2006 NSFC 41
FNGCFSA 41987

IN THE FAMILY COURT FOR THE PROVINCE OF NOVA SCOTIA
Cite as: Children's Aid Society of Pictou County v. S.B., 2006 NSFC 41
BETWEEN:

THE CHILDREN'S AID SOCIETY OF PICTOU COUNTY
Applicant

- and -

S.B. and J.C.
Respondents

DECISION

Editorial Notice

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

HEARD BEFORE THE HONOURABLE JUDGE JAMES C. WILSON, Judge of the Family Court for the Province of Nova Scotia

HELD: Pictou, Nova Scotia, August 24, 25, 31,
September 29, October 20, October 26, 2006

FINAL WRITTEN SUBMISSIONS RECEIVED:
Applicant - November 14h, 2006
Respondent - November 28th, 2006

DECISION DATE: November 30th, 2006

COUNSEL: Leisa MacIntosh for the Agency

Coline Morrow for J. C.

S.B., Self-represented

[1] The applicant Agency seeks permanent care of T. H. B., born August *, 2005, without access to the respondents. The child was taken into care September 23, 2005 and has remained in care to date. The respondents have continued to exercise regular access. The respondent S.B. dismissed her counsel before the disposition hearing began and is self-represented. The respondent J.C. was represented by counsel and both respondents presented a joint plan for care of the child.

BACKGROUND:

[2] On or about September 21st, 2005 the Agency received a referral from Laura (Green) Brady, a dietician at the Aberdeen Hospital. The respondent S.B. had been referred to Ms. Brady about the 27th week of S.B.'s pregnancy because she was experiencing nausea and lack of weight gain. Subsequent to T. G. B.'s birth and discharge from the hospital, there were concerns about follow up care involving nutrition for both S.B. and the baby. A referral was made to public health. As a result of a chance meeting on the street between Ms. Brady and S.B.,

Ms. Brady believed the respondent may be feeding the baby solids, something which is not advisable because of low nutritional value within the first four to six months of birth. Ms. Brady attempted to follow up with a phone call to the respondent. During this phone call, when Ms. Brady overheard an argument between the respondents, Ms. Brady suggested S.B. come to the hospital for assistance. When S.B. failed to turn up, Ms. Brady felt obliged to notify the Children's Aid Society of her concerns.

[3] The applicant Agency followed up the referral by consulting Dr. Melanie McCara, the baby's family doctor. The doctor advised the family was not well known to Dr. McCara but she did have "concerns" and had sought assurance from the public health nurse that somebody was watching the parenting in the home. The Agency attempted a home visit but no one was present. The respondent's neighbour reported concern about domestic violence (verbal). The Agency also contacted the public health nurse who reported no concerns regarding the child, but noted S.B. was distrustful of the system and had indicated a preference for meeting outside the home at Kids First.

[4] As a result of this information the Agency attended the respondents'

residence on September 23rd and took the child into care, alleging that both parents appeared to have limited intellectual functioning and parenting skills, had demonstrated difficulty in grasping basic parenting concepts related to infant nutrition and did not appear to be a attuned to the infant's emotional needs. The Agency was concerned about lack of community or extended family support, the respondents arguing in the presence of the child, and the possible refusal of support services.

[5] S. B. is 22 years of age. She grew up in * and left home about 18. She has been in a relationship with J.C. for over two years. She completed an adjusted High School program and had some employment before meeting J.C.. S.B. has cognitive limitations and was picked on and teased in High School. She has been referred a number of times over the years to pediatricians and mental health specialists. Her circumstances have caused her problems with anxiety and impulse control.

[6] J.C. is 39 years of age. He struggled in school, leaving in grade 9. He receives a disability pension. J.C. has been in at least three previous relationships and has four or five children from those relationships. J.C.'s relationships with his

children appears generally positive. Both A.C., a university student, and J.C. a grade 12 student testified on J.C.'s behalf. Unfortunately J.C.'s relationships with his former partners have resulted in problems for him, including a number of criminal charges and a period of incarceration. J.C. had used marijuana in the past. There is no evidence that alcohol or other substances are a current problem of either J.C. or S.B..

[7] Since T. G. B. came into care, the Agency has provided the respondents with a number of services including regular supervised access twice per week, services of a family support worker, parental capacity assessment, group sessions with family services, public health and Kids First.

[8] Dr. Susan Hastey conducted the parental capacity assessment. Based on her education and work experience and having been previously qualified in trial courts of this Province to offer opinion evidence in the area of parental capacity she was similarly qualified in this case. At the outset of her evidence she made clear that she was not a registered psychologist nor was she offering a psychological opinion. Dr. Hastey's assessment included 10 interviews, assessments and observations between November 2005 and February 2006 as well

as her review of case notes, access workers notes, and public health records. Dr. Hastey noted that S.B. had a history of anxiety, impulse control and relationship problems. She reviewed the reports of previous professionals at the I.W.K. and St. Martha's hospital who had worked with S.B.. Dr. Hastey conducted screening tests to determine intellectual functioning. She found S.B. to be functioning in the boarder line range with a full scale I.Q. of 76. Her reading comprehension is estimated to be at a grade 3.3 level and her listening comprehension falls at a grade 2.5 level. In Dr. Hastey's opinion these results indicate a serious impediment to S.B.'s ability to listen to oral information as well as read passages of contextual information with an adult level of comprehension. Dr. Hastey believes these low levels of comprehension will effect her day to day functioning including her ability to learn from both oral and written materials and transfer this learning to future situations. In Dr. Hastey's opinion S.B.'s intellectual capacity alone does not preclude parenting, but makes it more of a challenge and dependent upon other supports. S.B. can and does learn. The challenge is her ability to integrate her learning into real life situations so that she can exercise good decision making. It is Dr. Hastey's opinion S.B. lacks trust in people, has trouble admitting her short comings and blames others for her problems. Dr. Hastey testified S.B. has trouble decoding information in a social context and as a result feels victimized. She has,

in Dr. Hastey's opinion a limited reproitire of parenting skills.

[9] Dr. Hastey determined that J.C. was functioning in the low average range of intelligence. He has a complex and confusing personal history for which he takes little responsibility as far as his personal relationships are concerned. Dr. Hastey found a rigidity in J.C.'s belief system that did not match well with S.B.'s intellectual limitations and impulse control. Communication between the two can be a challenge if they are under stress. Their stressors include S.B.'s conflicted relationship with the Children's Aid Society, financial pressures, social isolation and J.C.'s other family responsibilities. In considering the respondent's parental capacity Dr. Hastey noted the need to look at parenting, not just in the present, but at other stages of the child's life where tolerance or impulse control will be more tested. Dr. Hastey concluded that the respondents do not have, nor can they acquire, the skills to parent independently. She recommended T. G. B. be placed in permanent care.

[10] Despite S.B.'s confrontational approach with the Agency, the respondents have cooperated with many services. Public health nurse Sue Arsenault met with S.B. in the hospital and at her home. In both places S.B.

appeared appropriate with T. G. B. although Ms. Arsenault did assess the family situation as high risk on her "Healthy Beginnings" assessment. Ms. Arsenault has continued to see S.B., but not with T. G. B. present.

[11] The respondents have visited regularly and the majority of visits have gone well. Initially S.B. was less confident but with direction and support from J.C. she gained more confidence. The access facilitators feel the respondents are appropriate for short Agency visits but the workers cannot express an opinion beyond that. The facilitators did note the respondents ask more questions than normal and there is tension around Agency issues.

[12] Family support worker Nancy Morrell worked with the respondent from October 2005. Initially the services were to teach parenting skills but a month into the program, she was told to change her focus to parental support pending receipt of the parental capacity assessment. During her work, Ms. Morrell was concerned about S.B.'s lack of family or social support in the community and referred her to various community agencies, which referrals the respondent accepted. Of concern to the support worker was S.B.'s inconsistency in attending group sessions as she struggled at times to get up and catch her cab to the sessions.

Her participation was good when she was there but the worker had concern about her ability to remain focused on parenting full time.

[13] Dr. Hastey's findings were challenged by the respondents. They questioned Dr. Hastey's qualifications to use psychological tests, her procedures and the limited time she spent with the respondents in reaching her conclusions. Of particular concern was Dr. Hastey's findings regarding the respondents intellectual capacity and achievement potential. As a result, a second assessment limited to cognitive functioning and academic achievement was requested.

[14] Dr. Gerald Hann assessed the respondent's in October 2006. Before doing so he reviewed Dr. Hastey's report. In his opinion Dr. Hastey's assessment of cognitive functioning was "likely invalid" in part because Dr. Hastey used a pro-rated form of the Wechsler Adult Intelligence Scale - III (WAISS - III) and out dated form of the Wechsler Individual Achievement Test (WIAT) for which there is no current normative data available.

[15] Dr. Hann testified that a full scale I.Q. is determined using verbal and non-verbal scales over a number of sub-tests. Dr. Hann assessed S.B. as having

intellectual functioning within the low average range (as opposed to Dr. Hastey's borderline) and to be reading at approximately a grade five level (Dr.Hastey grade three point three). He also noted a significant learning disability is indicated. Although Dr. Hann acknowledged developing a profile on J.C. that is somewhat similar to Dr. Hasteys', he believes Dr. Hastey's assessment is likely invalid for the same reasons as noted above regarding S.B. He does note his assessment of cognitive functioning and academic achievement offers a limited view of one's overall psychological functioning and does not in isolation indicate J.C.'s functioning would effect his parenting responsibilities.

[16] In rebuttal, Dr. Hastey testified she used her test (WAIS III) as a screen only, to determine among other things the respondent's reading level and not for a psycho-educational assessment. She could have used other tests or an interview for the same purpose. In her opinion, pro-rating is an acceptable procedure for screening. She did not make a psychological diagnosis or hold herself out as a psychologist. The use of psychological tests by trained persons other then registered psychologists is, in Dr. Hastey's opinion, a wide spread practice in education or industry where these tests are used as a screening tool. Dr. Hastey noted many of the findings in the two reports are similar and even if Dr.

Hann's opinion were correct as far as I.Q. is concerned, her opinion on parental capacity would be no different nor could she have recommended different services to remediate the presenting issues.

[17] S.B. testified that she has not been given a chance to prove she can parent T. G. B. . She alleges her worker has not been available to her on a consistent basis and the Agency has had its mind made up against her since day one. S.B. feels the Agency could have x-rayed the baby to prove she had not been feeding him solid foods. She says the Agency never told her what she had to do to demonstrate her parenting ability. She says she never refused any service, her social workers never observed her with the child during visits and the parental capacity assessor spent only a few hours with them. If T. G. B. were placed in S.B.'s care she would not look to the Agency for support because she does not trust them, but would welcome other support like Public Health and Kids First.

[18] S.B. is currently employed delivering newspapers a few hours each day and has not missed time from this employment. Her plan is for J.C. and herself to remain a couple and raise T. G. B. . She testifies her mother is available to help, at least on weekends when the grandmother is not working. She denies J.C. has

ever been aggressive or threatening and there have only been a few arguments since T. G. B. went into care. She further testified she doesn't believe they belong where they are currently living, perhaps because they are a mixed race couple. She admits not trusting people other then J.C. or her mother.

THE LAW

[19] The relevant statutory provisions as set out in the *Children and Family Services Act*, S.N.S., 1990, c. 5, as amended include:

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

13 (1) Where it appears to the Minister or an agency that services are necessary to promote the principle of using the least intrusive means of intervention and, in particular, to enable a child to remain with the child's parent or guardian or be returned to the care of the child's parent or guardian, the Minister and the agency shall take reasonable measures to provide services to families and children that promote the integrity of the family.

(2) Services to promote the integrity of the family include, but are not limited to, services provided by the agency or provided by others with the assistance of the agency for the following purposes:

(a) improving the family's financial situation;

(b) improving the family's housing situation;

© improving parenting skills;

(d) improving child-care and child-rearing capabilities;

(e) improving homemaking skills;

(f) counselling and assessment;

(g) drug or alcohol treatment and rehabilitation;

(h) child care;

(I) mediation of disputes;

(j) self-help and empowerment of parents whose children have been, are or may be in need of protective services;

(k) such matters prescribed by the regulations. 1990, c. 5, s. 13.

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;

© 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.

Disposition order

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 © of subsection (1), with the consent of the relative or other person.

(4) The court shall not make an order for permanent care and custody pursuant to clause (f) of subsection (1), unless the court is satisfied that the circumstances

justifying the order are unlikely to change within a reasonably foreseeable time not exceeding the maximum time limits, based upon the age of the child, set out in subsection (1) of Section 45, so that the child can be returned to the parent or guardian. 1990, c. 5, s. 42.

Duration of 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;

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.

(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 person's access will not impair the child's future opportunities for such placement; . . .

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

Adoption order

78(5) Subject to subsection (6), where an order for adoption is made in respect of a child, any order for access to the child ceases to exist.

(6) Where an order for adoption is made in respect of a child, the court may, where it is in the best interests of the child, continue or vary an order for access or an access provision of an agreement that is registered as an order under the Maintenance and Custody Act in respect of that child. 1990, c. 5, s. 78; 2005, c. 15, s. 6.

[20] The serious nature of the issue before the court has been addressed in *N.S. (Minister of Community Services) v. D.C. (1995) 138 N.S.R. (2d) 243*; (NSFC) [confirmed by Court of Appeal at (1995) 138 N.S.R. (2d) 241)] wherein Williams, J., then of the Family Court notes at paragraph 143 and 144:

> 143 The burden of proof in proceedings of this nature is on the agency. It is the civil burden of proof (C.A.S. of Halifax v. Lake (1981) 45 N.S.R. (2d) 361 (N.S.C.A.). The standard must, however, have regard for the seriousness of the consequences of a decision (J.L. v. C.A.S. of Halifax (1985) 44 R.F.L. (2d) 437 (N.S.C.A.). The placing of a child in the permanent care and custody of an agency is obviously a most serious matter. I conclude that the agency has satisfied its burden of proof in this proceeding.
>
> ¶ 144 The following statements of the law are referred to in D. (M.) v. C.A.S. of Halifax (1993) 41 R.F.L. (3d) 338 per Matthews, J.A. at pp. 350-351;
>
> (a) "The real issue is the cutting of the child's legal tie with her natural mother...while the Court can feel great compassion for the respondent, and respect for her determined efforts to overcome her adversities, it has an obligation to ensure that any order it makes will promote the best interests of the child. This and this alone is our task." (per Wilson, J.S.C., at p. 14, Racine v. Woods (1984) 36 R.F.L. (2d) 1 (S.C.C.))
>
> (b) "This does not mean, of course, that the child's tie with its natural parent is irrelevant in the making of an order under the section. It is obviously very relevant in a determination as to what is in the child's best interests. But it is the parental tie as a meaningful and positive force in the life of the child and not in the life of the parent that the court has to be concerned about. As has been emphasized many times in custody cases, a child is not a chattel in which its parents have a proprietary interest, it is a human being to whom they owe serious obligations." (per MacIntyre, J.S.C. (1985) 44 R.F.L. (2d) 113 (S.C.C.) at p. 126

[21] In considering the evidence placed before it and the disposition orders sought, the court acknowledges the comments of our Court of Appeal in *Nova Scotia (Minister of Community Services) v. K.A.B.S.* [1999] N.S.J. No. 216 at paragraph 73 where the court notes:

> . . . the Court has a responsibility not to wait until children are physically harmed or visibly distressed to make a decision . . .

[22] Guidance is offered in how to consider the evidence in *N. S. (Minister of Community Services) v. S.E.L. and L.M.L.* (2000) 184 N.S.R. (2d) 165 (N.S.C.A.) where the court noted at paragraph 27:

> ¶ 27 As this Court pointed out in Minister of Community Services v. S.Z., et al. (1999), 179 N.S.R. (2d) 240 at paras. 11 to 13, evidence of past parenting is invaluable in assessing the fitness of parents to continue with the custody of their children.

[23] In discussing the use of services, our Court of Appeal has again offered direction in *Nova Scotia (Minister of Community Services) v. L.L.P.* [2003] N.S.J. No. 1 at paragraphs :

> ¶ 25 The goal of "services" is not to address the parents deficiencies in isolation, but to serve the children's needs by equipping the parents to fulfill their role in order that the family remain intact. Any service-based measure intended to preserve or reunite the family unit, must be one which can effect acceptable change within the limited time permitted by the Act. . . . Ultimately, parents must assume responsibility for parenting their children. The Act does not contemplate that the Agency shore up the family indefinitely.

¶38 With the above caution, I would endorse as applicable to the case here under appeal, the comments of Niedermayer, J.F.C. in Nova Scotia (Minister of Community Services) v. L.S. (1994), 130 N.S.R. (2d) 193 (Fam.Ct.):

> [15] I interpret the phrase "provided by the agency or provided by others with the assistance of the agency" as follows. An agency is required to directly provide only those services it is capable of providing. With respect to all other services, the agency is to render assistance to the parent in having the service provided by others. This would include giving the parent the names and locations of these "out of house" services; payment for the cost of transportation to and from the services, if such was necessary; making referrals and setting up initial appointments where appropriate; and, advising the parent of alternatives, when needed. The agency is not expected to step by step "walk the parent through" all the stages of the service. There is a responsibility on the part of the parent to engage the "out of house" services. Not only does this indicate a willingness by the parent to improve, but it also demonstrates to others that the parent is capable of improvement as well as the degree to which positive change can be prognosticated.
>
> ...
>
> [17] Before any meaningful consideration can be given to the duty of an agency to be found wanting with respect to the services as enumerated in Section 13(2) the client has to be willing or be able to engage in such services. The offers for services can be presented. In order for them to be looked at they must be accepted and acted upon by the client.
>
> [18] As counsel for the Minister has pointed out, it is not mandatory for the Minister to provide all of the services enumerated in Section 13 but "shall take reasonable measures" to provide services. "Reasonable measures", in the context, means the agency must identify, provide or refer to the services and there has to be a reasonable probability of success in the provision of service ...
>
> [19] Notwithstanding the failings in the provision of services, the important issue to remember is that the person who is most affected by L.S.'s lack of engagement is her son, who requires a parent who

is capable of parenting.

> "The test is not the hopelessness of the mother or the failure of the public agency to place all its resources at the disposition of the mother. This court, as well as others, has often repeated that the only test is what is in the best interests of the children." (Children's Aid Society of Winnipeg v. M. and S. (1980), 13 R.F.L. (2d) 65 (Man.C.A.) at p. 66.)

[24] Establishing the merits of any alternative plan of care submitted on behalf of the respondents rests clearly on the respondents and any plan must be supported by cogent evidence. In *Children's Aid Society of Halifax v. T.B.* [2001] N.S.J. No. 225, N.S.C.A., Justice Saunders offers the following commencing at paragraph 51:

> ¶ 51 The agency has a statutory duty to take reasonable measures to provide services to families and children that promote the integrity of the family (s. 13 CFSA). The court has its own responsibility to take into account such measures and alternatives as are applicable in the circumstances of the case, before removing the child from the care of a parent or guardian (s. 42(2) CFSA). Thus the court and the agency share a responsibility to see that reasonable family or community options are considered. But the burden of establishing the merits of the alternative proposed are squarely upon the proponent. It is the proponent who must satisfy what I would term a burden of persuasion. Only when specific arrangements have been conceived and put in place by the proponent can the viability of that proposal be assessed. . . .
>
> ¶ 53 The agency is not required to investigate each and every family placement proposal. The burden of persuasion is upon those advocating a competing plan to advance the most compelling and sensible alternative they can muster.
>
> ¶ 54 There is an obligation upon the person advocating a competing plan to present

> some cogent evidence with respect to it. In that way, the merits and viability of the proposal will have some foundation in fact which might then be adequately assessed by the trial judge. Should time permit and circumstances warrant, it may well be that the plan put forward as a worthwhile family placement option will require further investigation, perhaps in some cases a complete home study report. However, not every possible placement alternative will require such a response.

[25] Our Court of Appeal in a recent decision *J. F. v. Children's Aid Society of Cape Breton (Victoria)* [2005] N.S.C.A. 101 made the following observations at paragraphs 17and 18:

> [17] The maximum time limits for a child welfare proceeding are set out in s. 45 of the **Act**: twelve months for children under six years of age and eighteen months for those between six and twelve years. At the end of the statutory period a court must either dismiss the proceeding or order permanent care and custody. The time frames within which the proceeding must be resolved are necessarily short in deference to the "child's sense of time," as is recognized in the recitals to the **Act**:
>
> > AND WHEREAS children have a sense of time that is different from that of adults and services provided pursuant to this Act and proceedings taken pursuant to it must respect the child's sense of time;
>
> [18] Orders for permanent care are not limited to situations where there is no hope of parental improvement. The question is whether adequate parenting can be achieved within a reasonable time frame. That period is presumed to be the statutory time limit (**Nova Scotia (Minister of Community Services) v. L.L.P.**, [2003] N.S.J. No. 1 (C.A.) (Q.L.)).

[26] And finally, In *The Minister of Community Services v. B.F., B.W., and Mi'Kmaw Family and Children Services of Nova Scotia* [2003] N.S.J. No. 405 our

Court of Appeal at paragraphs 57 and 58 offered the following guidance with respect to time limits:

> ¶ 57 The Act clearly contemplates a judicial determination of the child's best interest. If passage of a time limit which is a milestone toward that trial caused the court to lose jurisdiction to determine the child's best interest, this would contradict the object of the Act.
>
> ¶ 58 This principle does not apply to a time limit which governs the contents of the order after the trial.

[27] In *New Brunswick (Minister of Health and Community Services) vs. M.L.* [1998] 2 S.C.R. 534 the Supreme Court of Canada dealt with the child's best interests in terms of birth parents right to access and adoption. The following portions of that decision are helpful.

> ¶ 47 The Ontario Act is regarded as one of the least interventionist, in that it emphasizes the importance of preserving the family unit. This Court has held, however, that preserving the family unit plays an important role only if it is in the best interests of the child (Catholic Children's Aid Society of Metropolitan Toronto v. M. ©.), supra). This Court has also held on numerous occasions that pursuing and protecting the best interests of the child must take precedence over the wishes and interests of the parent (King v. Low, [1985] 1 S.C.R. 87; Young v. Young, [1993] 4 S.C.R. 3). In Catholic Children's Aid Society of Metropolitan Toronto, supra, at p. 191, L'Heureux-Dubé J. stated: "Thus, the value of maintaining a family unit intact is evaluated in contemplation of what is best for the child, rather than for the parent. In order to respect the wording as well as the spirit of the Act, it is crucial that this child-centred focus not be lost".
>
> ¶ 48 I conclude that while preserving emotional ties is one of the elements of the definition of the best interests of the child (s. 1(d)), it will only operate in favour of granting access if access is in the best interests of the child, having regard to all the other factors. . . .

> ¶ 50 If adoption is more important than access for the welfare of the child and would be jeopardized if a right of access were exercised, access should not be granted (New Brunswick (Minister of Health and Community Services) v. R.N. (1997), 194 N.B.R. (2d) 204 (Q.B.)). In other words, the courts must not allow the parents to "sabotage" an adoption that would be beneficial for the child (Re S.G.N., [1994] A.J. No. 946 (QL) (Prov. Ct.)).
>
> ¶ 51 The decision as to whether or not to grant access is a delicate exercise which requires that the judge weigh the various components of the best interests of the child. It is up to the judge to determine which of the child's interests and needs take priority (see New Brunswick (Minister of Health and Community Services) v. D.T.P., [1995] N.B.J. No. 576 (QL) (Q.B.), at para. 41). A child's emotional stability is of prime importance. If the child is unduly disturbed by access, it is generally not granted (see New Brunswick (Minister of Health and Community Services) v. K.E.B. (1991), 117 N.B.R. (2d) 229 (Q.B.), at p. 239; New Brunswick (Minister of Health and Community Services) v. P.P. (1990), 117 N.B.R. (2d) 222 (Q.B.)).

ANALYSIS

[28] S.B. is a first time mother. S.B. came to the attention of hospital authorities because she had complications during her pregnancy and had been inconsistent with treatments/medication. S.B. suffered from a serious blood clotting condition during her pregnancy. Future pregnancies could be life threatening. As a result, T. G. B. will be her only child. Because S.B. also presents with obvious intellectual limitations, health care professionals were closely monitoring after care for both mother and child.

[29] The circumstances that brought about the apprehension can be described as preventive. There is no evidence T. G. B. suffered physical or

emotional injury while in the respondents care. There is substantial evidence of risk.

[30] J. C. has a number of criminal convictions for assaultive or threatening behaviour that occurred in a domestic context. He has been incarcerated and is known to authorities. His relationship with a young intellectually challenged first time mother created a concern for child protection authorities.

[31] S.B. has not had an easy time. Given her intellectual limitations she struggled in school. She has been the object of bullying and teasing to the point she didn't ride the school bus her last two years in school. That these circumstances would cause her to be anxious or distrustful is understandable. As she struggles to grasp the significance of a moment, she seems to lack either the intellect, self-confidence, or the trust necessary to communicate effectively. As a result, she and J.C. have experienced some communication problems and she presents to the Agency as being confrontational and threatening.

[32] Succeeding in a social setting appears to be a great challenge to these

respondents. As a couple they are very isolated, depending entirely on each other and S.B.'s mother. While they have connected with helping Agencies, they present without friends to support them in the community. They refer to people in the community as "associates" but find friends difficult to come by. Despite having appropriate housing, S.B. clearly states that she doesn't feel they belong where they are. Whether this struggle to develop a social network is the result of limited intellectual functioning, personality traits or some other cause, their isolation is a serious impediment to developing and maintaining a stable and nurturing home. Significant for these proceedings is the fact that the circumstances have changed little, if at all, in the past year.

[33] Throughout this process the respondents have been earnest and determined before the court. Dr. McCara noted "everyone was cheering for S.B., hopeful for her." There was present throughout an intangible quality that made one hope they could succeed. However this hope was tempered by concern expressed by most who testified. Generally, witnesses expressed concern about the ability of the respondents to go it alone.

[34] Success in this case is dependent upon the respondent's plan and their resources to support it. About November 16th, 2005, just as Dr. Hastey began her assessment, the family support worker was told to stop parenting skills and do support work with the respondents. It is unclear if the Agency made a decision at that early stage that reuniting the family was not an option. It would be inappropriate for the Agency to make that decision while awaiting the parental capacity assessment. It is clear however from social worker Melissa Chisholm's affidavit that placement options were considered with the respondents. At paragraph 4 of Ms. Chisholm's August 9th, affidavit she writes:

> Attempts have been made to source out possible family placement for the child without success. J.C. did not put forward names of any individuals who are interested in discussing a possible plan for the child. Nor did S.B.; however, the Agency discussed the possibility of a placement with the maternal grandparents, both with the maternal grandmother and S.B.. Neither S.B. nor her mother was interested in pursuing such a plan. The Agency also canvassed the possibility of S.B. and her mother jointly co-parenting the child which was also rejected by S.B..

[35] S.B.'s mother, T. B. testified at the hearing. TB. is employed and for the past year or so has had the additional burden of supervising the care of her invalid husband. She is not in a position to be involved day to day in her grandson's care although she is clearly available for respite or emergency care.

[36] The court cannot ignore S.B.'s intellectual limitations or J.C.'s relationship history. S.B. appears caught between isolation and confrontation. She does not feel comfortable or supported in her community. When she is engaged with the Agency she was frequently found to be confrontational. Parents have to be aware of their limitations. Parents must be able to reach out for support - to trust. Effective parenting requires more than love and good intentions. Parents themselves have to experience a level of success and self-confidence to be able to nurture their children. Parents who are isolated and distrustful will struggle to parent a secure and confident child.

[37] While Dr. Hastey's report was challenged, her identified risk issues are consistent with the personal history of each respondent. As Dr. Hastey noted, the concern for T. G. B. 's best interests is not just his present day care, but the ability of the parents to meet his future needs. While the respondents would do their best, T. G. B. 's best interests require a stable secure placement with care givers who are not burdened by limitations that make every day tasks a challenge. While J.C. has experienced some success as a parent, it has not been with S.B. J.C. has not been able to maintain his personal relationships and S.B. has not been

able to develop independent supportive relationships in the community. They continue to be isolated and vulnerable. They demonstrate little insight into the fragility of their circumstances. For these reasons T. G. B. must be placed in the permanent care of the Agency.

[38] The Agency plan is to place T. G. B. for adoption. Section 47(2) of the *Children and Family Services Act* is clear that the court shall *not* make an order for access unless it 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 twelve years of age and wishes to maintain contact with that person;
>
> © 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.

[39] The only condition which would allow the court to grant an order for access would be under (d) above:

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

[40] The court has before it the evidence of the Agency adoption worker Patricia Lord as well as the opinion of Dr. Hastey regarding access. Both the adoption worker with over 30 years of adoption experience and Dr. Hastey, who is consulted frequently on adoption related issues, agreed that an access order limits placement options for a child. In Dr. Hastey's opinion an access order would reduce by 60 to 80% the number of potential placements. Access orders mean there are simply fewer adoptive parents prepared to take on the responsibility and the placements prepared to accept access become even more limited because of the demands of access. If an access order exists, placement must be in relative proximity to the biological parents so that access can continue. In T. G. B. 's case the evidence is that the most likely placement for him is with a bi-racial family and the majority of these placements in Nova Scotia are located in either the Metro area or western Nova Scotia. Maintaining access at that distance would be a serious impediment to a successful placement. In addition Dr. Hastey and the access worker pointed out that the attachment and bonding process with the adoptive family can be complicated in these circumstances. The adoption worker testified that it should be possible to place T. G. B. for adoption within a couple months of a permanent care order being granted if placement is not complicated

with an access provision.

[41] There are recent amendments to the *Children and Family Services Act*. The former Section 70(3) (no adoption with access) was removed and the following added to Section 78:

> (5) Subject to subsection (6), where an order for adoption is made in respect of a child, any order for access to the child ceases to exist.
>
> (6) Where an order for adoption is made in respect of a child, the court may, where it is in the best interests of the child, continue or vary an order for access or an access provision of an agreement that is registered as an order under the Maintenance and Custody Act in respect of that child

[42] In the court's opinion these amendments do not change the clear meaning of Section 47(2) which amounts to a presumption against access when a permanent placement in a family setting is the plan unless the evidence supports one of the exceptions set out in section 47(2). The amendments taken together simply remove a barrier to post adoption access. Not only did the strong and clear wording of section 47(2) remain unchanged, but the inclusion of 78(5) appears to confirm the no access presumption of Section 47(2). Because post adoption access is no longer prohibited, the amendments create additional opportunities for adoption to occur in those circumstances where adoption and access together are

not inconsistent with the best interests of the child.

[43] The affect of these amendments was discussed at length by Judge Levy of this court in *Family and Children Services of Annapolis County vs. R.(A).* 2006 N.S.F.C. 28 (July 27, 2006). While I agree with Judge Levy's decision to grant access because of "special circumstances" (a high needs child with little evidence to support family placement for adoption), I believe the effect of the amendments is more limited then suggested in R.(A.). The fundamental change brought about by the amendments is that post-adoption access is now possible. I do not believe there has been a fundamental shift away from the clear meaning of Section 47(2). While access is now possible post adoption, access in the context of granting of a permanent care order should only be granted consistent with section 47(2).

[44] It should be remembered section 47(2) addresses access in the context of a permanent care order being made with a plan for family placement and adoption. Just as Section 47 recognizes there are appropriate cases for access after permanent care, the new amendments recognize that there are appropriate cases for adoption where access exists and should continue to exist. Section 78(6) creates

additional adoption possibilities in a number of circumstances including cases where children have gone into permanent care with access without an adoption plan. When, as a result of changed circumstances those children now have the option for adoption, they can still maintain important relationships. The amendments created additional opportunities for permanent placement. The amendments should not be interpreted in a way that limits placement opportunities.

[45] The *Children and Family Services Act* is careful to address children's needs through timely resolution of issues affecting their best interests. The whole process of the *Act* from taking into care to the appeal imposes strict time limitations. Any interpretation that would limit opportunities by reducing adoption placements or create uncertainty by inviting further litigation to remove access provisions would be inconsistent with the child's best interests. The granting of access in any other than special circumstance can only impede the child's placement. I agree with Judge Levy, where he acknowledges at paragraph 27:

> There is no question also that if it should in fact come down to an either-or situation, access or adoption, that for the child's sake the adoption option has to have priority.

[46] While it is understandable biological parents would want to maintain access to their child, it is simply not in the child's best interest at this stage to limit his options for a stable placement. There will be no provision for access.

_____

Judge James C. Wilson
Judge of the Family Court