IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Children's Aid Society of Cape Breton-Victoria v. A., 2004 NSSF 49

Date: (20040429)
Docket: CFSA 28161
Registry: Sydney

Between:

The Children's Aid Society of Cape Breton-Victoria
Applicant

-and-

H.A. and G.A.
Respondents

-and-

V.M.

Respondent

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on September 29, 2008.

D E C I S I O N

Publication restriction: **Pursuant to s.94(1)** ***Children and Family Services Act***

Judge: The Honourable Justice Walter R. E. Goodfellow

Heard: February 10, 11, 2004 and April 15 and 16, 2004, in Sydney, Nova Scotia

Counsel: Darlene MacRury, for the Applicant, Children's Aid
Francis X. Moloney, for the Respondent, H.A.

Douglas P. MacKinlay, for the Respondent, G.A.
Michael J. Kuna, for the Respondent, V.M.

Restriction on publication: Pursuant to s. 94(1) Children and Family Services Act.

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT S. 94(1) OF THE CHILDREN AND FAMILY SERVICES ACT APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

SECTION 94(1) PROVIDES:

> **94(1) 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.**

By the Court:

APPLICATION

[1]The Children's Aid Society of Cape Breton-Victoria filed a protection application and notice of hearing November 12, 2003 for a finding that the child, K.A., born [in 2003] was a child in need of protective services under the *Children and Family Services Act* s.22(2) para. (b). An interim hearing took place before Justice J. Vernon MacDonald who rendered his decision December 8, 2003 concluding that K.A. was a child in need of protection and should remain in the temporary care and custody of the Children's Aid Society until the protection hearing took place. The protection hearing took place before me February 10-11, and April 15-16. In this application, the Children's Aid Society seeks an order that the child, K.A., is a child in need of protective services and that the child should remain in the care and custody of the Agency until a disposition hearing takes place.

PRELIMINARY MOTIONS

[2]There were two preliminary motions before me.

FIRST MOTION

[3]An application by V.M. for standing as a party to this proceeding, pursuant to s. 36(1)(f) of the *Children and Family Services Act* which does provide authority for

the court to add a party at any stage in the proceeding, pursuant to the *Family Court Rules*. Her application maintains that she is a guardian of the child, K.A., within the definition of parent or guardian in the *Children Family Services Act* which provides s.3(1)(r)(iii):

> s.3(1)(r) "parent or guardian" of a child means
>
> (iii) an individual having the custody of the child.
>
> (iv) an individual residing with and having the care of the child.

[4]This application was made at the outset of this protective hearing and rather than provide any delay, I granted standing to V.M. as a party with the entitlement of full participation in this proceeding subject to a possible further ruling. Subsequently, I confirmed my ruling that V.M. was a party but in so doing, pointed out to all counsel that I might well be in error due to the comments and probable finding of a more experienced Justice, J. Vernon MacDonald, in his decision of December 8, 2003. I felt that in all fairness the full hearing of this matter was best served by her participating. Nevertheless, I also pointed out that my finding did not preclude, at any subsequent appeal or any other proceeding, counsel raising any issue, including that I was in error on the basis of V.M.'s standing having been addressed fully by Justice J. Vernon MacDonald, who made the determination that the appropriate hearing for V.M. to participate in, if such took place, would probably be a disposition hearing. This may well constitute *res judicata*.

SECOND MOTION

[5]The Children's Aid Society moved at the outset for incorporation in the record of this application, in relation to K.A., a substantial volume of material, including the decision of Justice Darryl Wilson, November 3, 2003, particulars of which I refer to more fully in this decision: the decision of Justice J. Vernon MacDonald on the interim hearing which decision was rendered December 8, 2003 along with the transcript of the interim hearing. In addition, the Children's Aid Society wished, as part of the record, incorporation of a number of documents and those that were objected to most strenuously were the statements of the children, A.D.M.D. and A.I.D., two children born of H.A. and a M.M.. Counsel for G.A. filed a detailed memorandum of law setting out in his view a number of conflicts and admissions by these two children in relation to the evidence they have given.

Mr. MacKinlay argued that, under s. 96(3), I should exercise discretion and deny the admissibility of these statements on the basis of their questionable reliability. I ruled that all of the documentation and material the Children's Aid Society wished admitted in this hearing, pursuant to s. 96 of the *Children's Family Services Act*, was admissible and that it would be for this court in this application to determine what, if any, weight would be attached to any portion of the record, documents and material so incorporated, including the objected statements of the two children.

[6]In addition, I heard from several witnesses and a number of exhibits were tendered. I had an opportunity to observe and evaluate the evidence of H.A., G.A., and V.M. in open court.

BACKGROUND

[7]The decision of Justice Darryl W. Wilson of the Family Division, November 3, 2003, forms part of the record before me. Justice Wilson's decision was appealed by G.A., but only as it relates to three of the children, A.D.M.D., J. and J.E.. In his appeal, he asked that these children be returned to his care. H.A. was not a party to the appeal.

[8]The Nova Scotia Court of Appeal, docket CA 210705, rendered its decision dismissing G.A.'s appeal April 8, 2004 and recited extensively from Justice Darryl Wilson's decision to set out the background and I incorporate that recital as follows:

> [6] The Respondents H.A. and G.A. were married in 1998. At that time, both had children from prior relationships. A.J.D. and A.D.M.D., two of the subjects of these proceedings, are the children of H.A. and M.M. who resides in Manitoba. Although notified of the proceedings, M.M. did not participate. G.A. has four children, one, H., is in the care of the Children's Aid Society of Halifax-Dartmouth. The other children are over 16 but have been the subject of child protection proceedings in the past. A.I.D.. and A.D.M.D. lived with their father in Manitoba but were returned to the care of their mother in 1997 (A.I.D.) and 1998 (A.D.M.D.).
>
> [7] After the Respondents' marriage, A.I.D. and A.D.M.D. lived with their mother and G.A. and his sons, G.A. Jr. and J.U., in a blended family environment. There was conflict between H.A. and G.A. over the discipline of their children by the other step parent.
>
> [8] H.A. was addicted to prescription pain medication. G.A.

would obtain these pain killers for her. The children were exposed to the use of non-prescription drugs. G.A. acknowledged transporting and using non-prescription drugs.

[9] The Children's Aid Society of Cape Breton Victoria initiated a child protection proceeding regarding H.A. and her children A.I.D. and A.D.M.D. in the April 2000. A.I.D. and A.D.M.D. were taken into care. The agency's concerns were inappropriate physical discipline, H.A.'s addiction to prescription pain medication, G.A.'s use of drugs, the children's exposure to drugs and the verbal and physical confrontations between the Respondents which put the children at substantial risk of physical harm. Services were put in place. Conditions including random drug testing and abstinence were imposed. The children were returned to H.A.'s care after three months. H.A. became pregnant and J. was born [in 2001].
[10] H.A. and G.A. reconciled. According to G.A., he stopped using and selling non-prescription drugs and supplying prescription medication to H.A.. The Respondents moved to [...] in September 2001 in order to get away from negative associations. Living in the home were G.A. and his sons G.A. Jr. and J.U.., H.A. and her children, A.I.D. and A.D.M.D. and their new born son J..

[11] The protection proceeding regarding H.A. and her children was transferred to the Antigonish agency and terminated in October 2001.

[12] Subsequent to the termination of the prior protection application, the agency in Antigonish received referrals regarding H.A.'s continued misuse of prescription pain medications. G.A. was found in possession of non-prescription drugs and drug paraphernalia was found in the home. G.A. said the drugs belonged to his son [G.A.. Jr.]. He was charged with trafficking but the charges were eventually dismissed. In December H.A. returned to [...] to enter a drug detoxification program. She was expecting a child. G.A. Jr. and J.U., with their father's urging, reported H.A.'s continued abuse of drugs to the Antigonish protection agency.

[13] Protection proceedings regarding A.I.D., A.D.M.D., and J. were initiated by the Minister of Community Service in Antigonish by application dated December 21, 2001 with the first hearing on December 28, 2001.

[14] The agency's concerns were violence in the Respondents relationship, drug trafficking, exposure of the children to drugs, and the abuse of prescription drugs by H.A. and the unsafe home environment of the children.

[15] The interim hearing was adjourned to January 2, 2002 to allow the Respondents time to obtain legal counsel. At the Interim Hearing on January 2, 2002 a Consent Interim Order was issued placing A.I.D., A.D.M.D. and J. in the care of G.A. subject to the supervision of the agency; granting H.A.

supervised access to the children through the agency; and requiring G.A. to report any direct contact or attempt to contact the children by H.A.; both parties were to abstain from the consumption of alcohol and the taking of illegal drugs or prescribed drugs in a non-prescribed manner; both parties were to participate in drug testing and H.A. was to take drug detoxification and rehabilitation services; both parties were to participate in a parental capacity and psychological assessment; there was to be no physical punishment of the children and the children were not to be exposed to drugs; the agency could access records of service providers to ensure compliance. There were also services put in place for the children.

[16] One of the purposes of the order was to minimize contact between the parties so as to avoid threats, arguments or confrontations in the presence of the children and the exposure of the children to drugs.

[17] At the time the protection proceeding was initiated in [...], H.A. was pregnant and had returned to [...] for detoxification purposes. G.A. remained in [...] providing care for A.I.D., A.D.M.D. and J.. J.U. moved to Halifax while G.A. J.r. stayed with his father in Antigonish. H.A. gave birth to J.E. [in 2002]. J.E. was taken into the care of the Children's Aid Society of Cape Breton-Victoria and a separate protection proceedings was initiated.

[18] At the protection hearing on March 20, 2002 in Antigonish the Respondents consented to a finding that A.I.D., A.D.M.D. and J. were in need of protective services pursuant to Section 22(2)(b). The terms of the Interim Order were continued and a Disposition Hearing was scheduled for May 29th, 2002 in Antigonish.

[19] The Parental Capacity and Psychological Assessment was completed by Michael Bryson on May 10th. It contained 17 recommendations and formed the basis for the Disposition Order of May 29. The assessment recognized the addiction of H.A. and the potential addiction of G.A.. It also recognized the difficulties G.A. would have parenting two adolescents and two young children with his minimal parenting skills. It recommended continued care of the children by G.A. with supervised access to H.A.. Both parties were to abstain from the consumption of alcohol, to participate in random drug testing and attend for out-patient addiction counselling. It provided for services to the children and recommended completion of a parenting program for G.A. and restrictions on the use of his children to provide child care in his absence. The assessment also recommended joint parent counselling if H.A. and G.A. were to remain living separate and apart. It also recommended marriage counselling and a further six months of abstinence before the parties reconciled and provided care for their children in the same residence.

[20] A review of the Disposition Order was held on July 3, 2002. At that time

the proceedings regarding A.I.D., A.D.M.D. and J. were transferred to the Children's Aid Society of Cape Breton-Victoria.

[21] Meanwhile an Interim Hearing regarding the child J.E. was held in Sydney on March 8, 18, 28th and May 9th. The child J.E. was placed in the supervised care of G.A. with conditions that he abstain from the consumption, use or possession of alcohol and drugs, that he participate in drug testing, that no drugs be stored in his residence and that access between H.A. and J.E. be supervised and that he not relocate with J.E.. The Protection Hearing was held on June 3, 2002 and a finding made by consent pursuant to Section 22(2)(b). The terms of the Interim Order were continued.

[22] G.A. was not able to return to [...] after he assumed the care of J.E. in [...]. Also he was a lobster fisherman who worked out of [...] area during the months of May to July. He resided with J.E. and J. for two months at the residence of M.P. and her partner until lobster fishing was completed and his own home was renovated. B.D., maternal grandmother of A.I.D. and A.D.M.D., relocated to [...] temporarily and cared for A.I.D. and A.D.M.D. until the end of the school year. They returned to the [...] area at the end of June and resided with their grandmother for a short time. They began living with G.A. after his home renovations were completed.

[23] The Disposition Hearing regarding J.E. was held on August 12, 2002 and the Disposition Review Hearing [regarding] A.I.D., A.D.M.D., and J. which was transferred from [...] was also heard at this time. Both proceedings were consolidated.
...

[29] On November 5, H.A. was visiting a co-worker's apartment on [...] Street. She reported to the police G.A. arrived at the apartment, threatened her and broke a window in the apartment. The police responded but G.A. had left at this time. H.A. changed her story and said G.A. did not threaten her or break a window. C.M. who was present was interviewed by the police but did not appear for the scheduled trial.

[30] G.A. said he was at the apartment. On a prior occasion H.A. told him that her co-worker C.M. was sexually harassed her. He said he went to the apartment and told C.M. he would report him to his employer if the harassment continued. He denies threatening H.A. or breaking a window in the apartment. This incident occurred around 1:00 a.m. and there was a report that A.I.D. and A.D.M.D. were with G.A. at the time of the incident. The police were not able to confirm this and G.A. reported that his son G.A. Jr. and his son's girlfriend were with him while A.I.D. and A.D.M.D. were in the care of S.M., a friend. S.M. confirmed that she was caring for all four of G.A.'s children on the night in question. After A.I.D. and A.D.M.D. were taken into care they

gave a statement in which they indicated they were present with G.A. on the night he broke a window in C.M.'s residence and was yelling at their mother. C.M. did not show for the scheduled court hearing and the charges remained outstanding at the time of this hearing.

[31] The Disposition Order was to be reviewed on December 5th . The hearing was adjourned to December 12th when neither Respondent appeared. The December 12th hearing was also adjourned as neither Respondent appeared. On January 6th the review was further adjourned as H.A. was not present and G.A., who had been unrepresented to this time, sought legal representation. The adjourned hearing date of January 17th was further adjourned as H.A. was not present and services had not being accessed by G.A..
...

[33] On February 19 [sic, it was actually the 18th] A.D.M.D. went to a friend's home after school and reported that she was afraid to return home. She reported a physical confrontation that morning with G.A.. Her mother and brother A.I.D. were present. She was interviewed at the police station by the police and child protection worker. She was placed in the care of her grandmother overnight while the investigation continued. The following day she was interviewed in greater detail and a video taped statement was taken. On the night A.D.M.D. would not return home, the agency attempted to locate J. and J.E.. G.A. would not tell the agency where his children were located because they were not telling them why they were looking for them and why A.D.M.D. was taken to the police station. When the agency workers and police arrived at H.A. 's apartment looking for the younger children, they found G.A. already present. There was a confrontation with the police and he was arrested and charged with obstruction. These charges remain outstanding. The incident was not a serious altercation although there was reluctance by G.A. to provide information. J. and J.E. were located at the residence of and allowed to remain there overnight while the investigation continued. The following day A.D.M.D. gave a detailed statement in the agency's office. She reported incidents of physical confrontation between H.A. and G.A., improper physical discipline of herself and J.E. by G.A., the frequent presence of H.A. in the home, continued arguments between H.A. and G.A. over H.A.'s addiction to drugs and the presence of drugs in the home. A subsequent interview with A.I.D. confirmed some of the information in A.D.M.D.'s statement. As a result all four children were taken into care. . . .

Hamilton, J.A. stated:

[3] The apprehension was taken before the court February 26, 2003 and the disposition order was varied to provide for temporary care by the agency for all four children with supervised access to G.A. and H.A..

[4] With respect to events after the apprehension of the children the trial judge states:

[38] Since the children were taken into care, H.A. has consistently visited them. G.A. has attended only two visits with J. and J.E. and none with A.I.D. and A.D.M.D.. He said it wasn't necessary as long as one parent was keeping in contact with the children.
...

[40] G.A. Jr. was charged with trafficking in drugs in late February 2003 from his father's residence. G.A. was not present at the time and the children were already in care. G.A. Jr. is awaiting trial on these charges.

[41] In March 2003 G.A. was found in his home in possession of a small quantity of hash oil and Percodan medication and $170.00 cash. Also found was a container with cannabis residue and an empty five gram [vial]. G.A. and H.A. were present. G.A. was charged with trafficking and is awaiting trial on these offences. He said the drugs belonged to his son to G.A. Jr.. He found them two days earlier when friends of G.A. Jr. were at the house and he held on to them to confront his son the next time he returned to visit. G.A. Jr. had moved out of the residence in January but visited regularly for meals and laundry. The Percodan pills were painkillers obtained by H.A. pursuant to a prescription in February. G.A. was holding them for her because she had been addicted to them and he did not want her to take them. H.A. planned to return the medication.

[42] The agency is concerned that both Respondents are encouraging A.I.D. and A.D.M.D. to deny their original statements and thus causing unnecessary emotional stress. A.D.M.D. initiated e-mail contact with her mother after being taken into care and there [have] been several e-mails exchanged in which the court [proceeding] was discussed. Also two agency workers at the Boys Residential Centre in [...] where A.I.D. was residing saw A.I.D. driving in a truck that matches the description of a truck owned by G.A. with a [male] person matching the description of G.A.. This sighting occurred a few days before the court proceeding. G.A. denies having contact with A.I.D. at this time.

[5] At the review hearing in June, 2003 the agency sought permanent care and custody of the children. A.I.D., A.D.M.D., Cst. Jodi Wilson, Cst. Stan Wadden, Cst. Shawn MacLean, Barbara Richardson, Todd MacRae and Patricia Bates MacDonald testified for the agency**.** V.M., G.A. and H.A., B.D., S.M., M.P. and G.A., Jr. testified for the parents.

[9]The hearing before Justice Darryl W. Wilson concluded June 27, 2003. At that time, H.A. was pregnant and gave birth to a child, K.A., [in 2003].

[10]The continuing history of the parties is well documented in the decision of Justice Wilson, described by the Court of Appeal as a thorough decision and Justice Wilson, despite evidence to the contrary of H.A. and G.A., determined that he could not conclude they had ended their relationship and that H.A. continued to have a significant substance abuse problem. Justice Wilson noted in his decision of August 12, 2003 that H.A.:

> ... refused random drug testing and has not attended for outpatient addiction counseling since the summer of 2002. She stopped supervised visits through the agency with her children. She breached the court order by visiting the children under the supervision of G.A.. She concluded she wasn't going to have the children returned to her care and it was just as well for G.A. to have the care of the children. Im my opinion, it was easier for her to allow G.A. to care for the children until the court process ended rather than submit herself to the compliance procedure of the court orders.

[11]The Children's Aid Society of Cape Breton-Victoria filed an application November 12, 2003 seeking a finding that K.A. was a child in need of protective services under the *Children and Family Services Act*, s.22(2)(b):

> (b) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (a);
>
> > (a) the child has suffered physical harm, inflicted by a parent or guardian of the child or caused by the failure of a parent or guardian to supervise and protect the child adequately;

[12]A s.39 hearing took place before Justice J. Vernon MacDonald December 8, 2003 where Justice Vernon MacDonald stated at p. 168:

> The test here is whether or not there are reasonable grounds to believe the child is in need of protective services. A court as recently as August found that neither parent here was in a position to parent four other children. Obviously there were reasonable grounds to believe at that time that these parents were not fit to take charge of their children. A roost I find was established and created by H.A. such

> that she believed or came to believe that by signing over her custodial rights to this child to V.M. the intervention of the Children's Aid Society would be avoided because the child would not be seen to be in need of protective services. However, on the birth of the child neither parent, especially H.A. was in a position to parent the child. The Children's Aid Society is the appropriate Agency in this province to deal with children who are in need of protective services. At birth I find the child was in need of protective services based on the decision made in August and there being no evidence to indicate that H.A. or G.A. had made any gains in their parenting at that time or since. She believed, as she put forward that what she did was acting appropriately placing the child in the care of V.M.. I find she wasn't. I find she was seeking to avoid the intervention of the Agency.
>
> G.A. participated in the roost as well. V.M. acted with the best of intentions here, to secure as best she could the welfare of the child, but as opposed to her placement and the public authorization by means of the statue to provide the Children's Aid Society to deal with children who are in need of protective services. I find that the statutory obligation should be recognized here, as opposed to the placement arranged as it was by H.A. with V.M.. V.M. may indeed prove to be a valid placement for the child. I would simply say to her, this is not the way to go about it.
>
> I am satisfied there are reasonable probable grounds to exist finding the child in need of protective services at this time. In the circumstances here I find it would not be fit to have the child placed with V.M. at this time and the consent of the child's parent, I will direct the child remain in the temporary care and custody of the Agency with access to the parents as requested by the Agency.

V.M.

[13]It is necessary to determine the position of V.M.. The evidence of H.A. was that when she fully realized she was pregnant with K.A., it was too far along for an abortion and she talked to V.M. and they decided that V.M. would take the child when K.A. was born. H.A. acknowledged that she was acting on the assumption that the Children's Aid Society would take the child from her. There is some question as to how long H.A. and V.M. had known each other, but they probably met about ten years ago but have only been more than acquaintances for about five years. H.A. spoke of how she observed V.M. as a parent. There is some question as to the extent of her opportunity for such observation. After discussion with

V.M., they both agreed and it was H.A.'s idea that V.M. would raise K.A. and this agreement was apparently reached three or four months prior to K.A.'s birth. V.M. was there through the entire process of the birth which was described as quick. H.A.'s evidence is that it was her intention for K.A. to grow up with V.M., that was the long-term plan. When K.A. was born, she says they already had this agreement in place and K.A., when she left the hospital, went directly with V.M. and never spent a night at H.A.'s residence. H.A. does have a measure of access, as to some lessor extent does G.A.. There was apparently a complaint by G.A. about the visits to see K.A. being at the same time but in any event, it ended up that was the arrangement.

[14]H.A. indicated that she advised G.A. he was not the father of K.A.. Apparently, H.A. and V.M. approached someone by the name of W.O. who, according to H.A.'s evidence, drafted up an agreement after K.A. was born. When asked why G.A. was not mentioned in the agreement, H.A. said, "that was a good question, that G.A. had issues and I was not sure that K.A. was his". V.M. confirmed that the child, K.A., entered her care direct from the hospital. V.M. is on receipt of disability and has three children in the home. Their respective fathers exercise access and V.M. indicates that she is engaged to be married sometime in the future. She recited that K.A. was born in the elevator at the hospital and says that she and H.A. came to an agreement on October 17 that the baby would come home with her. She gives evidence to the same thrust as H.A., that the arrangement of her taking the child was to be permanent and suggests that the follow-up for her court application, etc., confirms that intention, etc. V.M. endeavors to convince the court that, if the child, K.A., was returned to her, she would control the situation and the child would not be returned to H.A. and H.A. would not see the child, if she was under the influence of drugs, etc. etc. etc. V.M., on the evidence before me, appears to be handling single parenthood and if she goes through with her plans to get married, it will be her first marriage. Her disability is in relation to lung disease and its impairment relates to walking, shortness of breath and she recognizes that smoking does not help and she continues to be a smoker. The issue for me to determine is whether or not V.M. was, as she alleges, a parent within the *Act* of K.A. by virtue of having the child with her for approximately twenty-seven days and having received written authority for the child by at least the mother.

[15]In order for the court to determine V.M. falls within the *Act*, it must be a *bona fide* situation.

[16] Without a shadow of a doubt, I conclude that the arrangement between H.A. and V.M. was an artificial sham solely intended to try and avoid the high probability that the child, K.A., would be taken into protective custody by the Children's Aid Society. V.M. and H.A. apparently received advice from this W.O. and they ended up with an agreement that clearly can only be interpreted as temporary and the explanation, that the temporary period was to cover only until they could get a permanent court order, is not at all credible. The agreement itself is in plain simple language and clearly indicates a direction of the child being returned to H.A.. The relationship of V.M. and H.A. is also shown by the access of H.A. to her daughter, K.A., and I am satisfied that at any given point, H.A. could have walked out of V.M.'s home with her daughter. The consequences, of course, were clear that then K.A. would be put into protective custody. There is also the incident of the visit of the health nurse which I find was engineered to deceive the Children's Aid Society. This artificial attempt to do an end run around the Children's Aid Society was probably the worst course of action H.A. and V.M. could undertake.

[17]Given my satisfaction beyond a reasonable doubt that the placing of the child, K.A., with V.M. and the so-called agreement in writing represent an artificial sham created with one intention and only one intention, to avoid the apprehension of the child, K.A., into the protective custody of the Children's Aid Society. Therefore, there is no foundation for a determination that V.M. comes within the *Act* as a parent or guardian of the child, K.A..

[18] It is unfortunate that they did not get proper sound advice as to how H.A. could go about increasing the prospects of her daughter, K.A., being returned to her care, instead of embarking on a clear program of deception.

PATERNITY

[19]The issue of paternity was not raised in the briefs or argument of counsel; however, I do want to make comment on this topic because of my concern that in the future there is a distinct probability that the issue will arise at some point and the longer it remains without being addressed, the more likely is it to be a cause of hurt and difficulty for the child, K.A.. G.A.'s evidence confirms that he was advised by H.A. that K.A. was not his child. G.A.'s participation is essentially

because he believes, but not without doubt, that K.A. is of his blood. I feel rather confident that, if down the road it turns out K.A. is not the daughter of G.A., he will abandon what, if any, relationship he has with her.

[20]I do not have the experience of Justices MacDonald and Wilson and therefore, I am simply making the recommendation that counsel give some thought to having DNA samples taken, to determine this issue once and for all. It is in the best interest of the child, K.A., and I assume DNA testing can be arranged, if all parties agree that such a course is in the best interest of K.A.. Additionally, if it turns out that G.A. is not the father of K.A., then I strongly suspect he will bow out of these proceedings. If that should be the case, it is far better that it occur now than run the risk of it occurring after a possible relationship between G.A. and K.A. evolves.

FINDINGS

[21]I agree with Mr. MacKinlay that, with respect to the time for determining whether the child, K.A., is in need of protection, is now. The considerable history of these parties with respect to parenting, etc., particularly where some of it is of recent date, is worthy of careful consideration. This is not, however, an exercise of confirmation and the onus is on the Children's Aid Society to establish that K.A. is a child in need of protection at this time.

[22]There were a number of considerations to which Justice Wilson attached weight. He had before him to some extent the denials of H.A. and G.A. as to the nature and continuation of their relationship. In the evidence before me, both H.A. and G.A. conveyed that no relationship exists, save attendances for access to K.A.. There is no concrete direct evidence of any continuing close relationship between H.A. and G.A., but one cannot help but conclude their evidence on this point, and virtually all other points, was severely lacking in credibility. H.A., and to a lessor extent, G.A., as I have already determined, gave evidence under oath that the placing of K.A. with V.M. was a legitimate, clear program with one intent only; namely, for K.A. to be in the long-term custody of V.M.. I have already concluded that this was a false artificial sham. Not only did they conduct such deception but they gave evidence under oath attempting to clothe what they did in an entirely different light.

[23]There is evidence before me through the records of their attendance on the exercise of access which gives the court no comfort that they are aware of the seriousness of the situation and the history of their lack of responsibility. They are prepared to rationalize any lack of punctuality and failure to attend; in other words, act as responsible parents, not by recognizing any deficiency, but by excuses and often resorting to blame lying elsewhere.

[24]There is before me a record of G.A.'s attendance at the Capital District Health Authority for drug analysis; however, these run from sometime in 2001 to May of 2002, a period that does not extend to the end of the hearing before Justice Wilson and well before his decision of August 12, 2003. They do show some effort on the part of G.A. throughout this time period, but notably absent of any such records from the time of Justice Wilson's decision.

[25]Mr. Moloney, in his summation, noted that there was no expert evidence and I readily agreed with him that such was not necessary but certainly, it would have been helpful to the court and what also would have been very helpful to the court to have had some independent evidence of a reliable nature.

[26] What I have is the evidence of H.A. and G.A. that they virtually cleaned up their act. They have to their credit, particularly H.A., achieved some certificates. G.A. is undertaking a course but it has just begun. H.A. has been to a detoxification program but she has done those programs in the past and, unfortunately for H.A. and G.A., they are so lacking in credibility and, given the up-dated evidence of the deception and lack of responsibility, it is impossible to conclude there has been any degree of change since Justice Vernon MacDonald issued the interim order. The one exception is friction between them has been lessened by virtue of all of their four children having been placed in protective custody. H.A. indicates, as she has done in the past, that she is no longer utilizing drugs but again, both she and G.A. talk of their problems in terms of issues to be addressed. There is no independent evidence of "random" drug testing of H.A..

[27]When the court is faced with the evidence of the parents and that evidence is totally lacking in credibility, the history of their parenting and problems take on considerable significance.

CONCLUSION

[28]I am satisfied that the Children's Aid Society has met the onus upon it of establishing that the child, K.A., is a child in need of protection in that the evidence leads to the conclusion that H.A. has not yet overcome her drug addiction to a point where it would be safe for this baby to be in her care. Similarly, with respect to G.A.'s problems and the probability that a continuing relationship exists between them, they both need considerable progress in parenting assistance, etc., before jointly or individually they take on the care of K.A., with some assurance they were are responsible enough to ensure the safety of the child.

[29] The child, K.A., will therefore remain in protective custody of the Children's Aid Society. The matter is to proceed to a disposition hearing.

J.