the floor;
(7) witness the parents with multiple partners; one boyfriend physically abused N.D. in front of the child D.D.;
(8) their home kept in an unhygienic state with dishes on the floor, while the children were present;
(9) children in the home not dressed appropriately for time of year;
(10) children were left without appropriate supervision; inappropriate supervision of the children continued even in a supervised access setting; efforts to remedy this problem were not successful.

[141] Neither parent learned from the numerous sessions of Family Skills Worker or Parent Aid. They were unwilling to accept a direction unless it was to their liking. Neither parent accepted they have serious parenting deficits and that these deficits pose a danger to the child. Neither parent acknowledged that they have any room to improve essential parenting skills.

[142] Evidence from every source, excluding the assessments, and including N.D.'s own evidence, shows that she has a bad temper and reacts badly to life's stresses. Throughout the hearing she gestured frequently in court, interrupted the hearing on occasion and left the courtroom when testimony was negative.

[143] A certain amount of upset is understandable in permanent care cases and in Family Court generally, but N.D. presented to the Court to be in a constant state of agitation. The Court acknowledges Judges are cautioned against placing too much emphasis on courtroom decorum,

however, I have observed N.D.'s deportment throughout the hearing; in particular the constancy of her agitation.

[144] R.M. could have protected the children. He could have worked to at least provide the necessities for them. His calls to complain about Children's Aid were often not timely. He has many children that he does not support. What is more alarming is he does not seem to have a problem with the failure to support. He has modified or forgotten many of his complaints again N.D.. He exhibits no difficulty with discrepancies in his own evidence. Any child rearing complaints are due to N.D. or causes he cannot remember. At the same time, he believes that N.D. has no child-rearing problems at the present time due to of the two (2) six-week programs she completed.

[145] The Applicant seeks to have the three (3) youngest children placed in permanent care without access to the parents. To agree with the Applicant's position, I must find all less intrusive avenues have been tried and failed or would not likely be changed within the foreseeable future, which is a year from today's date.

[146] The remedial measures for both parents have been numerous - money, transportation, budgeting, Family Skills Worker, Parent Aid, Counseling Referral Assistance, recommendation to mental health, coordinated care for S.M. to help her with her behavior, addressing concerns in the foster home and investigating various complaints. After approximately seven (7) years of involvement, four and one-half (4 ½) years of informal involvement, two and one-half (2 ½) years of court involvement, despite the consensual protection finding by N.D., both parents

believe they have no problem areas to correct. One cannot correct serious parenting problems which put children at risk- if the parents cannot see that they have the need to correct these problems. Even up to the last day of evidence, N.D. believes that she has no deficits and R.M. supports her in this belief.

[147] I find the onus under Section 42(2) of the *Children and Family Services Act* has been met in this case.

> **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,

1.(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.

[148] Based on the evidence at the Protection Hearing, the protection finding and the evidence at the Disposition Hearing as already set forward in this decision, I find neither parent can, or wishes to, change in the foreseeable future. Less intrusive avenues have been tried and failed.

[149] While I have effectively disregarded both assessments, the Respondents were not willing to accept any input from any professional. There is nothing to be gained, nor is it in the children's best interests to order yet another Assessment or any further remedial measures. Therefore I find there is no likelihood of change in either parent in the foreseeable future as specified in Section 42(4) of the *Children and Family Services Act.*

[150] The assessments were to provide an aid for new avenues to help the Respondents parent. The Respondents were not impressed with either assessment, which were negative to their cause. However, the Respondents have repeatedly refused to listen to any professional on how they could improve. The Respondents, by their own evidence, proved clearly the children would be at great risk if returned to them. It is not in the best interests of the children to be returned to the Respondents' care, either together or separately.

[151] The case has been made out against the Respondents on evidence excluding the opinion evidence. The Applicants plans could have been presented without opinion evidence. In this case, opinion evidence could be classified as "nice to have" and that is not the onus. I refer the Court to the decision of ***R. v D.(D.)***, decision of Major J. and the citation is ***2000 S.C.J. No. 44 at page 48***, where Justice Major said:

> **The second requirement of the *Mohan* analysis exists to ensure that the dangers associated with expert evidence are not lightly tolerated. Mere relevance or helpfulness is not enough. The evidence must also be necessary.**
>
> **I agree with the Chief Justice that some degree of deference is owed to the trial judge's discretionary determination of whether the *Mohan* requirements have been met on the facts of a particular case, but that discretion cannot be used erroneously to dilute the requirement of necessity. Mohan expressly states that mere helpfulness is too low a standard to warrant accepting the dangers inherent in the admission of expert evidence. A *fortiori,* a finding that some aspects of the evidence might reasonably have assisted the jury is not enough.**[10]

[152] Justice Major goes on to quote Professor Paciocco, when he said:

> **As the *Mohan* Court explained, the four-part test serves as recognition of the time and expense that is needed to cope with expert evidence. It exists in appreciation of the distracting and time-consuming thing that expert testimony can become. It reflects the realization that simple humility and a desire to do what is right can tempt triers of fact to defer to what the expert says. It even addresses the fact that with expert testimony, lawyers may be hard-pressed to perform effectively their function of probing and testing and challenging evidence because its subject matter will often pull them beyond their competence, let alone their expertise. This leaves the trier of fact without sufficient information to assess its reliability adequately, increasing the risk that the expert opinion will simply be attorned to. When should we place the legal system and the truth at such risk by allowing expert evidence? Only when lay persons are**

10 Doherty, M.P., The Portable Guide to Evidence, Thomson Canada Limited, 2001, at pg. 53

> **apt to come to a wrong conclusion without expert assistance, or where access to important information will be lost unless we borrow from the learning of experts. As *Mohan* tells us, it is not enough that the expert evidence be helpful before we will prepared to run these risks. That sets too low a standard. It must be necessary.**[11]

[153] In this particular case, I ordered the assessments as a possible road map to examine some personality deficits which would provide remedial measures for the purposes of reuniting this family. At the end of the day, I am not putting any weight, or very little weight, on the Bryson Report and none on the Hann Report for reasons already given. In the final analysis, and hindsight is a wonderful thing, the expert opinion in this particular case with this history, was not necessary - at least not necessary to decide if future remedial measures may work.

[154] I find there is no extended family capable of caring for these children as meant by Section 42(3) of the *Children and Family Services Act*, with the exception of S.M.. Section 42(3) of the ***Act*** states as follows:

> **Where a court determines that it is necessary to remove the child from the care of a parent or guardian, the court shall, before making an order for temporary or permanent care and custody pursuant to clause (d), (e) or (f) of subsection (1), consider whether it is possible to place the child with a relative, neighbour or other member of the child's community or extended family pursuant to clause (c) of subsection (1), with the consent of the relative or other person.**

[155] I endorse the decision of Justice Cromwell where he quotes Judge Levy, in the case of ***Nova Scotia (Minister of Community Services)*** **v.** ***C(B).T. and F.Y. (2002), 207 N.S.R. (2d) 109,*** at page 7, ***T.B. v. Children's Aid Society of Halifax*** that the evidence

11 Doherty, M.P., The Portable Guide to Evidence, Thomson Canada Limited, 2001, at pg. 54

of the extended family must involve a family that has the extra dedication to make the long-term commitment; that they have to be good and caring people and be willing to assert the responsibility of adding another child to their home.

> **The evidence is clear, however, that the extra dedication that is needed to their own children is a long-term commitment, conceivably until they leave home. These are good and caring people and parents, but it appears a third child would be taking on more than they could handle.**

[156] I find that with the exception of S.M., there is no other extended family member that has been put forward as an appropriate placement for the three (3) younger children.

[157] In my review of Sections 22 and 3 (2) of the *Children and Family Services Act*, and the best interests of these children. I find it is to be in S.M.'s best interest to be placed in the supervised care of M.L.. I did not hear from Mr. L.. If the L.s wish to pursue their custody application for S.M., it may be prudent to have an actual medical opinion of Mr. L.'s health, as is usually provided in these cases, and to hear evidence from Mr. L. as to his view of his role in S.M.'s life.

[158] R.M. is to find his own quarters apart from his parents. R.M.'s vision on parenting, his credibility, and his responsibility to his family are so diverse from that of his mother that he cannot serve as a long-term positive force living in that household. He can have visits with S.M., unsupervised, and these are to be four (4) times a week, over the next four (4) months and then two (2) times a week after that for a two-hour period. He is to always advise M.L. where he is taking S.M.. He will be courteous and prompt, failing which, access may be curtailed or terminated if it is not in S.M.'s best interests. I

acknowledge that S.M. will obtain professional help shortly. Therefore, if it is in her best interests to increase her access with her father, I leave that in the discretion of the caregivers and the Children's Aid Society, after proper consultation with S.M.'s counsellors.

[159] S.M.'s access to her father is to be carefully monitored. If access becomes a positive feature, it is to be expanded. If it becomes a negative feature, it is to be terminated.

[160] I find that N.D.'s access record with S.M. has not been consistent. However, she seems to have exercised her access consistently with the other three (3) children. It is my finding, as I have indicated already, that these children have experienced a chronic environment of absence of necessity; multiple moves; one child has seen physical violence; medical needs have not been met; basic hygiene had not been met; supervision and safety concerns have not been met. The provisions of the *Children and Family Services Act* are preventative in nature. We have four (4) children who have been overwhelmingly neglected by one or both parents. It is in their best interests, that the three (3) youngest children will be placed in permanent care for the purposes of adoption, and there is to be no access to either parent. I find that access is not in their best interest. The adoption option is the best hope for their right to a secure home; their right to have an attachment; their right to have their basic needs met; and their right to be safe.

[161] They have a limited opportunity to bond with other people and to have another family - to be happy, stable and content. I find that their needs can be met if placed for adoption, with appropriate families.

[162] Access to the mother and father shall be weaned from the three (3) younger children. If either party does not comply with proper access provisions, access will be terminated. All three (3) children shall be placed for adoption forthwith. N.D shall have supervised access to S.M., as supervised by Mr. L.. If this access is not exercised, it shall be terminated. Access shall take place twice a month for two (2) hours at a time convenient for N.D. and Mr. L..

[163] I have heard very little, unfortunately, of S.M. and her bond with her siblings. Unfortunately, I do not have authority to have input as to the terms of adoption. It may well be that all four (4) children would benefit from knowing each other. Hopefully, D.D. and O.D. will be adopted by the same family. I am advised they have a solid bond. Ideally, it would be better if all three (3) children be adopted by one family, but that is a tall order, especially with the needs D.D. and O.D. have.

[164] This Court now has spent two and one-half (2 ½) years with these children's problems; it is my view they may benefit from a form of an open adoption arrangement. This possibility is prohibited by the current Nova Scotia Adoption Legislation. Therefore, access between all four (4) children will continue at least until it becomes

impossible due to the current adoption law in Nova Scotia. When adoptions are pending, an appropriate weaning-off process is to take place before access between these four (4) children is terminated.

_____

M. Clare MacLellan
Justice of the Supreme Court of Nova Scotia
(Family Division)