

**IN THE SUPREME COURT OF NOVA SCOTIA**  
**FAMILY DIVISION**

**Citation:** Nova Scotia (Community Services) v. S.L., 2005 NSSC 79

**Date:** 20050414

**Docket:** S.F.H. CFSA 29474

**Registry:** Halifax

**Between:**

Minister of Community Services

Applicant

v.

S. L. and A. M. G.

Respondents

**Restriction on  
publication:**

**There is a restriction on publication pursuant  
to s. 94 (1) Children and Family Services Act**

**Editorial Notice**

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

**Judge:** The Honourable Justice Leslie Dellapinna

**Heard:** April 4, 5, 6, 7 and 8, 2005  
in Halifax, Nova Scotia

**Written Decision:** April 14, 2005

**Counsel:** Jean Webb, for the Minister of Community Services  
Marian Mancini, for S. L.  
A. G., self represented

**Restriction on publication: Pursuant to s. 94 (1) of the 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:

"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 relative of the child."

**By the Court:**

INTRODUCTION

[1] The Minister of Community Services seeks an order for the permanent care and custody of the child J. T. L.. The application is opposed by his parents, the Respondents.

BACKGROUND

[2] J. was born on April [...], 2003. He was born with polycystic kidney disease. His kidneys operate at approximately twenty-five to thirty-five percent of capacity. He will eventually require a kidney transplant. It is necessary for him to receive several medications several times a day to keep him stable metabolically. Initially he was fed through a tube in his nose. Now he is fed through a tube to his stomach.

[3] J. also has developmental delays. His communication skills, learning ability and large motor skills are behind his chronological age.

[4] In addition to his medications, particular care must be taken with respect to his nutritional requirements. He requires follow up by his physicians and a renal dietitian who advise his caregivers on what changes to make to keep him stable.

[5] After he was born J. spent the first three to five months in the hospital so that his condition could be stabilized.

[6] Eventually he was discharged to the care of his parents who were at that time living together. However he was readmitted to the hospital on July 4 and November 17, 2003 for extended periods of time. On a couple of occasions during their son's hospital stays the Respondents were given passes to allow them to take J. home for a couple of days at a time. One such occasion was on December 24, 2003 in order to permit them to have J. with them over Christmas.

[7] On December 24, at or around noon, Ms. L. attended at the I.W.K. hospital to pick up J.. After collecting her son she went to Mr. G.'s mother's house for a short visit before going home at approximately 5:00 p.m.. Mr. G. was still at work and did not return home until approximately 7:00 p.m.. Some time after Mr. G. arrived the parties engaged in an argument during which Mr. G. punched Ms. L..

- [8] After the I.W.K. Health Centre received a telephone call from Mr. G.'s mother on the evening of December 24, 2003, the I.W.K. made a referral call to the Agency. It appears that Mr. G.'s mother had a conversation with Mr. G. earlier in the evening and as a result of that conversation she felt that J. may have been at some risk of harm. While accompanied by members of the Halifax Regional Police, agency workers went to the home of the Respondents. Ms. L. was discovered to have a lump on her forehead which she said was caused by Mr. G.. J. also had injuries to his face including a scratch to one cheek and a bruise running from the inner corner of one eye over the bridge of his nose to the inner corner of the other eye. There was also a mark under his left eyelid running from the inner corner of his left eye to the outer corner. Ms. L. was inconsistent with her explanation for what happened to the child. At first she said that when she was assaulted by Mr. G. the child was in his crib in a separate room. Later she said Mr. G. struck her while she held the child and that Mr. G. must have hit the child when assaulting her.
- [9] The Agency workers returned J. to the I.W. K. to have his injuries treated and he was formally taken into care shortly thereafter.
- [10] Mr. G. was found in the stairwell at the back of Ms. L.'s apartment building. The agency workers did not get to interview him at the time as the police considered him too angry. He was charged with assault on Ms. L.. Subsequently he entered a guilty plea, was fined and placed on probation for a year.
- [11] According to the police records they were uncertain as to how the child was injured.
- [12] J. remained in hospital until January 28, 2004. On January 16 he received surgery to have a tube put in his stomach. Upon his discharge he was placed in foster care.

#### HISTORY OF PROCEEDINGS

- [13] The Agency's protection application was filed with the Court on or about December 30, 2003. The interim hearing started on January 5, 2004 and was completed on February 3, 2004. Temporary care and custody was granted to the Agency with supervised access granted to the Respondents. Because of a court order prohibiting Mr. G. from having any contact with Ms. L., the Respondents, initially at least, exercised their access to J. separately.

- [14] The protection hearing was completed on March 24, 2004. With the consent of the Respondents the child was found to be in need of protective services pursuant to subsection 22 (2) (g) of the Children and Family Services Act.
- [15] The first disposition order was granted on June 17, 2004. That order too was granted with the consent of the Respondents. Temporary care and custody remained with the Minister. The Respondents' supervised access was continued. The order also provided for supportive and other rehabilitative services for the child and the Respondents. Review hearings took place on August 30, 2004, November 22, 2004 and January 21, 2005. On each occasion the terms of the original disposition order were renewed with the consent of the Respondents.
- [16] In the summer of 2004 J.'s paternal aunt and her husband were approved as restricted foster parents and he has been living in their home with them and his cousins on a full time basis since August, 2004. His aunt and uncle are also his godparents. According to the Minister's evidence, J. has formed a bond with his aunt and uncle and it is their intention to apply to adopt him if permanent care is granted.

#### SERVICES PROVIDED

- [17] Since the Agency became involved with the Respondents and their child, numerous services have been provided and others offered. Included in those services were the provision of access facilitators which enabled ongoing supervised access by the Respondents as well as extended family members on Mr. G.'s side of the family. Although Ms. L.'s mother and brother live nearby neither have shown much interest in seeing or spending time with J. or for that matter with Ms. L.. Case aides provided transportation for the child and Ms. L. to facilitate access and they took part in a training program offered at the I.W.K. to ensure that they were able to address J.'s special needs (particularly the administration of his medication) while he was in their care for access purposes.
- [18] Ms. L. was also provided with a family skills worker between March and September 2004. That worker, Jody Hann, also met with Ms. L. outside of her normal hours of employment in order to accommodate Ms. L.'s work schedule. Together they worked on a number of identified goals including parenting education, health, child safety, nutrition, growth and development and trying to assist Ms. L. in developing a support network within the

- community once the Agency ceased its involvement. Ms. L. discontinued this service in September 2004 because at that time she did not feel that she could get any further benefit from the sessions.
- [19] A parental capacity assessment was conducted and a report prepared by Ms. Debra Garland.
- [20] Counselling was provided to Ms. L. by Ms. Linda DeBaie, a clinical social worker, which service was recommended by Ms. Garland. As stated by Ms. DeBaie in her report dated October 11, 2004 the goal of her therapy was “[t]o assist S. in understanding the cycle of violence and the potential for emotional and physical harm to children who witness this or live in a home where violence is present” and “to support and help S. develop a stronger sense of self and confidence.”
- [21] Ms. L. met with Ms. DeBaie approximately twelve times between the end of March and the end of October 2004.
- [22] Mr. G. was also offered separate counselling but he chose not to make use of that service. He also declined couple counselling.

#### POSITIONS OF THE PARTIES

- [23] The Agency is seeking the permanent care and custody of J.. In the Agency’s plan of care dated November 9, 2004 it was stated that the Agency was at that time “willing to continue working with Ms. L., and to include Mr. G., if he chooses, in developing a plan for J. if it can be determined that they pose no risk to him.” And further; “It had been hoped that counselling and hands on support would help Ms. L. to learn the necessary skills to alleviate potential risk. This couple’s long term plan as it relates to each other has not been made clear to the agency, though Mr. G. has apparently voiced his support of Ms. L. regaining custody of J..”
- [24] Neither Ms. L. nor Mr. G. provided the Agency or the Court with any plan of care and neither filed with the Court an affidavit prior to these proceedings as directed at the pre-trial conference.
- [25] The Agency was not satisfied that either Respondent had developed an appropriate plan of care for J. nor was the Agency satisfied that either of the Respondents had developed the “necessary skills” to care for J. on an ongoing basis and protect him from potential risks. Recognizing that J. is a child with significant medical needs the Agency seeks permanent care because, among other reasons “Ms. L. also seems to minimize the extent of

J.'s medical problems and there is concern that attending to these may not be a priority for her.”

- [26] Ms. L. testified that she wants J. returned to her. She said that it is her intention to leave work for at least two years and live off money that she has saved after which she would then look into what daycare services may be available. She says that it is her intention and the intention of Mr. G. to resume cohabiting.
- [27] Mr. G. did not testify and did not produce any other evidence but has indicated that he supports the position taken by Ms. L..

### ISSUE

- [28] Should permanent care be granted to the Minister of Community Services and if so should there be any provision for access? Alternatively, should the Minister's application be dismissed as a result of which J. would be returned to the care of his mother?

### THE LAW

- [29] The Minister's application is pursuant to the provisions of the Children and Family Services Act of Nova Scotia. The more relevant provisions are as follows:

“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.

...

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 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.

...

#### 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.

...

#### Application for review

46 (1) A party may at any time apply for review of a supervision order or an order for temporary care and custody, but in any event the agency shall apply to the

court for review prior to the expiry of the order or where the child is taken into care while under a supervision order.

...

#### Matters to be considered

(4) Before making an order pursuant to subsection (5), the court shall consider

(a) whether the circumstances have changed since the previous disposition order was made;

(b) whether the plan for the child's care that the court applied in its decision is being carried out;

(c) what is the least intrusive alternative that is in the child's best interests; and

(d) whether the requirements of subsection (6) have been met.

#### Powers of court on review

(5) On the hearing of an application for review, the court may, in the child's best interests,

(a) vary or terminate the disposition order made pursuant to subsection (1) of Section 42, including any term or condition that is part of that order;

(b) order that the disposition order terminate on a specified future date; or

(c) make a further or another order pursuant to subsection (1) of Section 42, subject to the time limits specified in Section 43 for supervision orders and in Section 45 for orders for temporary care and custody.

...

#### 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.

[30] The onus is on the Agency to prove that permanent care and custody is the appropriate disposition.

ANALYSIS

[31] A parental capacity assessment was conducted and a report prepared by Ms. Debra Garland. Ms. Garland is a Registered Psychologist and has been accepted by various courts including this court as an expert witness on many occasions going back to 1999. She met with both Respondents separately, observing both of them on separate occasions with their son and interviewed a number of collateral witnesses. She opined that both Ms. L.'s and Mr. G.'s "fund of knowledge was below average, intelligence appeared to be below average and abstraction was functional."

[32] She stated in her report too that Ms. L.

"appears to have personality characteristics that predispose her to interpersonal difficulties that could adversely influence a treatment relationship. She has a tendency to deny problems and blame others for her shortcomings. She is not likely to view psychotherapy as an important option for her at this time and if pressured or mandated into therapy her cooperation is likely to be minimal and she could terminate the therapy prematurely."

[33] Regarding Mr. G. she said that "[i]nterpersonally he may be somewhat intolerant and insensitive."

[34] Under the heading “Summary and Recommendations” Ms. Garland stated:

“The current Assessment has identified that Mr. G. and Ms. L. have significant difficulties functioning as a family. There is conflict / confusion over rules within the family; in the freedom of each individual to express feelings; and discrepancy in each parent’s view of what actions and behaviours are appropriate or not. Violence within the parental relationship seems to be likely, though Ms. L. minimizes this while Mr. G. denies the occurrence.

This family has little support; Mr. G. identifies his family, Ms. L. names Ms. B. [Mr. G.’s mother]. In actuality these extended family members are not particularly supportive, appearing to be covertly critical of the actions of the parents.

Mr. G. and Ms. L. have limitations cognitively; however, Ms. L. established she is capable of managing J.’s many medications, which speaks to her ability in that capacity. The primary concerns focus on the temperament of the individual parents, their capacity to adopt new behaviours, and the likelihood of their resuming their relationship without returning to previous behaviour patterns.”

[35] She recommended at that time (March 1, 2004) that J. remain in the temporary care of the Minister recognizing that he had significant care needs that “if missed or neglected could result in serious medical repercussions”. She also recommended that supervised access continue in view of the fact that J.’s injuries remained unexplained and each parent was blaming the other for those injuries. She recommended programming / therapy for both Respondents to address issues relating to domestic violence, anger and relationships, that each Respondent become involved in parenting classes that would focus on J.’s special needs and that the Respondents be reviewed in six to eight months to determine if significant changes had occurred that would permit them to resume their roles as caregivers.

[36] Ms. L. accepted the services provided by the Agency as recommended by Ms. Garland but Mr. G. did not.

[37] In Linda DeBaie’s report dated October 11, 2004 she said that Ms. L. was able to recognize that her relationship with Mr. G. was emotionally and physically abusive but she had little insight into the seriousness of the violence to her son on the night that he was taken into care. Ms. DeBaie also reported that Ms. L. knew very little about Mr. G. or his life before her and that Ms. L. said it had nothing to do with her and that it was his

business. This was confirmed by Ms. L.'s testimony. She claimed that she did not know for sure where Mr. G. was currently living even though the two of them were now getting along and planned to live together once again. She knew that Mr. G. had been previously married and that he had one child who is now ten or eleven years of age. She did not know where that child lived and she did not know whether Mr. G. saw him or paid any child support for him. She said that with the exception of Mr. G.'s conviction for assaulting her on December 24, 2003, he had no criminal record. The evidence, however, disclosed that he was convicted on at least six previous occasions of various offences including break, enter and theft, theft under \$200.00, possession of stolen property, assault, assault with a weapon and uttering threats. According to the records of the Halifax Regional Police the assault convictions and the conviction for uttering threats related to Mr. G.'s ex-wife and son. The records from the Halifax Regional Police also indicated that Mr. G. had been incarcerated on at least three occasions. The Agency's plan of care which had been in Ms. L.'s possession since November 2004 clearly stated that Mr. G. previously served time at the Sackville Correctional Centre "as well as a period of probation for charges received while he was in a previous relationship."

- [38] More worrisome is the fact that Ms. L. does not care about what record Mr. G. may have or what kind of relationship he has or may have had with other children.
- [39] Ms. DeBaie said that Ms. L. felt quite confident that she could protect her son from harm if he was returned to her but wasn't able to describe ways that she could do that if placed in a situation similar to that which occurred on December 24, 2003. Ms. L. simply stated "I just know I can protect him." It's worth noting that, according to Ms. L.'s testimony, after Mr. G. punched her in the head he took the child from her and said "you're not getting this kid back", or words to that effect, and then left the apartment. When asked what she then did, Ms. L. said she did nothing. She did not follow him. She did not phone the police. She did not phone Mr. G.'s sister or any other relative. She did nothing to protect her infant son.
- [40] Ms. DeBaie also said that Ms. L. could not come up with any suggestions as to how she could get J. to medical appointments, who would care for him if he was ill or if she was scheduled to work. Ms. L. confirmed that she does not receive much support from her family since she has been on her own.

She appears to have no support system in place, either by way of family, friends or community based services.

- [41] Ms. Jody Hann, the family skills worker, provided a report in which she expressed her observations of Ms. L. as well as her own conclusions. Like many of the other professionals involved with Ms. L. she expressed concern and some frustration with Ms. L.'s unwillingness to ask her supervisor for more flexibility in her work schedule in order to spend more time with J. during the day and to meet with her during regular work hours to learn the skills she would require if J. was returned to her care. More serious concerns expressed by Ms. Hann were Ms. L.'s lack of insight into J.'s particular needs and developmental delays and Ms. L.'s apparent cognitive limitations. At the conclusion of her report she stated:

“... I have great concern regarding S.'s ability to parent J.. To date S. has not demonstrated flexibility in her work schedule to accommodate J.'s extraordinary needs and routine ... I have little confidence in S.'s ability to place J.'s needs ahead of her own and I have not noted progress in this area. It appears S. does not understand nor recognize the seriousness of J.'s condition therefore it would be difficult to ensure that S. would meet J.'s basic needs. I have concern that S. would not follow through with J.'s numerous medical and developmental appointments. The cause of J.'s injury is still unclear. Without addressing this, it would be difficult to say, with any confidence, that a similar incident would not occur again if J. were to be returned to S.'s care.”

- [42] Ms. Hann said that she encouraged Ms. L. to speak with Cheryl Osmond, the family's case worker, regarding what actually happened on the evening of December 24 and particularly how her son incurred his injuries so that the Agency could then determine whether further services should be offered in order to reduce the risk of a reoccurrence. No progress has been made on that issue.
- [43] Ms. Hann did not feel much had been accomplished by Ms. L. during the six months they met. On the positive side, however, Ms. Hann did acknowledge that Ms. L. was able to maintain a clean, neat and well organized apartment, was a hard worker and wanted to be and apparently was quite independent.
- [44] The court also heard evidence from the access facilitators. Their reports detailed their observations of Ms. L. and Mr. G. during their access visits. There did not appear to be any significant problems to report except for the difficulty in arranging the access visits around Ms. L.'s work schedule. Once the terms of Mr. G.'s probation permitted him to be in contact with

Ms. L. she agreed to exercise access with Mr. G.. Mr. G. however stopped attending the access sessions altogether as of the end of November. Ms. L. cancelled five access visits in the month of March, 2005 just prior to the commencement of the trial.

- [45] Dr. John Crocker of the I.W.K. Health Centre provided a report on J.'s medical condition. He confirmed that J. has polycystic kidney disease which is progressive and which will in all probability require J. to have a kidney transplant at some time in the future. His report summarized the function of the kidneys. Besides getting rid of the body's waste products they secrete a hormone which the body relies on to make red blood cells. The kidney also activates vitamin D which is necessary for bone development and growth, otherwise kidney rickets develop with bowed legs or knocked knees. J. is on regular activated vitamin D.
- [46] Dr. Crocker's report also confirmed that J. has a tube with a cap on it in his belly through which he is fed a special diet which has the correct chemical constituents to make him grow and which has a low residual waste product to lower the amount that he has to excrete through the kidney.
- [47] J. is growing and thriving. Presently he is considered to be in stable renal failure and in order to remain stable his nutritional intake as well as the regular and proper administration of his medications is crucial. As stated by Dr. Crocker in his report, "J. now and in the future needs stability of medical care. Pharmacological medicines to be given on a regular schedule and close medical follow-up for each problem and childhood illness as they present."
- [48] When it comes time for J. to have his transplant his physicians will look first to family members - most likely his parents, siblings, aunts, uncles, cousins and even distant cousins. Hopefully from that group they will find a suitable and willing donor. Again Dr. Crocker stated: "As he approaches kidney transplantation, where he will need to be on medicines for the rest of his life, stability of care is one of the best factors for a good transplant organ survival. Obviously, we also want to have the family contact, as he will need their consideration when a kidney donor is sought and this should also be in the minds of his care givers."
- [49] Ms. L. testified. She spoke of her relationship with her mother and brother, neither of whom she sees very often. She does, however, speak with her mother on the phone. Her father is deceased. She spoke of her relationship with Mr. G. which began with them living together for at least two years



- prior to her becoming pregnant. She gave evidence of her employment income and how she is saving to purchase a home. She has her high school diploma and had at one time considered attending community college.
- [50] She works 9:00 a.m. to 5:00 p.m., Monday to Friday at [...].
- [51] Ms. L. said that when J. was finally discharged by the hospital, she had no difficulty caring for him. In addition to his daily care she and Mr. G., or one of them, would return J. to the hospital regularly so that J.'s blood could be tested.
- [52] With respect to the events of December 24 and 25, 2003 she said that when Mr. G. came home from work on the evening of December 24 he and she became involved in a verbal argument over whether she would go with Mr. G. to his sister's home with the baby. She wanted to stay home. She said that Mr. G. then punched her in the head while J. was on her lap, took J. from her and put him into his snowsuit and said "you're not getting this kid back". He then left the apartment. She presumed that he was going to visit his sister. He returned to the apartment approximately thirty minutes later. She said things were then "back to normal" and Mr. G. said that he didn't mean what he said about not returning J. to her. The agency workers arrived later in the evening (approximately 11 p.m.). By that time Mr. G. was not at home.
- [53] Ms. L. says that she and Mr. G. separated as of that evening but they had now worked things out and intend to live together once again.
- [54] When asked how J. incurred the injuries that were evident from the photographs presented into evidence she claimed that one mark on his face was as a result of the tape that held the tube that went into his nose. Another mark was as a result of him scratching himself. A rather significant mark under one eye she said probably resulted when she was bathing his face. She thought that she may have scratched him with her ring.
- [55] When Ms. L. was asked why she had not given this explanation to anyone before she said that she tried but nobody would listen to her. She therefore decided that she would wait and explain it to the court. I don't accept that explanation. She had ample opportunity to explain what had happened to the police, to the workers who arrived at her home on the evening of December 24, or to any of the other professionals and service providers with whom she came in contact during the course of these proceedings including Cheryl Osmond, Linda DeBaie, Jody Hann or Debra Garland. I also do not

accept her explanation for how J. received the mark below his left eye. While it is possible that Mr. G. may have inflicted the injury, it is also possible and, in my view, more likely that Ms. L. inflicted the injury but not in the manner she described. While I do not believe that Ms. L. is by nature abusive or aggressive (she is in fact quite shy for the most part) I note that Ms. Garland in her report stated that Ms. L. “presents as being overly sensitive and irritable and easily becomes very angry with others.”

- [56] It is Ms. L.’s intention to once again live with Mr. G.. While acknowledging that Mr. G. is not perfect she couldn’t think of any changes that he would have to make in order for their relationship to be better. She acknowledged that before December 25, 2003 she and Mr. G. had separated on a number of occasions and that normally he would leave her. She said she wasn’t scared of him but said that on at least one other occasion she called the police to have him removed.
- [57] When asked how she thinks Mr. G. might feel about J. being returned to her care she said that she didn’t know if Mr. G. wanted J. back home but she thought he had no problem with it.
- [58] When asked why she believes Mr. G. stopped seeing J. as of last November she said she didn’t know.

## CONCLUSION

- [59] Ms. L. is 25 years of age. Academically she has achieved Grade 12 but I accept Ms. Garland’s conclusion that her “fund of knowledge” is below average and that she has below average intelligence.
- [60] She is a hard worker. To her credit she has worked full-time for approximately five years and appears to be financially responsible.
- [61] She is able to maintain a neat and clean apartment.
- [62] There is no evidence of any friends, other than Mr. G., and she had little or no family support. She has no support system in place to assist her in any way should J. be returned to her care.
- [63] Although Ms. L. has said over the last sixteen months that she wants J. returned to her care she has done nothing on her own to prepare for that eventuality. While she did cooperate with the services offered by the Minister she does not appear to have learned much from the experience and

- she has not approached any relatives (hers or Mr. G.'s) regarding the possibility of them helping her with J.'s care or even with transportation in the event of an emergency. She has not yet investigated any daycare services to see who, if anyone, could care for J. given his special needs.
- [64] Ms. L. has not seriously discussed with her supervisor if or how her work schedule could be changed so that she could see more of her son or, if he was returned to her care, to accommodate any care arrangements that she might be able to put into place or even to accommodate J.'s medical appointments.
- [65] Although directed by the court to do so, she did not file an affidavit in advance of the trial and has never put into writing a plan of care. The plan which she advanced during her testimony would see her resign from her employment altogether for at least a year and perhaps two, during which she would care for her son full-time and live off her savings. She was not able to tell the court how much she had accumulated by way of savings.
- [66] Her plan lacked substance. It appeared to have been put together without any serious thought and with no consideration for what she would do after her savings were depleted.
- [67] I do not believe that Ms. L. would be happy resigning from her employment.
- [68] I do believe Ms. L. when she says that she plans to resume living with Mr. G.. This is in spite of the fact that he physically assaulted her.
- [69] Ms. L. knows little about Mr. G. and doesn't appear to want to know more about him. She knows nothing of his prior relationships other than he was once married and has a son from that marriage. She knows nothing of his relationship with his son.
- [70] She says she knows nothing of his criminal record. Therefore, presumably she knows nothing about his periods of incarceration. She does not know if he ever assaulted his ex-wife or son. She considers his life before her to be none of her business.
- [71] She does not seem to care that Mr. G. did not accept any of the Agency's services even though they were recommended as a pre-condition to the return of J. to her care. She does not seem to care that he received no counselling for how he treated her in their child's presence or that he refused to accept couple counselling.
- [72] She doesn't know why Mr. G. stopped seeing J. as of last November. She doesn't know and doesn't seem to care how Mr. G. may feel about J. returning to her care even though if J. is returned to her then they will all be

under the same roof and Mr. G. will likely once again be sharing the responsibility for J.'s care.

- [73] J. is a special needs child. When and how he is fed and receives his medications will determine whether his condition remains stable. Although I don't doubt that Ms. L. in her own way loves her son and cares about his medical condition, she is much too nonchalant about how she would meet his needs.
- [74] I agree with counsel for the Minister that Ms. L. fails to appreciate what is required for J.'s proper care, the routine and discipline it would take to meet his needs and ensure his proper development. I am not satisfied that she is prepared or able to put her son's needs before her own.
- [75] I know little about Mr. G. since he chose not to testify and did not put forward a plan of any kind for J.'s care. He has said in argument that he supports Ms. L.'s efforts to have J. returned to her. He has a criminal record which includes acts of violence towards his ex-wife and her son. He assaulted Ms. L. and he refused services offered by the Minister that, among other things, would have been designed to minimize the risk of that happening again.
- [76] I believe that if the respondents continue seeing each other and especially if they cohabit there is a considerable likelihood of domestic violence. That in itself would place J. at significant risk of physical, emotional and psychological harm. Even if the respondents remain apart I believe that J. would be exposed to an unacceptable risk of harm if placed in Ms. L.'s care. I do not believe that Ms. L. is capable of meeting J.'s needs.
- [77] The purpose of the *Children and Family Services Act* is first to protect children from harm, second to promote the integrity of the family and third to assure the best interests of children. In considering what is best for J. I have considered the circumstances listed in subsection 3(2) of the Act and in particular subparagraphs (a), (b), (e), (f), (i) and (l). I have concluded that it would not be in J.'s best interests to be returned to the care of either (or both) of the respondents.
- [78] I therefore order that J. be placed in the permanent care and custody of the Minister of Community Services. In so ordering I have considered the provisions of section 42. I am satisfied that less intrusive alternatives have been attempted and have failed and anything less than permanent care would be inadequate to protect J.. I have also considered the possibility of

- J. living with another relative. He is presently in the care of his paternal aunt and uncle. He is doing well in their care.
- [79] I am also satisfied that the circumstances which have led me to believe that permanent care is the appropriate disposition are not likely to change in the foreseeable future and in any event not before the final disposition as determined by section 45(1).
- [80] Ms. L. has requested, in the alternative, that she be granted an order for access.
- [81] Once permanent care is ordered, the onus switches to the respondents to satisfy the court that an order for access would be appropriate.
- [82] Subsection 47(2) of the Act permits an order for access where there has been an order for permanent care and custody 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 person's access will not impair the child's future opportunities for such placement;
  - (b) the child is at least 12 years of age and wishes to maintain contact with that person;
  - (c) the child has not 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.
- [83] The respondents acknowledge that 47(2)(b) and (c) do not apply.
- [84] On behalf of Ms. L. it has been argued that although it is the preference of J.'s aunt and uncle to adopt him his placement would not be jeopardized by an order for access. It has also been argued that the child's future need for a kidney transplant is a "special circumstance" in that it is desirable to maintain maximum contact between the child and his parents. The implication being that if that relationship is severed the respondents may not be available as related donors in the future.
- [85] It is the intention of the child's aunt and uncle to apply for adoption if permanent care is granted. They have experience caring for him and he has done well since being in their care. They seek the security and permanence offered by an adoption order.
- [86] Having concluded that permanent care is in the best interests of the child it is for the respondents to convince the court that their continued involvement in the child's life through access is also in his best interests. Unless one of

the exceptions listed in subsection 47(2) applies the court shall not make an order for access.

- [87] In this case a permanent placement by the child with his aunt and uncle is planned, adoption is intended, and an adoption order would prevent that from happening.
- [88] I have not been satisfied that subsections 47(2)(a) or (d) apply. It has not been established that either of the respondents are suitable donors for the child nor have either of the respondents indicated that they would be willing to be donors. Further, neither have said that they would refuse to make themselves available as donors if access was not granted. I am not prepared to grant access solely because one or both of the respondents may be suitable donors and may make themselves available only if access is granted.
- [89] In all of the circumstances of this case I am unable to conclude that access would be in the child's best interests and therefore access is not granted.
- [90] Permanent care is granted to the Minister. There will be no provision in the order for access.

---

Dellapinna J