Please take note that s.94(1) of the ***Children and Family Services Act*** applies:

Section 94(1) provides:

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

S.F.H. No. C013751

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

BETWEEN:

CHILDREN'S AID SOCIETY OF HALIFAX

- APPLICANT

- and -

A.M. AND J. A.

- RESPONDENTS

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on September15, 2008.

DECISION

[Citation: CAS v. M. and A., 2003 NSSF 025]

HEARD: **at Halifax, Nova Scotia, before The Honourable Justice Deborah K. Smith March 18, 19, 20, 2003**

FINAL SUBMISSIONS: **Received from the Applicant: March 28, 2003; Received from the Respondent, A.M., April 22, 2003.**

DECISION: **June 25, 2003**

COUNSEL: **Peter C. McVey, Esq., counsel for the Applicant**
Lee Mitchell, Esq., counsel for the Respondent, A.M.

This case involves an application by the Children's Aid Society of Halifax (hereinafter referred to as "CAS") for permanent care and custody of J.E.A. who was born [in 2001]. The Respondents are 19 year old A.M. and 21 year old J.A.. A.M. and J.A. are the biological parents of J.E.A..

BACKGROUND TO THESE PROCEEDINGS

A.M. and J.A. met in A.M. of 1999, when both were living in [...], British Columbia. A.M. had just turned 15 years old and was a grade 9 student living with her parents, S.M. and R.M.. J.A., who was then 18 years of age, was residing with L.A. who is his adoptive mother and also his grandmother.

In January of 2001, A.M. became pregnant with the child that is the subject of this proceeding. According to A.M.'s testimony, she and J.A. had frequent arguments when she was pregnant. There is a suggestion in the evidence that in May of 2001, while living in British Columbia, J.A. may have set fire to A.M.'s parents' home. Despite this and the difficulties in the Respondents' relationship, in July of 2001, A.M. moved with J.A. to [...], Nova Scotia. By this time, L.A. was living in [...] and both of the

Respondents took up residence with her. A.M. was then 17 years old and J.A. was 19. By A.M.'s own admission, both of the Respondents were young and very immature at the time.

A.M. testified that once the Respondents moved to [...] their arguments became more frequent. In August of 2001, one of the Respondents' arguments resulted in J.A. physically assaulting A.M. (at this time A.M. was approximately 7 months pregnant). As a result, on August 6, 2001, A.M. sought shelter at Bryony House which is a transition house located in Halifax. A.M. suggested in her evidence that J.A. "never really abused [her]" until she and J.A. came to Nova Scotia although the records prepared by Bryony House staff call this evidence into question.

A.M. remained at Bryony House until August 30, 2001. Around this time, A.M.'s mother sent A.M. a plane ticket to return to British Columbia. The night that A.M. was scheduled to leave, J.A. and L.A. arrived at Bryony House. J.A. apparently convinced A.M. to stay in Nova Scotia (rather than fly home to B.C.) and A.M. returned to L.A.'s home. Shortly

thereafter, the Respondents found their own apartment with financial assistance from L.A. and S.M..

On August 31, 2001, a staff member at Bryony House contacted CAS expressing concerns about the then pregnant A.M. and her partner, J.A.. On September 21, 2001 an Agency Intake Worker met with A.M. and L.A.. According to the worker's notes, she discussed the Agency's concerns about possible violence between J.A. and A.M. as well as a suggestion that A.M. had, on occasion, attempted to injure herself when upset. The decision was made (apparently with A.M.'s agreement) that a long term social worker would be assigned to the family to coordinate appropriate interventive services.

[In 2001] J.E.A. was born. According to A.M.'s testimony, the Respondents continued to argue up until the time of J.E.A.'s birth as well as thereafter.

In the two months following his birth, J.E.A. was left for lengthy periods of time with his great grandmother, L.A.. A.M. acknowledged at

trial that for the first two months after J.E.A. was born, L.A. provided most of his care as by this time both of the Respondents were working.

On December 13, 2001, CAS received a telephone call from an individual at the [...] Medical Clinic indicating that baby J.E.A. had been seen at the clinic on December 7, 2001. The child had been brought to the clinic by L.A. who was apparently concerned about a cut under J.E.A.'s lip. In addition, a bruise was noted on the child's shoulder and there were marks around the baby's neck. There was a question as to whether the bruise on the shoulder was a Mongolian spot or caused by trauma at birth. Clinic staff had requested that the baby be brought back for follow-up but as of December 13, 2001, this had not occurred.

On December 17, 2001, A.M. returned to Bryony House. On this occasion, she had her newborn son with her. She testified that she had returned to the shelter as she and J.A. had had an argument. On December 18, 2001, A.M. left Bryony House and returned to L.A.'s home.

On December 24, 2001, A.M. returned to Bryony House again. She testified that she went to the shelter on this occasion as she had been arguing with both J.A. and L.A.. That same day, L.A. contacted CAS expressing concerns about J.E.A.'s safety. According to the affidavit of Ron Hennessey (a family care worker with CAS) sworn to on January 2, 2002, L.A. suggested that A.M. was unstable, suffered from depression and fought with J.A.. L.A. also advised that she had observed marks on the child in the past and had witnessed A.M. being rough with J.E.A..

According to that same affidavit, on December 27, 2001, L.A. advised Mr. Hennessey that following J.E.A.'s birth, A.M. and J.A. had separated on several occasions and A.M. had twice been to stay at Bryony House. L.A. described A.M. as quite young and immature for her age and unable to retain information about appropriate child care. According to Mr. Hennessey, L.A. described both of the Respondents as being rough and inappropriate with J.E.A. and described their physical care of the child as poor with inadequate supervision and ongoing domestic violence between them.

On December 27, 2001, a Risk Management Conference was held by CAS. That same day, J.E.A. was taken into Agency care.

On January 3, 2002 a Protection Application was filed by CAS in relation to J.E.A.. It was CAS's position that J.E.A. was in need of protective services under sections 22(2)(b), (g), (i), (j), (ja) and (k) of the *Children and Family Services Act* which state:

> **Child is in need of protective services**
> **(2) A child is in need of protective services where**
>
> **.....**
>
> **(b) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (a);**
>
> **.....**
>
> **(g) there is a substantial risk that the child will suffer emotional harm of the kind described in clause (f), and the parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;**
>
> **.....**
>
> **(i) the child has suffered physical or emotional harm caused by being exposed to repeated domestic violence by or towards a parent or guardian of the child, and the child's parent or guardian fails or refuses to obtain services or treatment to remedy or alleviate the violence;**

> **(j) the child has suffered physical harm caused by chronic and serious neglect by a parent or guardian of the child, and the parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;**
>
> **(ja) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (j);**
>
> **(k) the child has been abandoned, the child's only parent or guardian has died or is unavailable to exercise custodial rights over the child and has not made adequate provisions for the child's care and custody, or the child is in the care of an agency or another person and the parent or guardian of the child refuses or is unable or unwilling to resume the child's care and custody;**

.....

On January 4, 2002, the case was brought before the Court for an initial Interim Hearing. Both of the Respondents were in attendance with counsel. With the consent of the parties, the Court found that there were reasonable and probable grounds to believe that J.E.A. was in need of protective services and an Order issued leaving J.E.A. in the care and custody of CAS upon certain terms and conditions which are set out in the Order. The Respondents were granted access to J.E.A. on such terms as were authorized by a representative of CAS. The Interim Hearing was then adjourned.

On January 24, 2002, the matter returned to Court for the completion of the Interim Hearing. With the consent of all parties, the Court found that there were reasonable and probable grounds to believe that J.E.A. was in need of protective services, that there was a substantial risk to the child's health or safety and that the child could not be adequately protected by an Order pursuant to clauses 39(4)(a), (b) or (c) of the *Children and Family Services Act*. In addition, with the consent of all parties, it was ordered that J.E.A. was to remain in the care and custody of CAS upon certain terms and conditions as are set out in the Interim Order. Access was to continue.

On that same date (January 24, 2002), L.A. advised the Court that she wanted to have J.E.A. placed with her "until J.A. and A.M. comply with the court orders." L.A. subsequently decided not to pursue this plan.

Shortly after the Interim Hearing, CAS arranged for the Respondents to receive couple's counseling with Susan Bennett of the Family Service Association. Ms. Bennett is a clinical therapist and

social worker. The Respondents showed up a half hour late for their first appointment. Three follow-up appointments were arranged but not kept by the Respondents. As a result, Ms. Bennett eventually closed her file.

In a meeting that Mr. Hennessey had with both of the Respondents on February 5, 2002, the Respondents suggested that J.E.A. be placed with J.A.'s paternal grandmother in [...], Illinois. This plan was also not pursued.

According to A.M., she and J.A. separated in February of 2002. She testified that at that time she went to stay at a residence known as Adsum House. She stayed there for approximately three months.

A Protection Hearing was scheduled for A.M. 2, 2002. On that date, with the consent of all parties and with an admission by both of the Respondents pursuant to s.40(3) of the *Children and Family Services Act*, the Court found that J.E.A. was in need of protective services under s.22(2)(ja) of the *Children and Family Services Act* reserving to CAS the right to lead evidence and seek a finding with respect to the allegations

under ss.22(2)(b), (g), (j) and (k) of the said *Act* and reserving to the Respondents the right to cross-examine with respect to the affidavit evidence and all other documents that had been filed with the Court. Further, it was ordered that J.E.A. remain in the care and custody of CAS on certain terms and conditions which are set out in the Protection Order. The Respondents were granted continued access with J.E.A..

At the April 2, 2002 Protection Hearing, A.M.'s solicitor advised the Court that his client was supporting a plan to have J.E.A. placed in British Columbia with A.M.'s mother, S.M.. That same day S.M. advised Mr. Hennessey (of CAS) that she was agreeable to having the child placed in her care. Mr. Hennessey contacted a social worker with the [...] office of the British Columbia Ministry of Children and Family Development and requested that they conduct a home study of S.M.. The British Columbia Ministry agreed to do so.

The documentation filed by CAS indicates that during the period January - March, 2002 the Respondents (and often L.A.) were exercising regular access with J.E.A.. These access visits usually took place three

times per week at the Agency offices and were supervised by a case aide. The access facilitator's reports for this period are, for the most part, quite positive concerning the Respondents' interactions with J.E.A..

During this same time the Respondents were receiving parenting classes with Jessica White (a parenting education worker). Initially, there was some difficulty getting the sessions started and so an arrangement was made to have the parent education sessions take place at the same time as the Respondent's access visits.

In late March of 2002, J.A. ceased exercising access with J.E.A.. According to A.M., J.A. moved to the United States around this time. A.M. continued to exercise access with J.E.A. during the month of A.M., 2002, although it is noted in the access facilitator's reports that during that month A.M. was late for her access visits on five occasions.

In May of 2002, A.M. moved back in with L.A.. Thereafter, her access to J.E.A. became very sporadic. The access facilitator's reports indicate that A.M. cancelled her May 1, 2002 access visit at the last minute, attended an access visit on May 2, 2002 but did not exercise any

further access with J.E.A. for the remainder of that month or at any time in June of 2002. A.M.'s next access visit took place in mid-July, 2002. She has not exercised any access with J.E.A. since that time.

On June 11, 2002, CAS filed an application for a Disposition Order. At the time, CAS was seeking an Order for temporary care and custody of J.E.A.. On June 26, 2002, CAS filed an amended Application for a Disposition Order seeking permanent care and custody of J.E.A. pursuant to s.42(1)(f) of the *Children and Family Services Act*.

Throughout this time, CAS was attempting to obtain the home study that they had requested from the British Columbia Ministry of Children and Family Development. This home study was eventually received in June of 2002. While it found S.M.'s home to be appropriate for J.E.A. to be placed in, the report was cursory at best. Around the same time that this report was received, CAS decided to apply for permanent care and custody of J.E.A..

On June 27, 2002, J.A.'s solicitor appeared in Court and advised that his client was not intending to participate further in the proceeding.

J.A. has had no further involvement with the case since that time. The last time that J.A. had any involvement with J.E.A. was in late March of 2002.

With the consent of A.M., a Disposition Order was granted on June 27, 2002 granting temporary care and custody of J.E.A. to CAS. CAS's application for permanent care and custody was adjourned.

According to A.M., she left Halifax on July 26, 2002 and returned to her parent's home in [...], British Columbia. By this time, she was pregnant with another child. According to A.M., the father of this second child was the Respondent, J.A.. A.M. testified that to the best of her knowledge, she became pregnant with this child in February of 2002 and was due to give birth at the end of October, 2002.

In A.M.'s affidavit sworn to on February 4, 2003, she indicates that she decided to return to British Columbia in late July, 2002 to terminate this pregnancy. According to the evidence given at trial, A.M. had been physically assaulted by an unknown female on May 27, 2002. During

this assault, A.M. was kicked in the stomach. In A.M.'s affidavit sworn to on December 19, 2002, she indicates that as a result of this assault her water broke and she feared that her fetus may have suffered irreversible damage (there is some question as to whether A.M.'s testimony that her water broke is correct. Hospital records filed with the Court indicate that A.M. had a pelvic ultrasound the day following the assault which indicated a normal amount of amniotic fluid). Evidence was also given which indicates that A.M. was upset as a result of a conversation that she had with Mr. Hennessey in mid-July, 2002, during which it was suggested to her that there was a strong possibility that her second child would be apprehended by CAS. A.M. terminated the pregnancy of her second child following her return to British Columbia in late July, 2002 (she would have been five to six months pregnant at this time). She then returned to Halifax on August 27, 2002.

A.M. testified that prior to returning to Halifax in August of 2002, it was her understanding that an adoption process was underway in relation to J.E.A.. However, she also testified that she returned to Nova Scotia "to see what was going on with my with the baby." Despite this

suggestion, A.M. confirmed in cross-examination that when she returned to Nova Scotia in August of 2002 she did not speak with L.A., she did not contact the Court to find out what was going on in relation to the file nor did she contact Mr. Hennessey to inquire about J.E.A.. Indeed, as acknowledged in her cross-examination, she did not ask any questions of anyone to determine whether the adoption process of J.E.A. was actually under way. Nor did she seek, at that time, to reinstate access with J.E.A..

On September 16, 2002 the matter was reviewed and the Court issued a further Order granting temporary care and custody of J.E.A. to CAS.

Over the fall of 2002, CAS attempted to provide notice to the Respondents of the upcoming permanent care hearing. Numerous difficulties were incurred in this regard as neither of the Respondents kept CAS, the Court and in A.M.'s case - her solicitor, advised of where they could effectively be served with notice of further proceedings.

On October 28, 2002 the Court was scheduled to hear the application for permanent care and custody of J.E.A.. On that day, L.A. appeared and advised the Court that she thought that A.M. may be back in Halifax and that possibly, J.A. could now be located to advise him of the permanent care hearing. The Court adjourned the matter so that a final effort could be made to notify the Respondents of the permanent care hearing.

On November 27, 2002, A.M. returned to British Columbia and moved in with her parents, S.M. and R.M..

The case was again scheduled for a permanent care hearing on December 6, 2002. That day, A.M.'s solicitor appeared on behalf of his client requesting a further adjournment. A letter signed by A.M. was filed with the Court (Exhibit # 21) advising that A.M. was not able to appear for the December 6, 2002 court date as she had been threatened and was afraid for her life. A.M.'s solicitor advised the Court that his client wanted to participate in the permanent care hearing and asked that the matter be set over to another day. On December 9, 2002, I granted

A.M.'s application for an adjournment. CAS did not consent to this adjournment.

On December 11, 2002, CAS applied before Justice Leslie J. Dellapinna for a stay of the decision to adjourn the permanent care hearing. The application was dismissed.

CAS was not prepared to ask the Court for a further Temporary Care and Custody Order as they took the position that it would not be in J.E.A.'s best interests for a further temporary Order to be issued (they wanted the permanent care hearing to proceed). The Court found that in the circumstances, it was in the best interests of J.E.A. to renew the previous Order. On December 16, 2002 a further Order was granted giving temporary care and custody of J.E.A. to CAS. The permanent care hearing was then scheduled for trial on March 10, 11 and 12, 2003.

On February 21, 2003 a hearing was held to determine whether A.M. should be permitted to exercise access with J.E.A. until the permanent care hearing was held. A.M. had temporarily returned to Halifax in

February of 2003 and wanted to exercise access with J.E.A. in the time leading up to the permanent care hearing. The Court determined that it was in the best interests of J.E.A. to maintain the status quo until the hearing could be held and accordingly, A.M.'s request for access was denied.

The permanent care hearing which was scheduled to be heard on March 10, 11 and 12, 2003 had to be briefly adjourned due to a death in the immediate family of one of the counsel involved in the file. On March 6, 2003 the Court granted a further Order giving temporary care and custody of J.E.A. to CAS. The permanent care hearing was held on March 18, 19 and 20, 2003. A further temporary care and custody Order was issued by consent on June 5, 2003, pending adjudication of the permanent care hearing.

At the time of the permanent care hearing, CAS confirmed that when J.E.A. was taken into care (in December of 2001) there were concerns about what appeared to be injuries to the child. However, these concerns had been investigated and the Agency confirmed that it

was not alleging that A.M. physically abused J.E.A.. In addition, CAS confirmed that the permanent care hearing was not based on allegations of physical abuse to the child.

The plan for the child's care filed by CAS asks for permanent care and custody of J.E.A. to be awarded to CAS with no further access to the Respondents. Mr. Hennessey, who has been the case worker with respect to this file since October 3, 2001, testified that since the time that J.E.A. was taken into care on December 27, 2001, he has lived in one foster home with a single foster parent who now wishes to adopt him. Apparently, this foster parent cannot be formally assessed for the purpose of adoption until this proceeding has concluded. However, Mr. Hennessey testified that the Agency worker most familiar with the placement is supporting the foster parent's plan to adopt J.E.A.. I should note that J.E.A.'s foster mother is African-Canadian. A.M. is of Philipinno descent and J.A. is African-American.

A.M. is seeking the return of J.E.A. to her custody or the custody of herself and her mother/parents. (Her specific plan is somewhat unclear. In paragraph 19 of A.M.'s second affidavit sworn to on February 4, 2003

(Exhibit #4), she states that she is seeking an Order from this Court returning J.E.A. to the care of herself and her mother. During her cross-examination she agreed that she wants J.E.A. placed in her care and she will get help from her family. She went on to testify, however, that she wants whatever is best for her child - that he be placed under her custody or her parent's custody). At this stage, neither of A.M.'s parents have applied for custody of J.E.A. nor did they apply for party status in this action.

A.M. has been living with her parents in British Columbia since November 27, 2002. She testified that she is now taking a grade 12 equivalency course and plans to continue to reside with her parents until such time as she has completed her formal education and has acquired permanent, full-time employment.

STATUTORY CONSIDERATIONS

The following provisions of the *Children and Family Services Act* are applicable to this action:

Purpose

2 (1) The purpose of this Act is to protect children from harm, promote the integrity of the family and assure the best interests of children.

Paramount consideration
(2) In all proceedings and matters pursuant to this Act, the paramount consideration is the best interests of the child. 1990, c. 5, s. 2.

....

Best interests of child

3 (2) Where a person is directed pursuant to this Act, except in respect of a proposed adoption, to make an order or determination in the best interests of a child, the person shall consider those of the following circumstances that are relevant:
(a) the importance for the child's development of a positive relationship with a parent or guardian and a secure place as a member of a family;
(b) the child's relationships with relatives;
(c) the importance of continuity in the child's care and the possible effect on the child of the disruption of that continuity;
(d) the bonding that exists between the child and the child's parent or guardian;
(e) the child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs;
(f) the child's physical, mental and emotional level of development;
(g) the child's cultural, racial and linguistic heritage;
(h) the religious faith, if any, in which the child is being raised;
(i) the merits of a plan for the child's care proposed by an agency, including a proposal that the child be placed for adoption, compared with the merits of the child remaining with or returning to a parent or guardian;
(j) the child's views and wishes, if they can be reasonably ascertained;
(k) the effect on the child of delay in the disposition of the case;
(l) the risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent or guardian;

(m) the degree of risk, if any, that justified the finding that the child is in need of protective services;
(n) any other relevant circumstances.

Disposition hearing

41 (1) Where the court finds the child is in need of protective services, the court shall, not later than ninety days after so finding, hold a disposition hearing and make a disposition order pursuant to Section 42.

.....

Duty of court upon making order

(5) Where the court makes a disposition order, the court shall give
(a) a statement of the plan for the child's care that the court is applying in its decision; and
(b) the reasons for its decision, including

(i) a statement of the evidence on which the court bases its decision, and
(ii) where the disposition order has the effect of removing or keeping the child from the care or custody of the parent or guardian, a statement of the reasons why the child cannot be adequately protected while in the care or custody of the parent or guardian. 1990, c. 5, s. 41.

Disposition order

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

(e) the child shall be placed in the temporary care and custody of the agency pursuant to clause (d) for a specified period and then be returned to a parent or guardian or other person pursuant to clauses (b) or (c) for a specified period, in accordance with Sections 43 to 45;
(f) the child shall be placed in the permanent care and custody of the agency, in accordance with Section 47.

Restriction on removal of child
(2) The court shall not make an order removing the child from the care of a parent or guardian unless the court is satisfied that less intrusive alternatives, including services to promote the integrity of the family pursuant to Section 13,
(a) have been attempted and have failed;
(b) have been refused by the parent or guardian; or
(c) would be inadequate to protect the child.

Placement considerations

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

Limitation on clause (1)(f)

(4) The court shall not make an order for permanent care and custody pursuant to clause (f) of subsection (1), unless the court is satisfied that the circumstances justifying the order are unlikely to change within a reasonably foreseeable time not exceeding the maximum time limits, based upon the age of the child, set out in subsection (1) of Section 45, so that the child can be returned to the parent or guardian. 1990, c. 5, s. 42.

...

Total duration of disposition orders
45 (1) Where the court has made an order for temporary care and custody, the total period of duration of all disposition orders, including any supervision orders, shall not exceed
(a) where the child was under six years of age at the time of the application commencing the proceedings, twelve months; or

(b) where the child was six years of age or more but under twelve years of age at the time of the application commencing the proceedings, eighteen months,
from the date of the initial disposition order.

.....

Consequences of permanent care and custody order

47 (1) Where the court makes an order for permanent care and custody pursuant to clause (f) of subsection (1) of Section 42, the agency is the legal guardian of the child and as such has all the rights, powers and responsibilities of a parent or guardian for the child's care and custody.

Order for access

(2) Where an order for permanent care and custody is made, the court may make an order for access by a parent or guardian or other person, but the court shall not make such an order unless the court is satisfied that

(a) permanent placement in a family setting has not been planned or is not possible and the persons access will not impair the child's future opportunities for such placement;

(b) the child is at least twelve years of age and wishes to maintain contact with that person;

(c) the child has been or will be placed with a person who does not wish to adopt the child; or

(d) some other special circumstance justifies making an order for access.

THE APPLICANT'S POSITION

The Applicant has submitted that J.E.A. continues to be a child in need of protective services pursuant to sections 22(2)(b)(g)(ja) and (k) of the *Children and Family Services Act.* In support of this position the Applicant refers, inter alia, to A.M.'s youth, instability, her association with individuals who are known by her to be violent and her inability or unwillingness to accept parental direction and

guidance. The Applicant also relies on A.M.'s limited involvement in J.E.A.'s life. While it acknowledges that this case should not be a competition between J.E.A.'s biological mother and his foster mother, CAS encourages the Court to look at and consider the child's "real and existing" relationship with his foster mother as compared to his limited relationship with his biological mother.

The Applicant has filed an expert's report prepared by Debbie Johnson Emberly. Ms. Johnson Emberly is a psychologist (Candidate Register) who was qualified by the Court to give expert evidence in the area of children's psychological development. Ms. Johnson Emberly did not meet with J.E.A. nor did she observe J.E.A. with his biological mother or his foster mother. Her opinions were based on a review of the documents that were provided to her (which are listed in her report) and a review of the relevant literature in the field of child psychology.

In Ms. Johnson Emberly's report dated January 30, 2003 she discusses attachment relationships and the long-term developmental effects of a disrupted attachment and states at page 3:

Attachment is a term used to describe the basic, deep, intimate emotional relationship established between a child and caregiver in the first several years of life. It profoundly influences every component of a child's life and is essential to the development of the child..... Children who begin life with a secure attachment to a consistent caregiver have greater self-esteem, independence and autonomy, are better able to manage impulses and feelings, establish long term friendships, demonstrate resiliency in the face of adversity, develop positive relationships with parents, caregivers, and other authority figures, learn about trust, intimacy, and affection, and develop empathy, compassion and conscience, they are more successful in school and promote a secure attachment in their own children when they become adults.

.....

The consequences of a disrupted attachment are long term and profound. These children are left without the most important foundation for healthy development and present with an overwhelming array of emotional, behavioral, social, cognitive, developmental, physical and moral problems. They are at risk for problems with self-esteem, being needy or pseudo independent, not able to manage stress, lack of self-control, lack of impulse control, inability to regulate emotions, unable to develop or maintain relationships, antisocial attitudes and beliefs, extreme rage, depression, aggression and violent, difficulty with trust, intimacy and affection, lack of empathy, compassion and remorse. The development and maintenance of a secure

attachment relationship with a consistent caregiver in early childhood is essential to the healthy development of a child.

Ms. Johnson Emberly's review of the access facilitator's reports relating to this family confirmed that there appeared to be a positive relationship between A.M. and J.E.A. during access visits. However, this witness went on to state that given the length of time that A.M. and J.E.A. have been separated without access, the literature and research suggest that J.E.A. would no longer demonstrate an attachment to his mother. Ms. Johnson Emberly states at page 5 of her report:

... Based upon the facts presented for this consultation, the child has been in the same foster home since he was taken into care at the age of two months. It is almost certain that this infant has developed a primary attachment relationship with this substitute caregiver who has been providing for his needs for the last 13 months, with whom he has been involved in a reciprocal and sensitively attuned relationship.....

This witness goes on to state at page 6 of her report:

Assuming that the child has developed a secure attachment to the foster parent, removal from the safety of this relationship could have a profound effect on the child

at this stage in his development. Furthermore, removal from this relationship to the care of his biological mother with unknown potential for successful reunification would not be in the best interests of the child. From the point that the child was placed in foster care, in all likelihood, he began to develop an attachment relationship with this surrogate care giver. From that point, as long as the surrogate caregivers are meeting the child's developmental needs and are committed to doing so on long-term basis, Goldstein, Freud, and Solnit (1973) suggest that the child's needs for continuity of the attachment should be recognized and protected.....

Ms. Johnson Emberly goes on to state at page 6 of her report:

> **... every effort should be made to maintain the current foster placement and protect the existing attachment relationship, especially if this child has been with this surrogate care giver for the past 13 months. He has not resided with his biological family since the age of two months, nor has he had any contact with his mother over the last eight months.....**

Ms. Johnson Emberly acknowledges in her report that it would be possible for J.E.A. to make a new relationship with his mother if given the appropriate amount of time and care. When commenting on the issue of A.M. having access with J.E.A. until the permanent care hearing, Ms. Johnson Emberly stated:

At the present time, it is unlikely that the child has a real and existing relationship with his mother. He was only in her care for the first two months of his life and has only seen his biological mother once in the past eight months of his 15 month life. As noted above, the literature suggests that children under the age of five cannot tolerate a separation of more than two months without viewing the loss as permanent (Goldstein, Freud and Solnit, 1973). At this point in time, the child would not know his mother. However, it is possible that the child could make a relationship with his mother given the appropriate amount of time and care.... p.7

The Applicant submits that J.E.A. no longer has a relationship with his biological mother and has, in all likelihood, developed a primary attachment with his foster mother. CAS suggests that it would not be

in J.E.A.'s best interests to return him to A.M. - not only because of the attachment issue - but also in light of A.M.'s uncertain and unstable lifestyle.

CAS argues that A.M. has been on her best behavior since November 27, 2002 when she returned to British Columbia but asks the Court to look at and consider her longer term history. CAS suggests that A.M. has not been forthwith with the Court in this proceeding and questions whether the Court can rely on A.M.'s testimony that she has changed.

A.M.'S POSITION

A.M. acknowledges that she was young and immature when she gave birth to J.E.A. and also acknowledges that there were difficulties in her relationship with J.A.. She says, however, that her life has changed, she has grown up and is ready to take on the responsibility of being a mother. A.M. notes that since November of 2002, she has been living with her parents and other family members in British Columbia who, she says, will assist her in raising J.E.A..

A.M.'s mother is 51 years of age and is employed as a resident care attendant (nurse's aide) at the G.... in [...]. A.M.'s father is presently 52 years of age and is employed as a kitchen worker at the R.... in [...], B.C.. A.M.'s parents have been married for 29 years.

A.M.'s parents live in a large six bedroom rental property. At the present time, S.M. and R.M. live in this home with A.M., A.M.'s 16 year old brother, R., A.M.'s sister, J.M., J.M.'s husband, R.A.M. and J.M and R.A.M.'s daughter, D.. In addition, according to S.M., a nephew, (E.M.) also resides in this home. It is suggested that A.M. will have plenty of help from her family in raising J.E.A. if he is returned to her care.

A.M. testified that she is now enrolled in the [...] Learning Centre where she is completing a grade 12 equivalency course. She anticipates finishing this course in January of 2004. She testified that thereafter, she intends to investigate taking a nursing course.

A.M. has submitted that she now has the support that she requires in order to properly raise J.E.A.. She testified that she intends to register J.E.A. in a multi-cultural day care centre near her parents home and also intends to involve him in a local Philippino Centre, both of which should help J.E.A. identify with his cultural heritage.

In response to Ms. Johnson Emberly's report, A.M. notes that this expert has never met with J.E.A., A.M. or the foster mother and suggests that there is no evidence before the Court of any actual bond that has taken place between J.E.A. and his foster mother.

A.M. has submitted that it is in J.E.A.'s best interests that he be returned to her custody and care. She further suggests that this remedy properly reflects the objectives of the *Children and Family Services Act* and is the least intrusive alternative that is available to the Court (see s.42(2) of the said *Act*).

DISCUSSION AND CONCLUSIONS

The purpose of the *Children and Family Services Act* is to protect children from harm, promote the integrity of the family and assure the best interests of children (s.2(1)). The *Act* acknowledges the importance of family (see for example s.3(2)(a) and (b)) and requires the Court to consider the least intrusive option that is available in the circumstances (s.42(2)). These provisions of the *Act*, however, must be read in conjunction with the overall objective and paramount consideration of the Court when dealing with the *Act* - ensuring the best interests of children. The Court's focus must be on the child rather than on the parents and their understandable desire to try to keep the family together.

The burden rests upon the Applicant to satisfy the Court that an Order for permanent care would be in J.E.A.'s best interests. A Permanent Care and Custody Order is the most intrusive remedy available under the *Act* and accordingly, the onus on the Applicant is a heavy one.

J.E.A. is presently 20 months of age. For the first two months of his life, L.A. provided most of his care. J.E.A. was then taken into Agency care on December 27, 2001 and has remained with the same foster mother since that time.

Issues of bonding and a child's emotional needs are properly taken into account when dealing with a permanent care hearing *(Catholic Children's Aid Society of Metropolitan Toronto v. M.(C.), [1994] 2 S.C.R. 165).* While in this case, I do not have specific evidence of J.E.A.'s attachment to his foster mother, based on Ms. Johnson Emberly's evidence, I am satisfied that on a balance of probabilities, J.E.A. has likely developed a primary attachment to his foster mother. In the circumstances of this case, however, the inquiry should go further than that. The Court has to look at the evidence as a whole in order to determine what is in J.E.A.'s best interests.

As indicated previously, A.M. says that her life has changed, that she has grown up and is now ready to take on the responsibilities of being a mother. In order to analyze this suggestion, the Court must consider A.M.'s overall circumstances over the past number of years.

A.M. was born in the Philippine Republic [in 1984]. She and her family moved to Canada in 1994 when A.M. was 10 years of age. According to A.M.'s mother, A.M. was a well-behaved child who was a pleasure to deal with. This seemed to change, however, when A.M. was in grade 9. At that time, she apparently became involved with individuals who were a bad influence upon her. A.M. began coming home late and became argumentative with her parents.

In A.M. of 1999, A.M. met J.A.. As indicated previously, A.M. was fifteen years old at the time. A.M.'s parents were very much against her relationship with J.A.. Nevertheless, she continued to see him.

A.M. testified that she continued to live with her parents after meeting J.A.. She became pregnant with J.E.A. [in 2001] at which time she would have been 16 years old. She acknowledged that she was living with J.A. "more often than not" when she became pregnant. For a good number of months, A.M. did not tell her parents that she was pregnant with J.E.A..

In January of 2001, A.M. decided to stop going to school. She hid that decision from her mother and father.

In March of 2001, A.M.'s parents tried to arrange counseling for A.M.. A.M. did not participate in counseling as was suggested by her parents.

In July of 2001, A.M. moved to [...] with J.A.. She was then 17 years of age. It is clear that her relationship with J.A. was violent and that both of the Respondents were immature and unprepared to raise a child at the time that J.E.A. was born.

To the best of A.M.'s knowledge, she became pregnant again in February of 2002, when she was still 17 years of age. That same month, she and J.A. separated. Despite this separation, A.M. did not return to live with her parents nor did she advise them of her second pregnancy.

It is difficult to piece together a full picture of A.M.'s life following her separation from J.A.. However, it is clear that A.M. lived a difficult and unstable life until moving back to British Columbia in late November of 2002. I refer, for example, to her living arrangements.

According to the evidence given at trial, A.M. resided at Adsum House for approximately three months after her separation from J.A., then returned to live with L.A., then resided at the home of a friend's grandmother (she does not recollect the civic address of this residence), then returned briefly to her parent's home (at the time that she decided to terminate her second pregnancy), then took up residence with a friend (T.M.), then moved in with a boyfriend (K.M.) and then took up residence with a woman named C. (she is uncertain of C.'s last name). Finally, A.M. returned to her parent's home on November 27,2002.

In addition to A.M.'s lack of a permanent residence, she has, since J.E.A.'s birth, been involved in a number of violent incidents that have caused her physical harm. I refer in particular to her abusive relationship with J.A. (the evidence disclosed that even after A.M.

separated from J.A. he continued to abuse her. For example, A.M. testified that in March of 2002, she had to go to the hospital as J.A. had punched her and broken her nose).

In addition, in May of 2002, A.M. was attacked by an unknown female in Halifax. According to the police report relating to this incident, the woman that assaulted A.M. kicked her in the stomach (A.M. was then pregnant with her second child), knocked her to the ground and continued assaulting her.

According to the Bryony House records, in November of 2002, A.M. went to Bryony House after placing a distress call. A.M. advised Bryony House staff that she and her boyfriend (K.M.) had gotten into a fight and K.M. had hit her in her mouth and split her lip.

According to A.M.'s evidence, on November 20, 2002, she was approached by three females who threatened her and stated that they intended to "get her". Shortly thereafter, A.M. wrote a letter to the Court stating that she was not able to attend the permanent care

hearing scheduled for December 6, 2002 as she had been threatened and was afraid for her life. At trial, A.M. confirmed that she had been threatened by K.M. as well as the three unknown females referred to above.

While the Court in no way suggests that A.M. is somehow at fault for any of these violent occurrences - it must, when considering J.E.A.'s best interests, take into account that the fact that A.M. has been exposed to a number of violent individuals that have caused her harm. The concern is that J.E.A. may also be exposed to these individuals and their violent tendencies if he is placed in A.M.'s care.

There is a suggestion in the materials forwarded by the British Columbia Ministry of Children and Family Development that in September of 2000, A.M. had been picked up by the RCMP for prostituting. In addition, on February 18, 2002, J.A. advised Mr. Hennessey that he believed that A.M. may be involved in prostitution in Halifax and that she might be being held against her will by a pimp. Further, on May 8, 2002, L.A. advised Lynn Legge (the access facilitator) that she was concerned that the people that A.M. was

associating with might be trying to get A.M. into prostitution, but she believed that they had not been successful. A.M. denies any involvement with prostitution.

The Applicant suggests that the Court cannot rely on A.M.'s testimony that she is now going to remain with her parents and turn her life around. They refer to the fact that in the past, A.M. has been secretive with her parents and has not been truthful and open with them concerning what is going on in her life. In addition, the Applicant suggests that A.M. has not been forthright with the Court which calls into question the reliability of her testimony concerning the changes that she has made in her life.

I accept the Applicant's suggestion that at times, A.M. was less than forthright when testifying in this matter. For example on December 19, 2002, A.M. swore an affidavit that contained the following:

I returned to Halifax on August 27, 2002. When I returned to Halifax I took up residence at the apartment of my friend, T.M.. T.M. lived in [...], however, I do not

remember the civic address. I continued to reside with T.M. until approximately October 30, 2002.

T.M. lives with her mother and T.M. and her mother were involved in frequent arguments. I found this distressing and decided that it would be better to find another place to live.

On approximately October 30, 2002, I took residence with a friend of T.M.'s, C.. I don't remember C.'s last name, however, she lived on [...], in [...].

I continued to reside with C. until November 20, 2002.

On November 20, 2002 I was going to the store from C.'s house at approximately 8:30 p.m. I was approached by three black females who were approximately 21 years of age. These individuals threatened me and stated that they intended to get me. I became very afraid as a result of this experience and took up residence at Bryony House as I felt I would be safe there. This was my only contact with any support agency after June 27, 2002.

There is no mention in this affidavit of A.M. living with her boyfriend (K.M.) in the fall of 2002. Nor is there reference to K.M. assaulting or threatening her.

During the trial the following exchange took place between A.M. and Mr. McVey (counsel for CAS):

Q. I'm going to ask you again about K.M. because I'm-- I seem to remember asking you about someone named K.M. when you were testifying on February the 21st. Do you remember me asking you questions about K.M.?

A. Yes.

Q. And you were very clear testifying that you didn't know a K.M.. Isn't that right?

A. No, I said I knew him. I didn't say that he was my boyfriend.

Q. All right. He wasn't your boyfriend or he was.

A. I- - I- - *the last time* I was - - you asked me *I told you that he wasn't my boyfriend*. He was a friend.

Q. Okay. And what's true, friend or boyfriend?

A. He's my partner.

Q. And what do you mean by that?

A. He's a close friend to me that's - -

Q. And he still is?

A. No, not now, no.

In other trial testimony, A.M. acknowledged that K.M. was in fact her boyfriend and that she was living with him in the fall of 2002. Reference is made to the following exchange which also took place between A.M. and Mr. McVey:

Q. All right. And K.M. did live with you in the [...] area, did he not?

A. He lived with his sister but I wasn't living there. I was just going there and staying.

Q. Well, "A.M. has been living with K.M. for about three months since returning from B.C.," is that wrong?

A. I was staying at their house, I wasn't living there.

Q. Okay.

A. You can say I was living there because I was there most of the time, so.

Q. Right. You were there most of the time.

A. Yes.

Q. And he was your boyfriend.

A. Yes.

K.M. is the individual that apparently hit A.M. in the mouth in November of 2002 and split her lip. A.M. ackowledged at trial that K.M. was also one of the individuals that threatened her in November of 2002.

If A.M. failed to mention in her affidavit that she was living for three months with a man that assaulted and threatened her, the Court is left to wonder whether there is other relevant information that she has failed to mention that could affect J.E.A.'s best interests.

There were various occasions throughout A.M.'s testimony that I was satisfied that she was not being completely forthright with the Court. The fact that A.M. lacked candor in some of her evidence is, in the Court's view, of limited relevance when dealing with the specific

question of J.E.A.'s best interests. However, it is relevant when considering A.M.'s testimony that she has changed and is now ready to parent J.E.A..

While I am satisfied that A.M. is attempting to turn her life around, I am not satisfied that she has reached the stage that it would be in J.E.A.'s best interests to return him to her care. Even after A.M.'s relationship ended with J.A., she lived an unstable life that would not be conducive to the care of a small child. I am satisfied that if J.E.A. was returned to the care of his mother there is a substantial risk that he will suffer emotional harm and exposure to violence. While hopefully, A.M.'s decision to return to her parent's home is the beginning of a new life for her, I am not satisfied that she has matured and stabilized her life to an extent that it would be in J.E.A.'s best interest to return him to her care. I have concluded that J.E.A. continues to be a child in need of protective services.

I have considered the provisions of s. 3(2) of the *Act* including J.E.A.'s cultural, racial and linguistic heritage. J.E.A. is biracial.

Both plans of care submitted to the Court acknowledge the child's cultural and racial heritage although each plan emphasizes a different aspect of this heritage.

I have also considered s. 42(2) of the *Act*. I am satisfied that less intrusive alternatives including services to promote the integrity of the family have been attempted and have failed and, in the case of the couple's counseling offered by the Family Service Association, have been refused by the Respondents.

At the conclusion of the hearing, the Court raised the question of its ability to award joint custody to A.M. and her mother in the event that it was deemed to be appropriate. As indicated previously, there was some uncertainty concerning the specific plan that A.M. was advancing in relation to J.E.A.. (While in A.M.'s second affidavit sworn to on February 4, 2003, she indicated that she was seeking an Order from the Court returning J.E.A. to the care of herself and her mother, S.M. had never applied for standing in this action nor had she

filed an application for leave to apply for joint custody of J.E.A. under the *Maintenance and Custody Act*).

Following the hearing, counsel for A.M. wrote to the Court requesting that the statutory time lines set out in the *Act* be extended to permit S.M. an opportunity to commence an action pursuant to s. 18(2)(a) of the *Maintenance and Custody Act*. Mr. Mitchell advised the Court that following the permanent care hearing he was advised by S.M. of her intention to commence an application for standing pursuant to the said *Act* in order to obtain an Order vesting joint custody of J.E.A. with S.M. and A.M.. Mr. Mitchell noted that pursuant to s. 45(1)(a) of the *Children and Family Services Act*, the Court has until June 27, 2003 to conclude the matter. He submitted that the Court has the authority to extend the time limitations set forth in the *Act* in the event that it finds that the statutory deadlines are in conflict with the best interests of the child. In support of this position, he referred the Court to the cases of *Children's Aid Society and Family Services of Colchester County* v. *H.W. et al* (1996), 155 N.S.R. (2d) 334

(C.A.) and *Family and Children's Services of Kings County* v. *H.W.T.* (1996), 156 N.S.R. (2d) 237 (C.A.).

Mr. Mitchell further submitted that in the interim, s. 42(1)(c) of the *Children and Family Services Act* provides the Court with the authority to grant an Order placing J.E.A. in the care and custody of S.M. until the application under the *Maintenance and Custody Act* could be dealt with. Implicit in this suggestion is the position that s. 42(1)(c) can be utilized by the Court when the statutory deadlines set out in s.45(1) have been extended by the Court. (An Order pursuant s.42(1)(c) of the *Act* is only available until the maximum time limits set out in s.45(1) of the *Act* have been reached. See *Children's Aid Society of Halifax v. T.B.*, [2001] N.S.J. No. 225 (C.A.)).

On April 22, 2003, Mr. Mitchell provided the Court with a letter apparently signed by S.M. indicating that she intends to commence an application for an Order "granting joined custody of J.E.A. to me and my daughter, A.M.." Mr. Mitchell also forwarded a letter apparently signed by A.M. indicating that she was prepared to consent to an

adjournment of this matter in order to give her mother time to make an application for "joined custody" and instructing Mr. Mitchell to consent on her behalf to an Order that grants custody of J.E.A. to her and her mother. There is also an indication that A.M. is prepared to consent to a term in the Order that provides for S.M.'s home to be the permanent residence of J.E.A..

I am satisfied that in appropriate and limited circumstances the Court has the ability to extend the time lines set out in the *Children and Family Services Act* provided that it is in the best interests of a child to do so. However, I am not satisfied that in the circumstances of this case, it is in J.E.A.'s best interests to extend the time lines beyond the June 27, 2003 deadline.

The evidence establishes that J.E.A. has had limited contact with A.M. since the time of his birth. There is no evidence to suggest that he has ever met S.M. or her husband, R.M.. Since being taken into care on December 27, 2001, J.E.A. has been living with his foster mother. As indicated previously, I am satisfied that he has likely

developed a primary attachment to this care giver. While S.M. may be able to provide an appropriate home for J.E.A. to live in, I am not satisfied that it would be in J.E.A.'s best interests to adjourn the matter further to allow S.M. to bring an application for joint custody. J.E.A. is entitled to have a permanent care arrangement put into place in a timely manner. I am satisfied that his best interests would be served by granting permanent care to CAS and allowing the adoption process to proceed.

I have considered s.42(4) of the *Act* but note that we have now reached the maximum time limits under the *Act.* As indicated previously, I am not satisfied that A.M.'s circumstances have changed to an extent that it would be in J.E.A.'s best interests to be returned to her care.

Finally, I have considered the provisions of s.47(2) and conclude that access by the Respondents should not be ordered in the circumstances of this case.

I therefore grant the application for a Permanent Care and Custody Order with no order for access.

Smith, J.

Halifax, Nova Scotia