S.C.A. No. 02735

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Hallett, Chipman and Roscoe, JJ.A.
Cite as: D.R. v. Family and Children's Services of Kings County, 1992 NSCA 37

BETWEEN:

D. R. Appellant	Andrew Pavey for the Appellant
- and -	Donald B. MacMillan and Terrance D. Potter for the Respondent, Family and Children's Services of Kings County
FAMILY AND CHILDREN'S SERVICES OF KINGS COUNTY, RANDI ROBICHAUD (Guardian-Ad-Litem for the child, D. J. R., JR.), C. R., D. G. and G. G. Respondents	Jean M. Dewolfe for the Respondent, Randi Robichaud
- and -	Lynn M. Connors for the Respondent, C. R.
A.C. and B.C. Intervenors	D. G. and G. G. In Person
	Gordon R. Kelly for the Intervenors, A.C. and B.C.
	Appeal Heard: December 8, 1992
	Judgment Delivered: December 29, 1992

Editorial Notice

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

THE COURT: The appeal is dismissed without costs as per reasons for judgment of Chipman, J.A.; Hallett and Roscoe, JJ.A., concurring.

<u>CHIPMAN, J.A.</u>:

This is an appeal by the natural father of a male child, born February [...], 1992, from a disposition in the Family Court granting an order for permanent care and custody of the child to the respondent, Family and Children's Services of Kings County (the agency).

The child was taken into care by the agency pursuant to s. 33 of the **Children and Family Services Act**, 1990, c. 5, on March 2, 1992. At that time the appellant and his wife, another respondent herein, were residing together but they have since separated. A finding that the child was in need of protective services was made by the Family Court pursuant to s. 22(2) of the **Act** on May 21, 1992. None of the parties questions that finding. The disposition hearing was held pursuant to s. 41(1) of the **Act** on August 4, 5 and 7 and the decision under appeal herein was rendered on September 3, 1992. In addition to the mother and the agency, a **guardian ad litem** for the child appointed by the Family Court, and a couple who, with the appellant's approval, wish to adopt the child (the proposed adoptive parents) are also respondents to this appeal. Another couple who have adopted the child's older sister made application to this court and have been given intervenor status in this appeal (the intervenors).

The agency made an application at the hearing of this appeal to admit fresh evidence. After hearing counsel, the court dismissed the application.

The decision of the Family Court is challenged by the appellant and the respondents, the natural mother, the proposed adoptive parents, and the intervenors. There are four issues.

1. Whether throughout the proceedings a reasonable apprehension of bias on the part of the trial judge was raised.
2. Whether the trial judge erred in law by applying wrong principles, particularly in carrying out the duties imposed on the court by s. 41(3) and s. 42 of the **Act**.
3. Whether the trial judge erred in making findings of fact that were palpably wrong.
4. Whether the intervenors had such an interest in the outcome of the proceedings as to be entitled to notice thereof and the right to participate therein.

1. <u>BIAS</u>:

It is submitted that the trial judge demonstrated, throughout the court process and the

decision, tendencies which in totality raised a reasonable apprehension of bias.

(a) Issue was taken with the fact that the trial judge had, approximately two years earlier, presided over the disposition proceedings concerning the sister of the child at issue. Reference was made to **Children's Aid Society of Halifax v. M.B. and R.W.** (1988), 85 N.S.R. (2d) 34, where a Family Court judge who previously presided over the disposition of another child of the same parents declined to preside over proceedings involving a second child. The agency in both applications was the same. The circumstances in that case differ vastly from those in the case before us. There the parents, fearing bias, applied to the judge at the outset of the proceedings to disqualify himself. No such application was made here, and the bias issue was not even raised until the decision was appealed to this court. I agree that the judge in **M.B. and R.W., supra**, was correct in proceeding as he did, since to have heard the matter would, in the circumstances, have reasonably exceeded his comfort level.

On the other hand, there can be no hard and fast rule against a Family Court judge exercising jurisdiction under the **Act** merely because the judge has on previous occasions addressed cases involving other children of the same parent or parents. In **M.B. and R.W., supra**, the judge pointed out that he did not believe that this particular decision "should set a precedent for the future". Of necessity, Family Court judges will encounter cases involving families previously before the court. Each case will have to turn on its own circumstances and will be determined by the judge's view of the situation having regard to the overriding principle that the test of bias is one of perception - what a reasonable person would think in the circumstances.

(b) Also related to the previous proceedings was a comment in the trial judge's decision respecting the natural mother's ability to locate the proposed adoptive parents. It was said of her that she was capable of making phone calls as "the judge first presiding on the application for the first child found out early one morning". The material before us dealing with the applications and dispositions respecting the first child does not assist in determining whether this call was made to the trial judge or another judge of the Family Court involved in the proceedings. The behaviour referred to in the comment was consistent with the evidence. Both the natural parents had

demonstrated their persistence in not facing up to the result of the previous disposition hearing by posting in public places a number of handbills protesting it. There were a number of very disturbing incidents involving the mother to which the trial judge referred. While it is unfortunate that a reference was made to something occurring outside the record, the abundance of evidence about the mother was such that a reasonable person would conclude that whatever prompted the remark could have had no effect on the conclusions reached by the court.

(c) The principal objection centres around the appointment of Randi Robichaud as **guardian ad litem** of the subject child, the fact that she was permitted to give expert testimony as a psychiatric social worker and a communication between the court and Dr. Rhodri Evans, a psychiatrist, called by counsel acting for Robichaud.

Randi Robichaud and Dr. Evans were agreed on two critical points:

(i) That the intervenors, by reason of their age (their mid-fifties) were not good candidates for adopting an infant.

(ii) That the plan put forth by the proposed adoptive parents and supported by the natural parents was questionable by reason of the fact that the proposed adoptive parents' whereabouts were known to the natural parents. The child's best interests would be impaired by the probable persistent contact that the natural parents would likely pursue in the future. Absolutely no contact between the biological parents and the child during the first few years of the adoption was advocated by these experts. Another problem with this plan was that the proposed adoptive parents had not been screened for status as an adoption placement home - a process that would involve a time delay not in the best interests of the child.

The trial judge, in determining that the agency should have permanent care and custody rather than making a custodial disposition in favour of the proposed adoptive parents, was clearly influenced by their testimony. The court expressed the concern that the latter alternative would expose the child's formative years to the natural parents' wants and interference. Anonymity in the adoptive process was clearly to be preferred.

Under s. 37(3) of the **Children and Family Services Act**, the court had power on its

own motion to order a **guardian ad litem** to be appointed for the child. At a pre-hearing conference on July 20, 1992, at which all counsel attended, the judge stated an intention to contact Dr. Evans to request him to act as guardian. Dr. Evans declined to act, but recommended Randi Robichaud. The judge contacted her and she agreed to act. The judge had counsel for one of the parties contact Ms. Jean Dewolfe to act as counsel for the guardian. Another pre-trial conference was held on July 29, 1992, at which were present counsel for each of the natural parents, the proposed adoptive parents, the agency and the guardian. The procedure to be followed at the disposition hearing was discussed and the reports of Dr. Evans and Ms. Robichaud were shared among counsel. No objection was raised by counsel at this point to the steps that had been taken, although one or more counsel indicated to us that they were not aware at the pre-trial conference that the contact with the proposed guardian would be made by the court personally.

During the course of his testimony, Dr. Evans was questioned about the information to which he referred in preparing his report. He answered:

> "While I discussed the matters at some length with Ms. Robichaud, and I incidentally also spoke very briefly with (the trial judge)."

Following Dr. Evans' testimony, the court made the following comments on the record:

> "I am sorry now that Dr. Evans has left, I made a note to myself and I want to simply put it on record because it certainly did sound to someone else other than involved in the case, as much as the parties present were, he indicated he had a brief discussion with myself. I would like to indicate for the record that at this point I do not have a supervisor who was actively involved. It was a motion by the court to find a guardian **ad litem**. The court moved on its own motion after hearing nothing further, and no objections thereto and part of the job was to find someone. I first approached, as counsel is aware, Dr. Evans, to ask him whether or not he would act in that capacity. He indeed suggested that he didn't think that his time, or whatever, would allow him to do so, and that Randi Robichaud was a name suggested, and the court took a further follow up with that.
>
> As a result, I was doing the calling because there was no one else to rely on, and I can say that on the record."

Counsel did not take objection to these comments at the time and at the hearing of this appeal no challenge was made to their accuracy. There was, however, an objection at trial to

Ms. Robichaud giving expert evidence as a psychiatric social worker. Counsel for the natural mother submitted that Ms. Robichaud would be giving evidence in a dual capacity, that is as **guardian ad litem** and as an expert in psychiatric social work. In ruling that she could give such expert evidence, the trial judge pointed out that one could have a guardian who is an expert and that was one reason why the court appointed someone other than, say, a grandmother. Randi Robichaud is in private practice as a social worker. She has very impressive credentials. She had extensive experience with adoptions as they progressed from birth, and she dealt with open adoptions and confidential ones. She had encountered adoption breakdowns. She was familiar with the careful screening process of proposed adoptive parents, which although no guarantee of success, afforded substantial protection against unsatisfactory adoptions. She had experience in judging the fitness of parents to carry out their roles as such. She had testified in proceedings in the Family Court on many occasions on the subject of child welfare. The objections of counsel were noted and the witness was permitted to give the expert testimony, the most important aspects of which I have already touched upon.

Another objection, raised on appeal but not at trial, was that Randi Robichaud had once been employed by the agency as a family service protection worker. This employment ceased in 1985. I dismiss this at once because I am unable to infer bias from the mere fact that the agency had once been her employer.

It is submitted that a reasonable person would be concerned that the judge personally sought out the **guardian ad litem** and, in the process, spoke out of court to a witness who gave vital testimony in support of that guardian's position and further permitted that guardian to give expert testimony in support of that position. With respect, that is not how I think a reasonable person would characterize the situation. It is clear that at the time the judge made the contact with these two people, they had no position with respect to the issues in this case. The contact with the witness (Dr. Evans) was only for the purpose of asking him to act as guardian and it ended upon his refusal. The judge had no idea then that he would be a witness. He was subsequently recruited by Randi Robichaud. The contact with Robichaud was solely to see if she would act as guardian. Counsel knew that a guardian would be sought out at the instance of the court, even if they did not know the

court would make the contact personally. The court gave an explanation on the record respecting the absence of appropriate personnel other than the judge personally to approach these experts. There is nothing to suggest that the judge had any particular preference as to the position the guardian would take relating to the parties other than the child. Apart from initial contact to see if they were willing to act, no other contact took place. It might have been preferable to have had the contact through an intermediary, but as the trial judge pointed out:

"There was no one else to rely on."

In the absence of evidence to the contrary, that statement is accepted. Obviously the trial judge was attempting to ensure that expertise was available to the court on behalf of the child whose interests are paramount, as mandated by the **Act**. The **Act** imposes a time constraint upon the Family Court. The disposition hearing had to be held not later than 90 days after the finding of need of protection - May 21, 1992. See s.41(1) of the **Act**.

There can be no objection to a **guardian ad litem**, if otherwise qualified, to giving expert evidence in his or her field. The weight to be attached to it may be affected by any interest the expert might have. Here, the mere fact that the expert had a duty as **guardian ad litem** to act in the best interests of the child would not preclude the expert opinion being given. Indeed, other than saying that there was a dual role as guardian and as expert, the objections by counsel simply failed to advance a valid reason for the expert testimony not being permitted. There was never a suggestion that the objection rested on the fact that the court selected the guardian. Ms. Robichaud's qualifications were not challenged. No better reason for her being prevented from testifying was offered in argument before us.

Another point raised need only be mentioned to demonstrate its lack of merit. When Dr. Evans was testifying, he was cross-examined about some of his source material. He was unable to recall it as he testified. He subsequently, during the course of the trial, wrote an unsolicited letter to the trial judge outlining this source material. The trial judge distributed this to all counsel.

The critical evidence given by these two expert witnesses was not contradicted by other expert testimony. It was accepted by the trial judge. I am unable to accept that any reasonable

person would infer bias from all the circumstances.

Viewed individually none of these objections has merit, and viewed in totality they fare no better. They would fail to raise in the mind of a reasonable person any apprehension respecting the manner in which this trial was conducted. I would reject this ground of appeal.

Counsel for the intervenors raised the point that no formal order was taken out appointing Ms. Robichaud or the child as a party. While it is clear that the Family Court Rules respecting the appointment of a **guardian ad litem** were not fully complied with, no objection was taken until after the decision of the Family Court judge. No application was made to set aside the proceedings. I would apply Rule 2.01 of the Rules of the Family Court and treat this as an irregularity which does not nullify the proceedings.

2. THE COURT'S DUTY UNDER S. 41(3) AND S. 42 OF THE ACT:

The appellants and the intervenors submit that the court erred in finding that the agency submitted a plan in writing that met the criteria of s. 41(3) of the **Act**. That section provides:

> "41(3) The court shall, before making a disposition order, obtain and consider a plan for the child's care, prepared in writing by the agency and including
>
> (a) a description of the services to be provided to remedy the condition or situation on the basis of which the child was found in need of protective services;
>
> (b) a statement of the criteria by which the agency will determine when its care and custody or supervision is no longer required;
>
> (c) an estimate of the time required to achieve the purpose of the agency's intervention;
>
> (d) where the agency proposes to remove the child from the care of a parent or guardian,
>
> (i) an explanation of why the child cannot be adequately protected while in the care of the parent or guardian, and a description of any past efforts to do so, and
>
> (ii) a statement of what efforts, if any, are planned to maintain the

> child's contact with the parent or guardian; and
>
> (e) where the agency proposes to remove the child permanently from the care or custody of the parent or guardian, a description of the arrangements made or being made for the child's long-term stable placement."

These requirements offer protection against the intrusive potential of an agency acting as an arm of the state. The safeguarding of the well-being of the family against unjustified interference is recognized in the very first paragraph of the preamble to the **Act**. It cannot, of course, override the best interests of the child which are paramount and must, in the end, prevail where there is conflict. The intention of the legislature here is obviously to exhaust all reasonable alternatives before sanctioning permanent removal of a child from his or her family or guardian.

The agency's written plan did, in my opinion, include in substance all of the items enumerated in s. 41(3). The plan did not set out the headings or slavishly track the language of the **Act**. What it did do was set out the essential facts. The agency had attempted to provide a number of services to assist the parents, all to no avail. The parents were obviously unable to provide satisfactory parenting. The child had been placed in a foster home. Various options were open to the agency, including that it had a long waiting list of childless couples who were eligible to adopt the child. The agency saw no problem in finding a suitable couple should this option be considered. On the subject of access by the natural parents, the writer of the plan was non-committal and stated that this was a matter better left to the court's discretion. While the written plan made reference to the intervenors and stated they showed extreme interest in adopting the child, no further opinion was expressed with respect to them as such. However, a few days before the trial, counsel for the agency sent a FAX to all counsel stating that the agency's plan was modified and they would be seeking placement of the child with a couple on its adoption list. This shift in direction resulted from the comments contained in the reports of Randi Robichaud and Dr. Evans setting out concerns respecting the age of the intervenors.

Section 42(1) and (2) of the **Act** provide:

"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.

(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."

Counsel referred to the unreported decision of **Children's Aid Society of Halifax v. Y.L. and R.W.** (1991), N.S.J. #574 where a judge of the Family Court was reported as saying the following in considering the adequacy of a plan filed by an agency:

"The mandatory factors to be considered total 11 under sections 42(2) and 13 (the least intrusive test service), 14 under sections 42(1) and 3(2) (the factors applicable to the best interests of the child), at least 11 factors provided to remedy the condition or situation of the child,

> the possibility of placing the child with a member of the child's community as pursuant to section 42(3) and the likelihood of changing circumstances within a reasonably foreseeable time as per section 42(4)."

I recognize that the **Act** is characterized by long lists of factors to be taken into account at every stage of the proceedings. Many of them have no relevance to the case at hand, and the trial judge can hardly be faulted for failing in all cases to verbalize the various factors in their entirety in reaching a conclusion. It is the substance that counts, and as long as the agency plan and the Family Court judge address and evaluate the applicable factors in s. 41(3), as they apply to the circumstances of the case, that section of the **Act** has been complied with. The many other factors directed for consideration in various parts of the **Act** (eg. s. 3(2) and 13(2) - a total of 25) need not all be spelled out. Only those relevant to the case need be specifically addressed by the court in reviewing the plan and arriving at the decision. Central to all of the concerns is the paramount consideration, which is the best interests of the child (s. 2(2)). I am, therefore, somewhat concerned about the following passage quoted by counsel from p. 61 of the decision in **Y.L. and R.W., supra**:

> "Section 41(3) requires the court to consider a plan for the child's care in writing put forward by the agency. There is no requirement for the parent or guardian to put a plan before the court. It is a requirement for the court to compare the merits of the agency's plan with the merits of the child residing with its parents as per section 3(2)(i). It would be my view, because of a finding of need for protective services which necessarily requires the court to decide what protective services are needed and where and how these services may be properly provided, that for the court to make an informed disposition, the parent(s) or guardian must put a plan for the care of the child before the court. The best interests of the child rule requires all sides to bring forward their plan for there to be a proper disposition. <u>The construction of the **Act** leads to the conclusion that if the court finds the agency's plan wanting in one of the multitude of areas, the child is to be returned to the parent(s) or guardian even though the need for protective services exists</u>."

While the agency's plan must comply with s. 41(3), the emphasis must be on substance rather than on form. Moreover, even if a plan were found wanting, the Family Court judge must exercise other available options than returning the child to the parents or guardian, if that course is not in the best interests of the child. That is the paramount consideration in <u>all</u> proceedings and matters pursuant to the **Act**.

Counsel raised the point before us that the plan did not comply fully in form with the requirements of Rule 21.12(1) of the Family Court Rules. No objection on this ground was made when the plan was entered on the record. I would apply Rule 2.01 of the Family Court Rules to dispose of this objection.

I am satisfied that the agency's plan in the instant case did comply with s. 41(3) and that the amendment made by the FAX from counsel was a reasonable response to an opinion from experts raising a very valid consideration. This opinion was uncontradicted and accepted by the court. I find no merit in the submission that the court did not properly consider a plan for the child's care prepared by the agency in compliance with s. 41(3) of the **Act**. It was not necessary here for the court to make an analysis of all of the factors mentioned in the above quotation as urged by counsel for the natural mother. This argument was advanced by such counsel to support the submission that the agency should have placed the child with the proposed adoptive parents - the plan favoured by the natural parents. The abundance of material on the record and the court's unequivocal findings that this was not in the best interests of the child is sufficient to deal with this submission.

Counsel for the natural father submitted that the court erred in failing to give proper meaning to the best interest test by consideration of the circumstances set out in s. 3(2) of the **Act** and of the import of the **Act** as made clear by the preamble and the other relevant provisions in the **Act**. It is said that the trial judge did not apply the best interest standard in the context of the **Act** overall. It was submitted that the trial judge rested the ultimate disposition on too narrow an application of the principle that the paramount consideration is the best interests of the child. I cannot agree. The many factors to be taken into account under the **Act** which are pointed to in support of the plan of the natural father simply do not, in the face of the evidence on the record, support the submission that the trial judge should have adopted the plan of the natural parents to place the child with the proposed adoptive parents. It is necessary to look at the disposition in the light of the evidence and of all of the considerations in the **Act** to see if the judge has overlooked any governing principle or applied a wrong one. I find no evidence of such errors in this disposition. On the contrary, the evidence of all of the witnesses and particularly that of Robichaud and Evans

makes a compelling case in support of the judge's reasons for doing exactly what was done.

It is also submitted that the trial judge erred in carrying out the duty imposed by s. 42(3) of the **Act** which provides:

> "42(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."

The Family Court judge heard evidence from the agency that there were no relatives of the child who were able or willing to care for him properly. This was a given and it was not necessary for the judge to specifically flag this section and recite this position which was so clearly established.

The intervenors contend that since their adopted child is a relative of the child, the trial judge should have considered whether it was possible to place the child with them. I accept the argument of counsel for the guardian that this section is inapplicable to placement in a home with a sibling of a child who is also a minor. The section plainly contemplates placement with a relative who would assume the role of caretaker.

3. <u>WHETHER THERE WERE PALPABLY WRONG FINDINGS</u>:

Randi Robichaud met with the natural father, the proposed adoptive parents, the child, the representatives of the agency, the foster mother having custody of the child at the time, the intervenors and all counsel in the case. She spent considerable time with each. She reviewed the extensive written material in the possession of the agency. In the beginning she had to consider two options for the child: (a) placement with the proposed adoptive parents with a view to ultimate adoption should they meet the screening process of an agency; or (b) placement in the permanent care and custody of the agency with a view to adoption by the intervenors.

Ms. Robichaud determined that the natural parents should not have access. The father had told her that in choosing the proposed adoptive parents as central to his plan, he did so because

he wanted contact with his child. This was not desirable. Randi Robichaud did not object to so-called "open adoptions" in principle. In fact, she believed in them, but each case had to be critically analyzed, and here it was contraindicated. The evidence respecting the natural parents strongly supported this conclusion. She recommended no contact in the first five years of the adoption. Delay was another problem with the proposed adoptive parents as they would have to be screened by an agency. This baby needed a family right away. Randi Robichaud said, "I don't want delays".

The problem with the intervenors was their age. Any advantage of placing the child with a natural sibling was greatly lessened where, as here, there was no bonding between them to preserve, and it was more than offset by the age factor.

Randi Robichaud saw her role as speaking for the child. The child's best interests called for an immediate adoption. A reading of her evidence makes clear that she must have been an impressive witness. She showed a grasp of the entire situation, recognized and balanced all interests and articulated her conclusions clearly. Searching cross-examination revealed no weaknesses. When her thinking was tested, it only served to strengthen one's confidence in her conclusions. While we have not had the advantage of seeing and hearing her testify, her evidence appears on the printed page to be impressive. It is not surprising that the trial judge accepted it.

In advocating an early adoption, Randi Robichaud pointed out that infants form selective attachments to persons around the second half of the first year of life. The risk of moving the child becomes greater with delay. It is desirable to avoid a child having many caregivers.

Dr. Evans was a psychiatrist, specializing in child psychiatry since 1986. He had appeared in Family Court on numerous occasions as an expert in matters relating to child custody and access and had appeared in the County Court in criminal matters for both defence and the prosecution. In preparation for the case, he spoke to Randi Robichaud and reviewed a report respecting the natural parents prepared by Dr. Brian Garvey, a psychiatrist. That report emphasized in the strongest terms the unfitness of the natural parents to parent the child. Dr. Evans conferred with Dr. Gary Mulhall, a psychiatrist who had seen the natural mother and concluded that she had a personality disorder, had difficulty in getting along with other people and in acting appropriately.

Dr. Evans shared Randi Robichaud's opinion respecting the reservations to be had with respect to both the intervenors and the proposed adoptive parents. He, too, was emphatic that an early adoption in an agency approved home was best for this baby. He, too, was tested at length on cross-examination, the overall effect of which was to increase the reader's confidence in his opinions.

After the expert testimony had made clear that contact with the child's parents should not take place for the first five years, the proposed adoptive parents and the natural parents through their counsel changed their position to support a plan whereby the child would not be contacted by the natural parents for the first five years. They would be willing to move and change their telephone numbers if necessary in order to preserve anonymity. They would offer regular updates and photographs for the natural parents. They were agreeable to physical contact by the natural parents to the child only in later years if, after seeking professional advice, it was appropriate for the child. Randi Robichaud acknowledged that while it had appeared that they had changed their positions in terms of access, she had always been worried that they were naive about what they were getting into regarding access. If adoptive parents sometime down the road decided that it was in their baby's best interest to have contact with the birth parents, that would be fine, but if done it should be done out of interest to the baby, and not because it was a decision they had to take to get the baby.

The court reviewed the unanimous professional evidence that (a) the child should have no physical contact with the natural parents for the next five years, as such would be of no benefit to him; (b) the child should be exposed to the least number of caregivers; (c) the child's attachment stage is such that he should be placed in a home for adoption within the next two months, given that one month had passed since Dr. Evans had testified. The trial judge referred to a number of considerations mandated by the **Act**, including the best interests of the child, the matters to be examined, weighed and balanced under s. 3(2), recital 9 of the **Act**, s. 3(2)(k), and the least intrusive disposition consideration under s. 42(3).

The trial judge referred to the change in approach by the natural father and the proposed adoptive parents with respect to the question of access and expressed difficulty accepting

that the natural father would not expect to demand more of the proposed adoptive parents in the next five years. The potential for turmoil imposed upon the child by the natural father was high. The court pointed out that the proposed adoptive parents "have yet to say no to what Dr. Brian Garvey determines to be two irrational and unstable personalties, that is to say the natural parents". The natural parents were of borderline intelligence, both from severely disruptive and damaging backgrounds and both with severe personality disorders approaching major psychiatric illnesses. The father had in the past presented to Dr. Garvey as angry, unreasonable and not capable of rational discussion given his rigidity of thinking and irrationality and his strong paranoid streak. The natural mother had in the past presented as unstable, moody, unpredictable and capable of being irrational towards people who threatened her. It was necessary prior to trial to appoint a **guardian ad litem** on her behalf. She was unable to give evidence, the **guardian ad litem** testifying at the trial on her behalf. The judge reviewed the evidence respecting the natural parents at great length and finally came to a number of conclusions about them, which not only demonstrated their unfitness as parents, but also the risk that in placing the child with the proposed adoptive parents his formative years would be exposed to the natural parents' wants and assertion of legal rights. The child would not, under the plan of the proposed adoptive parents, be afforded the immediate protection of s. 48(4) of the **Act**. The trial judge concluded:

> "It cannot be in the child's best interest to have his adoptive parents looking over their shoulders to determine whether the child's natural parents intend to vigorously pursue access to their son. An anonymous placement is in the best interest of the child if it prevents even one unfortunate incident in the life of the child. I should provide the child with a trouble free, loving, nurturing environment. He should not be compromised in any way. I should not have to be entertaining any thought of having to rely upon this court's powers to impose conditions under the **Act** or upon other court's powers at any point in the child's life."

The court concluded that in compliance with s. 41(5) the agency's plan should be applied for the long term security and development of the child. He could be placed in one of the 80 anonymous approved adoptive homes in the province. He should be placed in the agency's permanent care and custody pursuant to s. 42(1)(f) of the **Act**.

Overall, the findings of fact by the trial judge were ones that, on the evidence, were reasonable. I emphasize the unique advantage possessed by the trial judge in carrying out the duties mandated by the **Act**. The Family Court judges presiding at trial are best suited to strike the delicate balance between competing claims to the best interests of the child. In the absence of error in law or clearly wrong findings of fact, this Court is neither willing nor able to interfere. See **Nova Scotia (Minister of Community Services) v. S.M.S. et al.** (1992), 12 N.S.R. (2d) 258.

4. INTEREST OF THE INTERVENORS IN THE PROCEEDINGS:

The intervenors, in their mid-fifties, are a couple with six grown children. When the older sister was placed with them in 1990, the agency obviously thought them to be fit persons. The agency fully supported their adoption of her in 1992. The agency's original plan referred to them as possible candidates for adoption in these words:

> "The family who adopted [the sister] are aware that a second child has been born and has extreme interest in this second child."

The intervenors were interviewed by officials of the agency shortly before the disposition hearing. They indicated their high level of interest in adopting the child and expressed their view that it was important to have the sister and brother grow up in the same home and get to know one another. The agency noted that although both parents appeared to be in good health, they had six grown children who could be called upon to care for the children in the event anything should happen to them. There is no information documented about the suitability of any of these six children. The agency's records indicate that the intervenors were prepared to wait and were advised that the court would make the final determination with respect to the placement of the child.

Subsequently, the intervenors were interviewed by Randi Robichaud whose report expressed this reservation respecting them.

> "The adoptive family being suggested by Family and Children Services of Kings County is loving and solid. However, the adoptive mother and father are 55 and 57 respectively and in my opinion not good candidates for adopting an infant. When the infant is a 13 year old child, these parents will be 68 and 70 years old respectively. The likelihood that one or both parents would become incapacitated or deceased before the child reaches adulthood is quite real when placed with parents of this age.

> This is not a special needs child, there is no psychological attachment with his biological sister to preserve, he has no diagnosed physical or mental handicaps to date, and is of an easy-going temperament. Certainly, given all of the above, finding an appropriate adoption placement should not prove difficult."

Randi Robichaud followed up on these views in her testimony. Her argument was convincing:

> " . . . I thought his need for parents that would be there throughout his life was more important than putting him with a full sibling [with no] psychological relationship to preserve."

The intervenors complained that they were never advised of the existence of Randi Robichaud's report, not provided with a copy thereof, nor advised that as a result the agency had also formed reservations about them being suited to adopt the child. They say that they were simply advised by the agency that they would hear in due course. They heard nothing until September 3 when the trial judge's decision was released. The agency then advised them that the child would not be placed with them and were told that Randi Robichaud had expressed the opinion that they were too old to adopt him.

The intervenors subsequently contacted officials at the agency but were unsuccessful in convincing it to place the child with them.

The intervenors say that they were denied natural justice in that they were lead to think that they were serious candidates, if not the leading candidates for the adoption, and that in such circumstances there was a duty on the agency to notify them of the position taken by Robichaud and Evans and of the agency's acceptance of that position. Having been in contact with the agency and having participated in the home study conducted by Randi Robichaud at the agency's instance, they say they had such an interest in the proceedings as to necessitate the provision of adequate notice. They maintained they had a substantial interest in the outcome of the proceedings, which interest was or should be known to the agency and the court.

The intervenors' case is based solely on the fact that they are the adoptive parents of a sibling of the child. Reference was made to s. 20(b) of the **Act** which sets out placement considerations to be entertained in cases of temporary care agreements and special needs agreements.

In such cases the minister or the agency should take into account the desirability of keeping brothers and sisters in the same family unit. The same consideration is to be entertained at an interim hearing pursuant to s. 39(1) to determine whether a child is in need of protective services. It is also a consideration when the court makes an order for temporary care and custody pursuant to clauses (d) or (e) of s. 42(1). It is not surprising to find such considerations mandated. In many such instances, the agency or the court is dealing with existing family units.

In the case of a disposition order under s. 42 - the case here - the placement considerations are set out in s. 42(3) which I have already discussed. No specific statement is made of a desirability of keeping brothers and sisters in the same family unit. Even if there were, such would have much less weight here than in most cases because the child and his sister do not know each other and have never been bonded to each other.

A review of the **Act** does not reveal an intention on the part of the legislature to confer a status on persons who have adopted the sibling of a child to have standing at a disposition hearing pursuant to s. 42 of the **Act**. If the disposition made pursuant thereto is that the child shall be placed in the permanent care and custody of the agency, the agency becomes 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 (s. 47(1)). Only after the agency places a child for adoption pursuant to s. 67 - 87 of the **Act** do the adoptive parents acquire any rights respecting the child. To hold otherwise would be to risk rendering disposition hearings utterly unmanageable with every would-be adoptive parent intervening in the proceedings in the hope that the Family Court judge would consider them most suited to adopt the child. With respect, the selection of the most suitable adoptive parents is the function of the agency under the **Act** and not that of the court.

I reject the contention of the intervenors that they had a legal interest in the outcome of the disposition proceedings. They were not entitled to notice thereof or to participate therein.

DISPOSITION:

I would dismiss the appeal without costs.

J.A.

Concurred in:

Hallett, J.A.

Roscoe, J.A.