M.G. v. Director of Family and Child Services, 2007 BCSC 461 (CanLII)

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***M.G. v. Director of Family and Child Services,*** 2007 BCSC 461

Date: 20070402

Docket: 39526
Registry: Vernon

Between:

D.M.G

Appellant

And

Director of Family and Child Services

Respondent

Before: The Honourable Madam Justice Russell

Reasons for Judgment

Counsel for Appellant	T. McCaffrey
Counsel for Respondent	P.A. Dyck
Date and Place of Hearing:	March 6 & 7, 2007 Vernon, B.C.

INTRODUCTION

[1] This is an appeal from a decision of the Provincial Court of September 25, 2006, granting the Director of Child, Family and Community Services (the "Director") a continuing custody order for the child M.G., born February 12, 2004 ("Baby M.G."). The child's mother, M.G. (the appellant), seeks to have that order set aside, and to be granted custody of Baby M.G. with support services and monitoring to be provided by the Ministry of Child, Family and Community Services (the "Ministry").

[2] At the time of the child's removal, the child had been in the care of four individuals: his mother M.G., his stepfather J.S., his maternal grandmother D.L., and the stepfather's mother, S.I. (collectively the "Caregivers"). Baby M.G. was removed from the care of M.G. on January 14, 2005, as a result of a hospital visit in which Baby M.G. was diagnosed as having bruising to the head, bruising to the leg, bi-lateral sub conjunctiva haemorrhaging (blood in the eyes), a fractured right forearm, and seven bilateral rib fractures.

[3] Each of the Caregivers denied having caused the injuries, and denied any knowledge as to who may have caused the injuries. After being removed from the care of D.G., Baby M.G. suffered minor scratches and scrapes, but no further bruising to the face and head, conjunctiva haemorrhaging, or fractured bones.

[4] On April 8, 2005, a Provincial Court judge made an interim custody order in favour of the Director under paragraph 35(2)(a) of the ***Child, Family and Community Services Act***, R.S.B.C. 1996, c. 46 ("***CFCSA***"). On October 3, 2005, the Director applied for a continuing custody order pursuant to section 49 of the ***CFCSA***. The continuing custody order hearing took place from February 13-16, 2006, April 18-21, 2006, and August 16, 2006 in the Provincial Court. As a result of that hearing, the learned trial judge granted the Director a continuing custody order pursuant to sub-section 49(5) of the ***CFCSA***. The operation of that order was suspended for 120 days by this Court on November 27, 2006 with respect to the Director placing Baby M.G. for adoption, and the appellant was granted liberty to apply for extensions if necessary. Throughout this process, M.G. and J.S. have continued to exercise access to Baby M.G. with no negative incidents reported.

Grounds of Appeal

[5] The appellant raises the following grounds of appeal:

1. Did the trial judge err by failing to give reasons to support his decision granting a continuing custody order in favour of the Director that are sufficiently intelligible to provide appellate review of the correctness of his decision?
2. Did the trial judge err by failing to analyze and interpret section 49 of the ***CFCSA***?
3. Did the trial judge err by disregarding significant material evidence?
4. Did the trial judge err by misapprehending the evidence?
5. Did the trial judge err by failing to admit relevant evidence?
6. Did the trial judge err by failing to assess the credibility of witnesses?
7. Did the trial judge err by demonstrating a bias against the caregivers?

Appropriate Standard of Review on Appeal

[6] Before commencing a review of the trial judge's decision, the appropriate standard of review must be considered. The appropriate standard of review of the B.C. Supreme Court on an appeal pursuant to section 81 of the ***CFCSA*** is well set out by MacKenzie J. in ***A.S. v. British Columbia (Director of Child, Family and Community Service)***, 2006 BCSC 133 (CanLII), 2006 BCSC 133 at paras. 19-21:

> The scope of appellate review, pursuant to s. 81 of the ***Act*** is narrow. This Court does not re-hear the matter and substitute its own findings. The parties agree that this Court can intervene only if the trial judge made an error of law or seriously misapprehended the evidence. There must be an error in principle, a failure to consider all relevant factors, a consideration of an irrelevant factor or a lack of factual support for the judgment: ***New Brunswick (Minister of Health and Community Services) v. L. (M.)***, 1998 CanLII 800 (S.C.C.), [1998] 2 S.C.R. 534, 165 D.L.R. (4th) 58, at paragraph 35; ***Van de Perre v. Edwards***, 2001 SCC 60 (CanLII), [2001] 2 S.C.R. 1014, 2001 SCC 60, at paragraph 13. Errors in findings of fact are not to be overturned unless the appellant can point to some palpable error. The appellant must be able to point to an error that is "plain to see:" ***Housen v. Nikolaisen***, 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235, 2002 S.C.C. 33 at paragraph 5.
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> In ***Re S.(P.J.)***, 2000 BCSC 582 (CanLII), [2000] B.C.J. No. 787, 2000 BCSC 582 at paragraph 6, Blair J. confirmed the standard of review on an appeal from the provincial court on a child protection proceeding, described by Lord Simmonds in ***McKee v. McKee***, [1951] A.C. 352, 2 W.W.R. (N.S.) 181, (Canada P.C.) at p. 360, as follows:
>
>> [T]he question of custody of an infant is a matter which peculiarly lies within the discretion of the judge who hears the case and has the opportunity generally denied to an appellate tribunal of seeing the parties and investigating the infant's circumstances, and that his decision should not be disturbed unless he has clearly acted on some wrong principle or disregarded material evidence.
>>
>> The deferential standard of review in child custody cases is based upon the trial judge's unique role in observing the witnesses and in society's interest in promoting finality and stability in those types of hearings: ***Van de Perre***, at paragraph 11-12.

[7] To these comments, I add that the same standard of palpable and overriding error applies to inferences of fact (***Housen v. Nikolaisen***, 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235, 2002 SCC 33 at paras. 19-25), and to questions of mixed fact and law where the issue on appeal involves the trial judge's interpretation of the evidence as a whole (***Housen v. Nikolaisen***, *supra*, at para. 36). I also agree with the Director's submission that the appropriate standard of review will be correctness on a pure question of law: ***Housen v. Nikolaisen***, *supra*, at paras. 8-9.

[8] For the reasons that follow, it will become clear that I do not agree that the trial judge has made a palpable and overriding error that would justify the intervention of this Court. Alternatively, after a thorough review of the evidence in this case and the relevant law, I conclude that the learned trial judge reached the correct decision in this case. Given the serious implications of this decision, and because a proper review of the trial judge's decision cannot be undertaken without first understanding the facts of the case, below I review and discuss the evidence in the record (recognizing that it is not to be reweighed in the absence of palpable and overriding error) before proceeding to consider each ground of appeal raised by the appellant.

Relevant Statutory Provisions

[9] For convenience, below I set out the relevant provisions of the ***CFCSA***. Although lengthy, these detailed provisions assist in understanding the scheme and purpose of the ***CFCSA***.

Guiding principles

2 This Act must be interpreted and administered so that the safety and well-being of children are the paramount considerations and in accordance with the following principles:

(a) children are entitled to be protected from abuse, neglect and harm or threat of harm;

(b) a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents;

(c) if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided;

(d) the child's views should be taken into account when decisions relating to a child are made;

(e) kinship ties and a child's attachment to the extended family should be preserved if possible;

(f) the cultural identity of aboriginal children should be preserved;

(g) decisions relating to children should be made and implemented in a timely manner.

Service delivery principles

3 The following principles apply to the provision of services under this Act:

(a) families and children should be informed of the services available to them and encouraged to participate in decisions that affect them…

Best interests of child

4 (1) Where there is a reference in this Act to the best interests of a child, all relevant factors must be considered in determining the child's best interests, including for example:

(a) the child's safety;

(b) the child's physical and emotional needs and level of development;

(c) the importance of continuity in the child's care;

(d) the quality of the relationship the child has with a parent or other person and the effect of maintaining that relationship;

(e) the child's cultural, racial, linguistic and religious heritage;

(f) the child's views;

(g) the effect on the child if there is delay in making a decision.

When protection is needed

13(1) A child needs protection in the following circumstances:

(a) if the child has been, or is likely to be, physically harmed by the child's parent;

(b) if the child has been, or is likely to be, sexually abused or exploited by the child's parent;

(c) if the child has been, or is likely to be, physically harmed, sexually abused or sexually exploited by another person and if the child's parent is unwilling or unable to protect the child;

(d) if the child has been, or is likely to be, physically harmed because of neglect by the child's parent;

(e) if the child is emotionally harmed by the parent's conduct…

Protection hearing

40(1) At the protection hearing the court must determine whether the child needs protection.

(2) If the court finds that the child does not need protection, it must

(a) if the child was removed, order the director to return the child as soon as possible to the parent apparently entitled to custody unless the child has already been returned, and

(b) terminate any interim order made under sections 33.2 (2), 35 (2) and 36 (3).

(3) If the court finds that the child needs protection, it

(a) must consider the plan of care presented by the director, and

(b) may hear any more evidence the court considers necessary to help it determine which order should be made under section 41.

Orders made at protection hearing

41(1) Subject to subsection (2.1), if the court finds that the child needs protection, it must make one of the following orders in the child's best interests:

(a) that the child be returned to or remain in the custody of the parent apparently entitled to custody and be under the director's supervision for a specified period of up to 6 months;

(b) that the child be placed in the custody of a person other than a parent with the consent of the other person and under the director's supervision, for a specified period in accordance with section 43;

(c) that the child remain or be placed in the custody of the director for a specified period in accordance with section 43;

(d) that the child be placed in the continuing custody of the director.

…

(2) The court must not order under subsection (1) (d) that the child be placed in the continuing custody of the director unless

(a) the identity or location of a parent of the child has not been found after a diligent search and is not likely to be found,

(b) a parent is unable or unwilling to resume custody of the child, or

(c) the nature and extent of the harm the child has suffered or the likelihood that the child will suffer harm is such that there is little prospect it would be in the child's best interests to be returned to the parent.

Continuing custody hearing and orders

49 …

(5) The court may order that the child be placed in the continuing custody of the director if there is no significant likelihood that

(a) the circumstances that led to the child's removal will improve within a reasonable time, or

(b) the parent will be able to meet the child's needs.

(6) Before making a continuing custody order under subsection (5), the court must consider

(a) the past conduct of the parent towards any child who is or was in the parent's care,

(b) the plan of care, and

(c) the child's best interests…

Effect of continuing custody order

50(1) When an order is made placing a child in the continuing custody of a director,

(a) the director becomes the sole guardian of the person of the child and may consent to the child's adoption,

(b) the Public Guardian and Trustee becomes the sole guardian of the estate of the child, and

(c) the order does not affect the child's rights respecting inheritance or succession to property.

Evidence of others

68(1) Before ordering that a child be placed in or returned to the custody of a person other

than a director, the court may consider the person's past conduct toward any child who is or was in that person's care.

(2) In a proceeding under this Act, the court may admit as evidence

(a) any hearsay evidence that the court considers reliable, or

(b) any oral or written statement or report the court considers relevant, including a transcript, exhibit or finding in an earlier civil or criminal proceeding.

Appeal to Supreme Court

81 (1) A party may appeal to the Supreme Court from an order of the Provincial Court made under this Act.

…

(5) On application the Supreme Court may suspend the order under appeal for the period and subject to the conditions it thinks appropriate.

(6) If the order under appeal is suspended under section 62, the Supreme Court may continue or cancel the suspension.

(7) After hearing the appeal, the Supreme Court may do one or more of the following:

(a) confirm the order of the Provincial Court;

(b) set aside the order of the Provincial Court;

(c) make any order that the Provincial Court could have made;

(d) direct the Provincial Court to conduct a new hearing.

<u>The Evidence in This Case</u>

[10] Although the parties disagree on what evidence is relevant to this case and on how the expert evidence should be interpreted, there really is very little dispute about the basic facts. Essentially, the Director takes the position that the numerous injuries suffered by Baby M.G. indicate that one or more of his caregivers has been physically abusive to him, and that the others are either unaware of this fact, or are covering up the identity of the abuser. The appellant contends that the injuries were innocently caused due to various falls and accidents by the child, and that there are therefore no child protection concerns. The fact that the child has suffered extensive physical injuries is not disputed.

<u>The expert opinion evidence in this case</u>

[11] Three experts gave opinion evidence in this case in an attempt to explain how Baby M.G.’s injuries could have arisen. Dr. Manthorne was the paediatrician at the hospital who first assessed Baby M.G.’s injuries in response to a referral by Baby M.G.’s family physician, Dr. Maskey. Dr. Manthorne provided a written report, and appeared as an expert witness at the trial for the Director.

[12] Dr. Manthorne testified as to the various injuries suffered by Baby M.G., and possible explanations for those injuries. Baby M.G. suffered several bruises to the face, a rug burn, conjunctiva haemorrhage (collection of blood in the eye), and a bump on the vertex of the child’s head. J.S. informed M.G. of various falls by the child on toys or in his crib which had caused these injuries, and M.G. relayed

these explanations to Dr. Manthorne. Dr. Manthorne testified that on January 11, M.G. noticed a bump on the left side of Baby M.G.'s ear, which she described as a pinnal haemorrhage. Although the bruise had resolved by the time of Dr. Manthorne's examination, she reported that there was still a palpable bump above the left ear.

[13] She also testified that such an injury is considered pathognomonic for non-accidental injury—in other words, there is very little explanation for such an injury, other than force applied to that part of the body. She further testified that the most common mechanism of subconjunctiva haemorrhages are acceleration and deceleration injuries requiring quite a significant force. Such injuries could arise from a car accident or shaking.

[14] Dr. Manthorne testified that the facial bruising could possibly arise from the child falling on a toy, although this was not plausible. Bilateral haemorrhaging in the eyes also had a very low probability of having been caused by an accidental injury. A linear haemorrhage like the one Baby M.G. had on his chin could possibly be due to his hitting his chin on his crib, although this was not likely—more often linear abrasions are associated with intentional injury. Dr. Manthorne also described further bruising and tenderness on other parts of Baby M.G.'s body. M.G. attributed the injuries to the fact the child was very active and a restless sleeper.

[15] Dr. Manthorne referred M. for an X-ray examination, which noted a fracture of the right forearm and several fractured ribs. She noted that rib fractures in the absence of a known significant force injury are highly indicative of a large amount of force applied to that part of the body, and would be unlikely to arise from a fall. The appellant suggests that a "constipation manoeuvre," which involved folding Baby M.G.'s legs up to his chest and pressing gently, might be responsible for the fractured ribs, or alternatively a "steamrolling" incident in which J.S.'s step-brother C.I. would roll around on the floor with Baby M.G., or possibly by the child being thrown up into the air and caught by a family friend, B.S.

[16] Further tests indicated that Baby M.G. did not have a higher tendency to bruise, beyond that of the general public. A CAT scan indicated that the child did not have further injuries inside his head. Overall, Dr. Manthorne concluded that the likelihood of non-accidental trauma was extremely high, and that she was therefore mandated to alert the appropriate authorities. M.G. wanted a second opinion and, therefore, Dr. Manthorne referred the child to Dr. Okano. On cross-examination, Dr. Manthorne agreed that there would be bruising associated with learning to walk, which could occur in the periorbital area (*i.e.* head).

[17] Dr. Okano, a paediatrician who runs a Suspected Child Abuse and Neglect clinic, also testified for the Director. He saw Baby M.G. on January 20, 2005. He presented a thorough discussion of the clinic's approach to assessing bone injuries in children, which includes ruling out bone frailty. In particular, a bone scan revealed that Baby M.G. did not have a fracture in the humerus, where a radiologist in Vernon had previously diagnosed a fracture. As there was very little hard callous visible in the initial X-rays, and as it takes about fourteen days for fractures to get hard callous, Dr. Okano agreed one could speculate that the fractures did not happen more than fourteen days before the child was assessed. He analyzed the rib fractures in detail, noting that Dr. Mawson, a paediatric radiologist, confirmed that there were seven rib fractures, and that this would be consistent with non-accidental injury.

[18] Dr. Okano noted that the radiologist's reports would not be in themselves sufficient to conclude that it was non-accidental injury, although that would be the most common reason for rib fractures. He confirmed that Baby M.G. had been seen by the head of the Metabolics department at Children's Hospital to rule out metabolic bone disease or other blood problems that could explain the multiple bruises. He concluded that there was not a clear incident that could explain these serious injuries—multiple bruising around the face, ears, and eyes, and multiple rib fractures.

[19] Based on the literature, significant forces like falling from a height of more than six feet or an adult

tripping and crushing the infant would be required to break the ribs, due to the plastic nature of ribs in children. He cited instances of children being run over by automobiles and suffering serious internal injuries, without having rib fractures. He also noted that in the literature, eighty percent of rib fractures in children are non-accidental. Considering all of the injuries occurring together at the same time, he was very suspicious that this was a non-accidental injury, particularly as the parents did not report a major accidental event. He noted that it would be “virtually impossible” for a child who could barely walk to suffer posterior rib fractures from a fall. Chest compression such as in C.P.R. could potentially cause anterior rib fractures, but not posterior rib fractures.

[20] Various causative scenarios were put before Dr. Okano, and he rejected these as being unlikely to have caused the injuries. On cross-examination, Dr. Okano accepted certain specific explanations for specific injuries as being possible—for example, a significant bump to the forehead could cause apparent bruising under the eyes as well. He also disagreed under cross examination that an adult could unknowingly break the child’s ribs—due to the significant pain, this would likely cause the child significant distress.

[21] Dr. Clarke also testified for the Director as an expert in paediatrics, clinical genetics and biochemical genetics. His evidence essentially considered various possible disorders, and concluded that Baby M.G. did not have a tendency to bruise easily, nor did he have a disorder that would indicate his bones were particularly susceptible to being broken.

[22] Dr. Hlady testified for the Director as an expert in paediatrics and child abuse. She saw the child in July of 2005. With respect to the proposition that the “steamrolling” incident caused the rib fractures, she thought this was unlikely from the mechanism described. She also rejected that throwing the child and catching him in the sense of normal handling could have fractured the ribs due to the significant compression required. She noted that the constipation manoeuvre—lifting the child’s legs to his chest and placing pressure on them—had not caused any injuries in other children to her knowledge. She agreed this was not impossible, but was unlikely because excessive force would have been required. She also expressed doubt that a child of that age could twist his own ears sufficiently hard to cause bruising, as this was a behaviour that M.G. reportedly engaged in.

The Director’s other evidence

[23] A public health nurse, Wendy Jackman also testified for the Director. She had involvement with M.G. both before and after pregnancy, and related an incident in November or December of 2004 in which she discussed various issues with M.G., and reported that M.G. was very upset and crying because J.S. had said to her “all your f...ing kid does is cry.” This statement is vigorously denied by both J.S. and M.G. Ms. Jackman did not report seeing any dark circles on M.G.’s cheeks.

[24] The foster parent who has been caring for Baby M.G. since his removal from his parents, Ms. A.V. also testified. She reported that when she first received Baby M.G., his right eye was bloodshot looking, and he had some bruising on his face. She reported that he did not bang his head on his crib or playpen and was not accident-prone, although he did have accidents that did not result in visible injuries or bruises. He also did suffer some injuries such as scratches or bruises arising from explained events. She further testified that Baby M.G. had not been constipated to her knowledge during the time he was in her care, including when he first arrived. The Caregivers testified that Baby M.G. had been constipated up until the time of his removal.

[25] Brian Bingham, the Ministry social worker who assumed Baby M.G.’s file in early March of 2005, also testified. He testified as to concerns that had been related to him by the maternal grandmother, D.L., regarding the significant level of bruising on the child in January of 2005; that J.S. had begun to baby-sit the child in December of 2004; and that M.G. reported that the child began hitting his chin on the crib railing beginning in October/November of 2004. There were two visits to Dr. Maskey in

mid-December of 2004, and the child had some bruising attributed to a fall at that time.

[26] Throughout, M.G. continued to tell Mr. Bingham that she did not know who had caused the injuries, and that none of the Caregivers could have caused the injuries. She was convinced that the injuries resulted from some sort of medical condition. Mr. Bingham also testified regarding previous Ministry involvement in D.L.'s family involving M.G., primarily due to sexual interference with M.G. and her sister by N., M.G.'s stepfather's son, as well as some altercations between mother and daughter. Ultimately, the situation improved and the file was closed.

[27] Mr. Bingham also confirmed that there were no criminal records or drug issues of concern to the Ministry, although M.G. had been involved in an incident in which she had hit another girl in high school, as a result of which she went through alternative measures, and J.S. had been involved in a fight outside a bar after losing his employment. Mr. Bingham also explained that no services had been offered to the family due to the serious nature of the injuries, for which no explanation was provided.

The appellant's evidence

[28] M.G. resided with her mother, D.L., up until October of 2004. At this time, she moved to her own apartment. Baby M.G.'s biological father, G.K., separated from M.G. after learning of her pregnancy, and has not been involved in Baby M.G.'s life other than seeing Baby M.G. on two occasions. J.S. moved in with M.G. on November 1, 2004, and assumed the role of father to Baby M.G.

[29] In November of 2004, J.S. lost his employment as a result of repeated absences, which were due to illness of a family friend. Following this, he began to look after Baby M.G. in order to save the couple money. During the period between November 9, 2004 and January 14, 2005, J.S. looked after Baby M.G. approximately 33 mornings, for half-days while M.G. was at school. M.G. also worked two evenings per week at a clothing store during this time, although J.S. would rarely look after Baby M.G. during those times—typically M.G.'s mother D.L. would look after Baby M.G. at these times.

[30] Baby M.G. began to crawl in September of 2004, and was described as a "turbo crawler" because he would crawl so quickly. He began cruising at the beginning of December, 2004. "Cruising" means attempting to walk by moving from one object to another. At this point, he began falling quite frequently. On December 13, 2004, he was cruising and fell on the coffee table, causing bruising on the whole left side of his face. M.G. recalls seeing him fall, while J.S. was present but J.S. says he did not actually see Baby M.G. fall.

[31] Cross-examination revealed some inconsistencies as to whether Baby M.G. fell on a table or a toy, with the notes of Drs. Maskey and Manthorne indicating a toy, but M.G.'s testimony and statement to police indicated a table. The day after this, Baby M.G. had his ten-month check-up with Dr. Maskey. M.G. was told not to worry about the bruising, as that was a common result of children falling when learning to walk.

[32] M.G. was off from school from December 17, 2004 to January 4, 2005. Baby M.G. had a fall a few days before Christmas while he was alone with J.S., and had a bruise on his forehead as a result. The family went to Edmonton just after Christmas, and again Baby M.G. continued to have many falls. Although M.G. was not present for these falls and accidents, she was informed of them by other family members.

[33] On January 6, 2005, there was an incident in which M.G. was leaving for work, and Baby M.G. became very upset and started crying. M.G. heard a big thump, and Baby M.G. started crying very badly. J.S. informed M.G. that Baby M.G. fell and hit his toy; J.S. testified that M.G. had hit the button on the spiral toy and then left the room, and then Baby M.G. became mad, started to jump up and down, slipped and hit his head first on the toy and then on the ground. M.G. left for work without checking on

Baby M.G. in order to avoid upsetting him further, as he displayed significant separation anxiety when she left. The next day, Baby M.G. had a bump in the middle of his forehead, and two rug burns to just off the centre of his forehead.

[34] On January 9, there was another incident in which Baby M.G. became excited with a toy, and fell on the toy, hitting his head on the toy as a result. Over the next two days, Baby M.G. began to get black eyes. The bump on the centre of his forehead bruised down to below his eyes by three days later so that he had “raccoon eyes.” There was no blood visible in Baby M.G.’s eyes until January 12. On January 11, Baby M.G. had a red mark under his chin, after he had spent time with J.S. and his mother S.I.

[35] January 12 was M.G.’s birthday, and the entire family, including Baby M.G. went out for dinner at Boston Pizza. After that, Baby M.G. went home with S.I. for the next two nights. Baby M.G. fell and hurt his arm during this time.

[36] M.G. also described how two people, B.S. (a friend) and C.I. (J.S.’s step-brother), would throw Baby M.G. up into the air a few inches and catch him, by holding him around the ribcage. Additionally, C.I. would roll around with Baby M.G. on the ground, in what was described as “steamrolling.” C.I. testified that he was careful not to put any pressure on Baby M.G. while doing this, and that Baby M.G. did not seem to object.

[37] On January 14, 2005, J.S. and M.G. took Baby M.G. to see Dr. Maskey, and M.G. related her concerns about Baby M.G.’s increasing level of bruises. Dr. Maskey checked for a concussion, and sent them to the hospital to have a CAT scan done on Baby M.G. to see if there was any internal bleeding. At the hospital, Baby M.G. was given a CAT scan and full body X-ray. A history of Baby M.G.’s falls was taken by Dr. Manthorne, who also put Baby M.G. on antibiotics due to redness in his ear. Blood work was done. Later that evening, Dr. Manthorne and a social worker at the hospital informed M.G. and J.S. that Baby M.G. had three rib fractures, a wrist fracture, and a shoulder fracture on the right side, and that Baby M.G. would be removed from their care. J.S. and M.G. were shocked, particularly as Baby M.G. exhibited no apparent signs of discomfort when crawling. They were asked to respond to questions from a social worker and a police officer.

[38] Both M.G. and J.S. reported that they were currently participating in an online parenting course called “Simply Parenting.” They had also asked the Ministry if there were any courses they could participate in, although the Ministry had not responded to them at the time of trial.

[39] On his cross-examination, there was some evidence that J.S. had given different statements at different times in regard to how much Baby M.G. cried—to the R.C.M.P. he related that Baby M.G. was a model baby and cried very little, even when he was hurt; while in his examination in chief, J.S. testified that Baby M.G. cried very hard when he was constipated.

[40] B.S., a friend of J.S.’s who lived in the same building and would drop by almost daily, also testified, as did his fiancée, A.N. A.N. described the execution of the “constipation manoeuvre” by both M.G. and J.S., and described it as a gentle kind of pressure of the legs against the stomach area; not a pressure on Baby M.G.’s chest. Both described Baby M.G. twisting his earlobe and noticing redness, but not bruising, as a result.

[41] D.L., M.G.’s mother also testified. She typically looked after Baby M.G. on weekends, although she was away on holiday from November 15 to December 8 of 2004. She did not make any observations of Baby M.G. in 2004 that she recalls, but on January 7, 2005, she noticed that he had a bruise and carpet burn on his face. The next time she saw him, January 12, he had even more bruises, including in circles around his eyes. His eyes were also red. She was concerned about the bruises, and told D.M. to take Baby M.G. to the doctor, which she did.

[42] D.L. also testified that at one point she told A.V., Baby M.G.’s foster parent, that she was going to

take responsibility for the incidents so that all the troubles would be over. This information was relayed to Brian Bingham, who told D.L. that she should not do that because he knew she had not hurt Baby M.G., and that she could get into a lot of trouble by saying such things.

[43] On cross-examination, D.L. accepted her statement to the R.C.M.P., to the effect that Baby M.G. never fell at her house. Her previous statements to the R.C.M.P. that Baby M.G. had begun displaying aggressive behaviour by hitting her, and also a habit of pulling his ears, after M.G. moved out of D.L.'s apartment, was also put to D.L. She disagreed with these statements, saying that both behaviours had started before M.G. moved out, and that she had been nervous when giving her statement to the R.C.M.P., which explained the discrepancy.

[44] Her description of the constipation manoeuvre and its potential role as a cause of the fractured ribs also appears to have arisen after the R.C.M.P. investigation. This does not appear to have been advanced by anyone as a possible cause of Baby M.G.'s injuries until after the trial started. D.L. says that she forgot about this at the time, and she never thought that it hurt Baby M.G. when she did it.

[45] S.I., J.S.'s mother, also testified. She cared for Baby M.G. occasionally, including for some overnight periods. She also observed that Baby M.G. engaged in "turbo-crawling" and would often crash into things. However, she could not recall seeing any marks on his body as a result of crawling. She recalled an incident on January 13, 2005 when she was playing with Baby M.G. and he fell on his right side, and then began crying very hard. She checked his arm later by moving it around to make certain that he had not been injured. In her cross examination, it was revealed that many incidents – Baby M.G. falling off the couch with J.S. and M.G., C.I. rolling around with Baby M.G., B.S. tossing Baby M.G. into the air – were not told to the R.C.M.P., but were remembered later through the various efforts of the Caregivers to try to remember any incidents that may have hurt Baby M.G. and explain his injuries.

The Decision Under Appeal

[46] In his reasons for decision, the learned trial judge briefly set out the injuries suffered by the child and the expert opinions of Dr. Manthorne and Dr. Okano that the injuries could not be explained by accident. The learned trial judge then proceeded to set out sub-sections 49(4) and (5) of the ***CFCSA***, and set out the two issues as being whether the circumstances that led to the removal improve within a reasonable time and whether the parent would be able to meet the child's needs.

[47] The trial judge concluded that there was no prospect that each Caregiver would change his or her position that he or she did not cause the injuries, or have any knowledge about who might have been responsible. On the issue of whether a parent would be able to meet the child's needs, the trial judge concluded that Baby M.G. needed protection from physical abuse, and that as neither parent had accepted responsibility, there was no reason for them to change, nor would they change.

[48] The trial judge then proceeded to give his decision in this case. He concluded that the only reasonable conclusion was that one or more of the Caregivers injured the child, and that it was highly improbable that they could not have known about the abuser, but they chose to protect the abuser rather than protect the child. He concluded that there were no supervisory terms that could protect the child if returned to the parents, and that a term that the child be examined regularly by a medical doctor would ensure future abuse would be detected, but that the deterrence of detection would largely have been present at the first instance of abuse. He concluded that massive force was applied to the child, that this force could not be the product of a rational thinking mind, and therefore that the appellant's supervisory proposal would not succeed.

[49] The trial judge considered that Baby M.G. was thriving in his current environment, and had a good relationship with his parents, who had been exercising access five times per week. The trial judge weighed the alternatives of adoption which, he concluded, would be devastating for Baby M.G. due to the

severance of the bonds with his parents; and returning him to his parents and the environment that gave him his severe injuries. He concluded that there was a likelihood the child would recover from the psychological harm done by removing him from his parents, but that he might not survive another serious physical attack if returned to his parents. He concluded that the child, once older, might be able to protect himself by avoiding confrontations and identifying his abuser; however, this would not occur within a reasonable time.

[50] Therefore, the trial judge noted that he had to choose the least unacceptable of two "untenable" options, and granted a continuing custody order in favour of the Director. He further went on to specifically note the provisions of the ***CFCSA*** that provide for notification to the parents and access after adoption where it is in the child's best interests, and made comments that suggest he hoped the parents would be able to remain involved in Baby M.G.'s life, although he recognized that they might not.

Consideration of The Grounds of Appeal

1. Did the trial judge err in failing to give reasons to support his decision granting a Continuing Custody Order in favour of the Director that are sufficiently intelligible to provide appellate review of the correctness of his decision?

[51] The appellant asserts that the reasons of the trial judge do not allow her to exercise her right to an appeal in a meaningful way and, therefore, that the trial judge's reasons are insufficient. The appellant asserts that there should arguably be a higher standard imposed on the sufficiency of reasons than in the criminal context because of the serious nature of the decision to remove a child from his or her parents. The Director disagrees that the context necessarily requires sufficiency of reasons greater than the criminal context, but submits in any event that the reasons are not inadequate, and are amenable to appellate review. The Director cites comments of L'Heureux-Dubé J. in ***Willick v. Willick***, 1994 CanLII 28 (S.C.C.), [1994] 3 S.C.R. 670, 119 D.L.R. (4th) 405 at para. 113 that

> … Courts of appeal must realize that trial judges deal daily with applications in family law for interim and permanent spousal and child support, as well as variation thereof. They develop considerable expertise yet often do not have the leisure to write long and detailed reasons in all cases. In fact, most of these cases are dealt with by the chambers judge, as was the case here. Experienced judges such as Carter J., a member of a specialized division -- the Unified Family Court of Saskatchewan -- deal daily with such matters and are able to dispose of them quickly, grasping the global picture and applying the appropriate standards, particularly in cases such as this one which do not present any exceptional features. Brief reasons are very often sufficient. Our Court has recently dealt with this issue in the context of criminal law in ***R. v. Burns***, 1994 CanLII 127 (S.C.C.), [1994] 1 S.C.R. 656, where McLachlin J. held for the Court, at p. 664:
>
> > To require trial judges charged with heavy caseloads of criminal cases to deal in their reasons with every aspect of every case would slow the system of justice immeasurably. Trial judges are presumed to know the law with which they work day in and day out.

The rule should not be different in matters such as the present one.

[52] I agree that the sufficiency of reasons must be assessed in light of the expertise of the court and the limited time available to write detailed reasons. However, I agree with the appellant that the threat of having a child removed from a parent engages serious, even constitutionally-protected interests akin to those raised by a decision in the criminal law context (see *e.g.* ***New Brunswick (Minister of Health and Community Services) v. J.G.***, 1999 CanLII 653 (S.C.C.), [1999] 3 S.C.R. 46, 177 D.L.R. (4th) 124 at

paras. 56-67, holding that the state removal of a child from his or her parents engages the parent's right to security of the person protected by section 7 of the ***Canadian Charter of Rights and Freedoms***; see also ***British Columbia (Superintendent of Family and Child Services) v. H.L.***, [1995] B.C.J. No. 926 at para. 9 (S.C.) (QL)), and that there was therefore a similar duty on the trial judge in this case to provide sufficient reasons to the parties. The removal of a child from a parent is much more serious than the matter of setting interim support.

[53] A functional test for assessing the sufficiency of reasons and the key rationales for requiring reasons were set out in ***R. v. Sheppard***, 2002 SCC 26 (CanLII), [2002] 1 S.C.R. 869, 2002 SCC 26 (see particularly para. 55 for a summary of propositions relating to the duty of a trial judge to give reasons). The functional approach to the sufficiency of a trial judge's reasons in the criminal context has been most recently affirmed by the Supreme Court of Canada in ***R. v. Gagnon***, 2006 SCC 17 (CanLII), [2006] 1 S.C.R. 621, 2006 SCC 17, where Bastarache and Abella JJ. stated for a majority of the Court at paras. 12-13:

> … In ***R. v. Burns***, 1994 CanLII 127 (S.C.C.), [1994] 1 S.C.R. 656, this Court held that the failure by a trial judge to expressly indicate that he or she had taken all relevant considerations into account in arriving at a verdict was not a basis for allowing an appeal where the record revealed no error in the appreciation of the evidence or applicable law.
>
> Eight years later, in ***Sheppard***, a case in which the trial judge's reasons were virtually nonexistent, this Court explained that reasons are required from a trial judge to demonstrate the basis for an acquittal or conviction. Failure to do so is an error of law. Finding an error of law due to insufficient reasons requires two stages of analysis: (1) are the reasons inadequate; (2) if so, do they prevent appellate review? In other words, the Court concluded that even if the reasons are objectively inadequate, they sometimes do not prevent appellate review because the basis for the verdict is obvious on the face of the record. But if the reasons are both inadequate and inscrutable, a new trial is required.

[54] Thus, it is not in every case where inadequate reasons are given that there will be an error of law. The appellant must demonstrate not only that the reasons are inadequate, but also that they prevent appellate review. Situations in which the reasons may be said to prevent appellate review, depending on the circumstances, include:

- where a judge has not set out the legal principles relied upon in a case where the law is unsettled (see *e.g.* ***R. v. Sheppard***, *supra*, at para. 40, citing ***R. v. McMaster***, 1996 CanLII 234 (S.C.C.), [1996] 1 S.C.R. 740, 105 C.C.C. (3d) 193 at paras. 25-27);
- where the trial judge has failed to address and resolve confusing or conflicting evidence (see *e.g.* ***R. v. Sheppard***, *supra*, at para. 41, citing ***R. v. D.R.***, 1996 CanLII 207 (S.C.C.), [1996] 2 S.C.R. 291, 136 D.L.R. (4th) 525 at para. 54); or
- where the trial judge has failed to explain the rejection of testimony on a critical point (see *e.g.* ***R. v. Sheppard***, *supra*, at paras. 44-45, citing ***R. v. Feeney***, 1997 CanLII 342 (S.C.C.), [1997] 2 S.C.R. 13, 146 D.L.R. (4th) 609 at para. 31).

[55] However, where the law is well settled and the decision turns on the application of the law to the particular facts of the case, or where the basis of the decision is obvious on the face of the record, then inadequate reasons may well not prevent appellate review, and no error of law will be demonstrated (see *e.g.* ***R. v. Sheppard***, *supra*, at para. 40, citing ***R. v. McMaster***, *supra*; ***R. v. Gagnon***, *supra*, at para. 13).

[56] In this case, the reasons of the trial judge may best be described as terse and sparse. However,

on a careful review of both the reasons and the record, the trial judge's rationale for granting the continuing custody order is clear from the face of the record. In the circumstances, the reasons are not so unintelligible as to preclude appellate review of the decision.

[57] In particular, three experts agreed that the injuries suffered by the child were in all probability non-accidental. All agreed that the magnitude of the force that must have been applied to inflict them was substantial. Another expert testified that there was no medical condition detected that would suggest that Baby M.G. was particularly susceptible to bruising or fractures. There is no conflicting evidence to be resolved here: the record is clear that this child suffered severe physical trauma. The identity of the perpetrator remained unknown, and none of the Caregivers thought that any of them could have caused the injuries. It was open to the trial judge to conclude on the evidence before him that the other Caregivers concealed the identity of the perpetrator. Additionally, the facts clearly showed that the serious injuries continued unchecked through December, 2004 and January, 2005, yet abated once the child was removed from the family.

[58] The remainder of the appellant's argument as to the insufficiency of the reasons really relates to her further substantive grounds of appeal, and so I consider each challenged aspect of the trial judge's reasoning in greater detail below. However, I consider that the trial judge's reasons do not preclude appellate review of his decision and, therefore, this ground of appeal must fail. Although I expand upon the trial judge's reasoning when discussing the individual grounds of appeal that follow, all of the steps in his reasoning process are clear on the face of the record—no weighing or consideration of the evidence, nor resolution of issues of credibility or conflicting principles of law, is necessary in order to review the trial judge's reasons.

2. Did the trial judge err by failing to analyze and interpret section 49 of the CFCSA?

[59] The second ground of appeal is that the learned trial judge erred by failing to analyze and interpret section 49 of the ***CFCSA***. The appellant's objection on this ground is really two-fold: that the trial judge made no finding that Baby M.G. was in need of protection as at the date of the removal; and that the learned trial judge failed to consider the mandatory factors required to be considered by a court making a continuing custody order under sub-section 49(5) pursuant to sub-section 49(6).

(a) A finding that the child was in need of protection

(i) The correct interpretation of sections 40, 41 and 49 of the ***CFCSA***

[60] In this case, the appellant submits that a finding that the child was in need of protection was necessary before a continuing custody order could be granted pursuant to sub-section 49(5). The appellant relies on the decision of the Court of Appeal in ***B.B. v. British Columbia (Director of Child, Family and Community Services)*** 2005 BCCA 46 (CanLII), (2005), 36 B.C.L.R. (4th) 108, 2005 BCCA 46. That case provides a very helpful discussion of the scheme and purpose of sections 40, 41, and 49 of the ***CFCSA*** in the context of a temporary custody order granted by consent pursuant to section 60. Of particular importance, while a finding that the child is in need of protection is a pre-requisite to making any custody order in favour of the Director under sections 40 and 41, where the Director proceeds to obtain a temporary custody order by consent pursuant to section 60, a finding that the child is in need of protection is not a prerequisite to granting that order (see sub-section 60(4)). Huddart J.A. noted for the Court of Appeal that, while there is no express provision in the ***CFCSA*** requiring a court to find a child in need of protection under section 40 before considering a continuing custody order under section 49, that requirement derived from the appropriate construction of the ***CFCSA*** by the Provincial Court (at paras. 23-25).

[61] Huddart J.A. summarized the correct interpretation of the ***CFCSA*** as follows: the grant of the

temporary custody order under paragraph 41(1)(c) by consent pursuant to section 60 triggers the running of time under section 45 and the right of the Director to seek a continuing custody order under section 49. At that application, the director must establish on a balance of probabilities the child's need for protection at the date of removal. Once the court has made the finding under section 40, it may consider whether to make a continuing custody order under sub-section 49(5): ***B.B.***, *supra*, at para. 43. Thus, it is clear that a finding that a child is in need of protection, is a necessary prerequisite to the granting of a continuing custody order pursuant to section 49, and this is one of the arguments raised by the appellant in this appeal.

[62] However, one potential problem in the case at bar is the fact that no temporary custody order appears ever to have been granted: an interim custody order was granted pursuant to paragraph 35(2)(a) of the ***CFCSA*** on April 8, 2005. The Director then appears to have applied for a continuing custody order pursuant to section 49 of the ***CFCSA*** on October 3, 2005, and this was the section under which the continuing custody order was granted by the trial judge. There does not appear to ever have been a temporary custody order granted, either at a section 40 protection hearing or by consent pursuant to section 60. This matter was briefly canvassed at trial, with the Director relying on and setting out the test under paragraph 41(2)(c) for a continuing custody order, even though the application was pursuant to sub-section 49(5). Counsel for the appellant sought to set out tests under both sections for the trial judge, who based his decision on sub-section 49(5).

[63] I express, in passing only, my doubts that the Director was entitled to apply under section 49 for a continuing custody order when no temporary custody order existed. Rather, the protection hearing should have been continued pursuant to section 40, and the test in sub-section 41(2) applied to the determination of whether a continuing custody order should be granted. This issue was not raised by the parties as a ground of appeal in this case, nor did I receive submissions on it. Counsel for the appellant did not seek to press the issue that the test to be applied was that under paragraph 41(2)(c) when the matter arose at trial, and counsel for the Director put this forward as the correct test. In my view, as discussed in greater detail below, the application of the more stringent test under sub-section 41(2) would not change the outcome of this case and to request further submissions regarding, what is in some sense a procedural matter, when the evidence as to where the best interests of this child lie on either test is crystal clear, would only be to delay inevitable outcome in this case. Delay of the inevitable is unlikely ever to be in a child's best interests: ***B.B.***, *supra*, at para. 36.

(ii) The trial judge did make a finding that Baby M.G. was in need of protection

[64] Regardless of the procedural mechanism by which this case came on for hearing, it is clear that the trial judge did make a finding that Baby M.G. was in need of protection. The court order dated September 25, 2006 specifically states that Baby M.G. was found to be in need of protection.

[65] Section 13 defines when a child will be considered to be in need of protection. However, section 13 is non-exhaustive and the provisions of section 2 may be invoked to ensure protection of a child, when the precise requirements of section 13(1) cannot be met with sufficient certainty: ***B.S. v. British Columbia (Director of Child, Family and Community Service)*** 1998 CanLII 5958 (BC C.A.), (1998), 48 B.C.L.R. (3d) 106, 160 D.L.R. (4th) 264 at paras. 19-25 (C.A.); ***B.B.***, *supra*, at para. 11.

[66] While the learned trial judge did not specifically reference these sections, he did state at para. 8 of his reasons: "Baby M.G. needs protection from physical abuse." I construe this as a finding that Baby M.G. was in need of protection. The trial judge's conclusion that Baby M.G. was in need of protection is supportable under paragraphs 13(1)(a) (child has been or is likely to be physically harmed by the child's parent); 13(1)(c) (child has been or is likely to be physically harmed by another person and if the child's parent is unwilling or unable to protect the child). I add that, even if the trial judge had concluded that none of the Caregivers was responsible for the physical abuse, as the appellant urges he should have, Baby M.G. could still be found to be in need of protection under 13(1)(d) (child has been or is likely to be

physically harmed because of neglect by the child's parent). In this situation, the words of R.R. Smith Prov. Ct. J. in the case of ***British Columbia (Director of Child, Family and Community Services) v. D.M.***, 2004 BCPC 476 (CanLII), 2004 BCPC 476 at ¶ 58 are apt:

> Under section 13(1)(a) of the ***CFCSA***, a child is in need of protection if the child has been physically harmed by a parent. Under section 13(1)(d), a child is in need of protection if the child has been harmed because of neglect by the parent. On the balance of probabilities, the father caused this head injury to the baby, and I find the child is in need of protection pursuant to section 13(1)(a). The burden of proof is on the balance of probabilities, and not proof beyond a reasonable doubt. The court can not be certain beyond a reasonable doubt that the father caused this injury by shaking the child in frustration, but even so, it is unimaginable that he did not know the cause of the injury given he was the sole care giver at the time in question and the baby was lying on the bed, too young to roll over. If he is truly unaware of the circumstances that caused the injury, then it is a serious case of neglect under s. 13(1)(b) [*sic*]. I have no difficulty in finding on the balance of probably that the safety and well being of the child requires me to make a finding of need of protection.

[67] That case involved a four month old boy who suffered significant head injuries, including bilateral retinal haemorrhages, which the trial judge concluded had been caused by the father. Expert opinion suggested that the injuries were caused by significant force, and could not be explained by normal handling. In that case, a temporary custody order was granted in order to enable further questions posed by the court to be answered.

(b) Application of the mandatory factors pursuant to sub-section 49(6)

[68] The second aspect of the appellant's argument, that the trial judge erred by failing to analyze and interpret section 49 of the ***CFCSA***, relates to the fact that he did not specifically set out sub-section 49(6), nor specifically enumerate these considerations. However, after a careful review of his reasons, I am satisfied that he considered the necessary mandatory factors in reaching his conclusion. The fact that he did not explicitly state so is, as explained above, not an independent ground for appeal.

[69] For the sake of convenience, the factors enumerated in sub-section 49(6) are:

> (a) the past conduct of the parent towards any child who is or was in the parent's care,
>
> (b) the plan of care, and
>
> (c) the child's best interests.

[70] Pursuant to sub-section 4(1) of the ***CFCSA***, a consideration of the child's best interests must include all relevant factors, including, for example:

> (a) the child's safety;
>
> (b) the child's physical and emotional needs and level of development;
>
> (c) the importance of continuity in the child's care;
>
> (d) the quality of the relationship the child has with a parent or other person and the effect of maintaining that relationship;
>
> (e) the child's cultural, racial, linguistic and religious heritage;

(f) the child's views; and

(g) the effect on the child if there is delay in making a decision.

[71] While the trial judge did not specifically set out sub-section 49(6) or section 4 of the ***CFCSA***, it is plain on the face of the reasons and the record that the learned trial judge did consider these factors in reaching a decision.

(i) The past conduct of the parents

[72] The trial judge did consider the past conduct of the parents and this is evident in his reasons. In particular, at para. 10 he found that one or more of the Caregivers injured Baby M.G., and that the others must have known or suspected the guilty party. However, the actions of the parents were to protect the guilty party rather than to protect the child. It is patently clear from the record and the overwhelming consensus of the experts that Baby M.G. suffered serious non-accidental injuries. It was open to the trial judge to conclude that one of the Caregivers inflicted these injuries. The past conduct of the parents discussed by the trial judge was either the infliction of these injuries, or taking actions to protect the guilty party.

[73] The fact of no prior involvement of the Ministry in the family is not, as the appellant suggests relying on ***British Columbia (Director of Family and Child Services) v. M.R.***, [2000] B.C.J. No. 973 at para. 46 (Prov. Ct.) (QL) ("***M.R.***"), an important factor in this case. Here, concerning incidents began at around the same time as J.S. moved in with M.G. and the child was less than a year old at the time of removal. In contrast, in ***M.R.***, the Ministry did not become involved until the child was two years old, and up to that point there had been no concerns about the mother's care of the child. Further, the trial judge in that case accepted that there were innocent explanations for the injuries suffered by the child, which were fewer in number and less severe than the injuries at issue in the case at bar.

[74] At this stage, I note that throughout her submissions, the appellant placed significant emphasis on the decision in ***M.R.*** in relation to the child being returned to the parent in a case of unexplained injuries that were innocently explained. I note that the child in that case was returned to the mother and just a few months later was found to be in need of protection, due to further and more severe unexplained injuries, likely caused by the mother's common-law husband: see ***British Columbia (Director of Family and Child Services) v. M.R.***, 2001 BCPC 318 (CanLII), 2001 BCPC 318. That there are no prior child protection concerns is simply one more fact to be weighed in each individual case—it will not be determinative of a particular outcome.

(ii) The plan of care

[75] With respect to the plan of care, the trial judge's comments indicate that he considered the plans of care and found the plan of care, offered by the appellant, to be inadequate to prevent future abuse. At para. 12, he specifically found that there are no supervisory terms that could protect the child, that the deterrence of abuse by reason of the threat of detection was a factor initially present before Baby M.G. was removed, and that Baby M.G. "may not survive another serious physical attack" (at para. 18). These conclusions are fully supported by the evidence and it was open to the trial judge to conclude that the appellant's plan of care would not adequately protect Baby M.G., because it might permit a further serious incident of abuse to occur.

[76] The trial judge also carefully considered the implications of the Director's plan of care, *i.e.* adoption, and wrestled with the positive and negative aspects of that plan of care, stating at para. 18 that there is a likelihood the child might recover from the psychological harm done by removing him from his parents. At para. 20, he noted that in choosing between two "untenable options," he chose the least unacceptable. Thus, the plans of care were fully considered.

[77] The trial judge's consideration of whether supervisory measures would suffice was also thoroughly canvassed during the appellant's oral submissions. In particular, the trial judge expressed concern that there is a significant amount of love in the family, and support among family members, and yet the child's serious injuries arose within that framework. The child's injuries were physically obvious, the evidence demonstrates that both the appellant and the maternal grandmother were quite concerned by the child's bruising, and yet the injuries continued to occur until the child was removed from the parents. The trial judge noted at para. 11 of his reasons that the abuser remained unknown and untreated and that deterrent factors, like detection, had largely been present in the first instance. He went on to note that the abuse was not the result of a rational thinking mind, being the result of massive force applied to a one-year old child. In his words, "[t]he actions were far beyond rational, proportionate or human" (at para. 13). While those are shocking conclusions to draw, the evidence in this case is likewise shocking.

[78] The trial judge works in a court that deals regularly with child protection matters. He had a chance to observe all of the witnesses, including the expert testimony. All three experts testified as to the significant forces that would have been required to cause the child's injuries. The trial judge's conclusions that supervisory measures could not preclude a risk of further serious injury, possibly even death (at para. 18), are amply supported by the evidence.

[79] The appellant faults the Ministry for not providing warnings, chances, programs or services; rather, she submits the Ministry abdicated their responsibility to the R.C.M.P. As Mr. Bingham testified, the family was not offered services because the abuser had not been identified. While accepting that one of the guiding principles of the ***CFCSA*** is that the preferred environment for children is the family, (paragraph 2(b)), and that families should be informed of services and encouraged to participate in decisions affecting them pursuant to section 3, it must not be forgotten that "<u>the safety and well-being of children are the paramount considerations</u>" (section 2); that "children are entitled to be protected from abuse, neglect and harm or threat of harm" (paragraph 2(a)); that "the primary responsibility for the protection of children rests primarily with the parents" (paragraph 2(b)); and that "<u>if, with available support services, a family can provide a safe and nurturing environment for a child</u>, support services should be provided" (paragraph 2(c)) [emphasis added].

[80] The ***CFCSA*** does not mandate that the Ministry provide services if a family cannot provide a safe environment for a child. Nor does it mandate or empower a court to require the Ministry to do so before considering a continuing custody order. The appellant cites a passage of R.R. Smith Prov. Ct. J. in ***British Columbia (Director of Child, Family and Community Services) v. D.M.***, 2004 BCPC 476 (CanLII), 2004 BCPC 476 at para. 69, to the effect that the director has two mandates, one of which is to provide family support. I set out that quote in its entirety, as it is highly relevant to the case at bar (at paras. 69-71):

> The social worker expresses concerns around the parents not having proper parenting skills and not understanding proper age appropriate development. Those are not the kind of concerns that would usually lead to a continuing custody order in the 1st instance, especially when the Director is choosing not to fund any such counselling or family support for this family. The Director does wear two hats and has two mandates. <u>Their primary function is to ensure the safety and well being of the child</u>. Their secondary function is to provide family support and assist the family in being able to properly protect the child.
>
> In this case, once the Director chose to obtain a continuing care order, the Director chose not to put any resources on their secondary mandate. That is always a judgment call which will be seen by the parents as the Ministry having pre-judged what will happen when this case goes to court. If the Director has a very strong case for a continuing care order in the first instance, then it is understandable why family services are not provided to the family. Such would be the situation where the Director believes that neither parent is capable of

> parenting the child even with resources and family support services being given.
>
> This begs the question of whether, in this case, there is any reasonable prospect that with counselling and support services, it will ever be in the best interest of the child to be returned to the parents. As long as the parents are living together, they will be treated by the court as a united family. Both parents lack significantly in parenting skills. Skills can usually be taught. However, even if the parents learn to "talk the talk" of proper parenting, it is hard to accept that they will ever be able to walk the talk in circumstances where there is denial of any involvement that caused the head injury to the child.
>
> [Emphasis added.]

[81] Along similar lines regarding the ineffectiveness of providing support to families in situations where an unidentified person has committed abuse and no one has accepted responsibility, see ***R.L. v. British Columbia (Director of Children and Families)***, [1998] B.C.J. No. 1727 at para. 20 (S.C.) (QL), aff'd 1999 BCCA 145 (CanLII), 1999 BCCA 145.

[82] While keeping a child in the family, with the provision of services, is generally the preferable route, the trial judge was fully entitled to find that the family could not provide a safe environment for this child, even with supervision and support services. The parents had failed to fulfill their responsibility to protect Baby M.G. from abuse in the first instance. The injuries suffered by the child were, in the opinion of three experts and on any reasonable reading of the evidence, severe. There was no reasonable innocent explanation offered for the injuries. There was no acceptance of responsibility on the part of either parent, either for causing the abuse or for allowing it to occur. The trial judge was entitled to conclude there was no evidence the parents would protect Baby M.G. in the future, even with support or supervision.

(iii) The child's best interests

[83] Finally, the trial judge did fully consider Baby M.G.'s best interests. He weighed the two alternatives considering Baby M.G.'s best interests, particularly his physical safety and his emotional ties to his parents. He determined that in this case, Baby M.G.'s need for physical security outweighed his emotional bonds to his parents and the quality of that relationship which could, hopefully, be preserved through the specific mechanisms for access after adoption which the trial judge referenced. He concluded at para. 20 that the best interests of the child would be best served by granting an order for continuing custody to the Director.

[84] The trial judge's reasoning, therefore, encompasses at least the factors set out in paragraphs 4(1)(a), (b), (c), and (d) as being relevant to a determination of the child's best interests. The same guiding principles I have discussed above with reference to the plans of care apply here: the paramount consideration is the safety and well-being of the child, and the child's safety is again reiterated in paragraph 4(1)(a).

[85] The appellant asserts that because there are no drug or alcohol concerns, no prior Ministry involvement in the family, and the parties "come to court with clean hands," they are entitled to what I will call a second chance. She argues that now the parents and family are all more aware that the child was injured, the child is now older and verbal, and the child is walking and not falling anymore. The trial judge carefully considered the fact that the child would be better able to protect himself as he aged, but found that this would not occur within a reasonable time and that, therefore, it was against the child's best interests to be returned to the family. There is no basis to interfere with this finding.

[86] With regard to the appellant's arguments that the parents and family are now more aware that the

child was injured, they were, and must have been aware and concerned, by what was going on in December of 2004, yet the injuries continued. The severity of those injuries argues strenuously against giving the appellant a second chance, notwithstanding that the family had no prior negative history. The trial judge specifically found the child might not survive another attack. There is no basis to interfere with his assessment of the risks within the family environment or where the best interests of Baby M.G. lie.

[87] Citing other cases in which children were returned to their families because there has been no negative history reported, does not mean that that should be the outcome in this case—each case must necessarily turn on its own facts and the unique risks presented by the family situation. The trial judge did not err in failing to return Baby M.G. simply because the parents had a "clean record."

(c) The two alternate grounds for the grant of a continuing custody order pursuant to sub-section 49(5) of the *CFCSA* were discussed by the trial judge

[88] The appellant does not really disagree that the trial judge did discuss the two alternate grounds on which a court may grant a continuing custody order pursuant to sub-section 49(5), which states:

> 49(5) The court may order that the child be placed in the continuing custody of the director if there is no significant likelihood that
>
> (a) the circumstances that led to the child's removal will improve within a reasonable time, or
>
> (b) the parent will be able to meet the child's needs.

[89] On the issue of whether the circumstances that led to the child's removal will improve within a reasonable time, the appellant contends that the trial judge analyzed only the denied behaviour and knowledge of the Caregivers; that the trial judge did not identify the parents as being the ones that injured Baby M.G., only that one or more of the Caregivers did so; that the trial judge's conclusion that if the child were abused again, the Caregivers would not act any differently is not supported by the evidence; and that the question was not who caused the injury, but whether the parents could protect the child. These are primarily challenges to the trial judge's findings of fact, and they cannot be maintained on the evidence.

[90] The circumstances that led to the child's removal were the infliction of severe injuries to Baby M.G. by some unknown perpetrator (the "denied behaviour"), and the trial judge amply discussed that fact in his reasons. The trial judge carefully considered that the abuser remained unidentified and untreated and that, not having identified the perpetrator in order to protect the child the first time around, the Caregivers were unlikely to act differently in future (at paras. 7 and 11). This was a circumstance leading to the removal that he concluded, on the facts, would not change.

[91] The trial judge also carefully considered that the child might become less irritating and more able to protect himself by identifying his abuser, but that that change in circumstances would not occur within a reasonable time (at para. 19). That conclusion, that there was no significant likelihood that those circumstances would change within a reasonable time, is a conclusion of mixed fact and law, and I can see no palpable and overriding error in that conclusion that would justify the intervention of an appellate court.

[92] On the second ground on which a continuing custody order may be granted under sub-section 49(5), that there is no significant likelihood that the parent will be able to meet the child's needs, the trial judge concluded that the child needed protection from abuse and that denials of abuse or knowledge of the abuser by both parents, when they clearly ought to have known or suspected that one of the Caregivers was responsible, meant that they would be unable to meet the needs of Baby M.G. He

concluded that this would not change (at paras. 8-9).

[93] Again, these are primarily factual conclusions that are amply supported on the evidence. The learned trial judge did not err, as the appellant suggests, by basing a "prospective future conclusion" on the parents' past evidence that they did not know who was responsible for the injuries. All future conclusions must necessarily be based on evidence of past conduct, and it was open to the trial judge to make an inference of fact that, not having protected the child from abuse in the first instance in order to protect the identity of the abuser, neither parent would identify the abuser if future events occurred. The trial judge committed no palpable and overriding error in drawing this inference.

(d) The law surrounding unexplained injuries and the relevant standard of proof

[94] To further clarify how the trial judge was entitled to draw the conclusions he did based on the evidence, below I set out some of the law relating to unexplained injuries and the standard of proof the Director must meet in order to demonstrate that a child is at risk of suffering harm in the future.

[95] The seminal case on unexplained injuries in British Columbia is ***British Columbia (Superintendent of Family & Child Services) v. C.G.*** 1989 CanLII 2967 (BC C.A.), (1989), 22 R.F.L. (3d) 1 (B.C.C.A.). Although decided under the old legislation, that case is still a good statement of the law: see the judgment of the majority of a five-member panel of the Court of Appeal in ***B.S. v. British Columbia (Director of Child, Family and Community Services)*** 1998 CanLII 5958 (BC C.A.), (1998), 48 B.C.L.R. (3d) 106, 38 R.F.L. (4th) 138 (C.A.).

[96] An excellent summary of the ***C.G.*** case, *supra*, is provided by R.R. Smith Prov. Ct. J. in ***M.R.***, *supra*, at para. 34:

> The most often quoted case in our Province dealing with unexplained injuries in child protection cases is ***British Columbia (Superintendent of Family & Child Services) v. G(C)*** [1989] B.C.J. No. 1577 (B.C.C.A.). At the Protection Hearing, two twin babies, age 7 months at the time of the Provincial Court hearing, and their five-year-old half-sister, were found not to be in need of protection. The twins had been examined at children's hospital where X-rays showed that one of the twins had a cranial fracture and 14 fractured ribs which were 4 to 6 weeks old at that date. The other twin had 6 broken ribs also approximately 4 to 6 weeks old. The parents were unable to explain the cause of the rib fractures to each of the twins although at trial several possible explanations were given. The parents did offer an explanation for the cranial fracture, stating the father was carrying the child when the father tripped over a dog, resulting in the child bumping his head against the door. Dr. Hlady testified that her impression was that the injuries were not accidental and that a baby of this age could not injure himself in this way. The Court of Appeal felt the hearing judge and the County Court judge on appeal had fallen into the mistake of turning the child protection hearing into a quasi-criminal hearing where the Superintendent had a duty to show one of the parents had caused the injuries. The court held:
>
>> In approaching the resolution of this matter in that way the hearing judge misdirected himself. To begin with he was not conducting a trial which might lead to a finding of guilt of one or other of the parents with respect to the injuries suffered by the twins. Yet he considered that that was the issue before him and having heard the parents testify he was reluctant to find that either of them had abused the twins and caused the injuries which they had suffered. But that was not the nature of the inquiry to be conducted on the hearing, rather the hearing judge was to consider the evidence led on the hearing and decide on the basis of that evidence whether having regard to the safety and well being of these children they should remain in the custody of their parents

> or whether they should be temporarily placed in the custody of the Superintendent.
>
> When the facts disclosed by the evidence are considered, namely that each of the children suffered extensive rib fractures, that in the opinion of Dr. Hlady those injuries were not accidental and the parents who had had the custody and care of these children gave no satisfactory explanation as to how those injuries had been sustained, the only conclusion open to the hearing judge on that evidence was that the safety and well being of the children required that they be placed in the custody temporarily of the Superintendent.

[My emphasis added.]

[97] The reasoning in ***C.G.***, *supra*, makes clear that the role of the trial judge is not necessarily to determine who the abuser is or assign blame. Rather, the focus of the trial judge is on assessing whether the children should remain in the custody of their parents, having regard to their safety and well-being. This approach was strongly affirmed in ***B.S.***, *supra*, at para. 17. In that case, the majority held that a child may be in need of protection even if the precise circumstances described in sub-section 13(1) have not been proven to the requisite standard. Thus, a child is in need of protection if the need of protection from abuse, neglect, harm or threat of harm is proven to the requisite standard, even if it cannot be proven who perpetrated the harm with sufficient certainty to meet the precise requirements of one of the paragraphs of sub-section 13(1) (see paras. 19 and 33).

[98] The ***B.S.*** decision also provides a helpful discussion of the requisite standard of proof to be met by the Director where what is at issue is the risk of future harm. The majority stated at paras. 27-31:

> When the assertion being made is about a past event then the actual occurrence of that event must be shown by the weight of the evidence to have been more probable than not. That is the case with past abuse, neglect, or harm to a child.
>
> But where the assertion being made is that there is a risk that an event will occur in the future, then it is the risk of the future event and not the future event itself that must be shown by the weight of the evidence to be more probable than not. That is the case with consideration of a threat of future harm.
>
> The result is that in considering past abuse the degree of certainty that it has occurred will be more than is required in considering whether abuse will occur in the future. A ten percent risk of future abuse may meet the test of the risk being shown to exist on the balance of probabilities, whereas a ten percent assignment of the probability that the abuse had occurred in the past would not meet the balance of probability test.
>
> In assessing the risk of future harm, (which is called the threat of future harm in s. 2), there is room for a variable assessment depending on the nature of the threatened harm which is in contemplation. A threat of harm through neglect of the child's hygiene might well have to be much more probable in order to meet the balance of probability test than a threat of serious permanent injury through physical or sexual abuse. Generally speaking, a risk sufficient to meet the test might well be described as a risk that constitutes "a real possibility".
>
> I have received a good deal of stimulation on this subject from the decision of the House of Lords in ***In Re H. and Others***, [1996] A.C. 563… However, I wish to say that I would adopt the views expressed by all five law lords that the word "likely" has a primary meaning of "more probable than not", but a recognized secondary meaning of "a real possibility", and that the secondary meaning captures the intent of Parliament in the use of the word "likely"

> in relation to the possibility of a child suffering harm in the future.
>
> [Emphasis added.]

[99] Thus, in order to show that a child is in need of protection, the Director must demonstrate that there is “a real possibility” that the child may suffer harm. Additionally, the assessment of that risk may vary, depending on the nature of the threatened harm. Here, where the experts were unanimous that “substantial force” was required to cause the child’s injuries, and where the trial judge specifically found that the physical abuse was so serious that there was a possibility that Baby M.G. “may not survive another serious physical attack” (at para. 18), any risk that another attack might be permitted to occur is unacceptable.

[100] Another relevant factor in the grant of the temporary custody order in ***B.S.***, *supra*, was the fact that the child had significantly improved once the foster parent was excluded from the hospital. The child had been born with several health issues and went through a series of foster homes before settling into the care of Ms. S.

[101] At approximately the age of eight, the child developed feeding problems, and was diagnosed as a victim of Munchausen’s Syndrome by Proxy, a condition where someone is harmed by someone else in order to attract some form of attention or concern. Once an order was issued excluding Ms. S. from the hospital, the child improved significantly. The trial judge noted that the central factor in the case was the speed and completeness of the child’s recovery after Ms. S. was excluded. He granted a temporary protection order, which was upheld on appeal at both levels of court.

[102] On the basis of the reasoning of the Court of Appeal in ***C.G.*** and ***B.S.***, *supra*, R.R. Smith Prov. Ct. J. concluded in ***D.M.***, *supra*, at para. 55 that:

> Following the logic in ***G.(C.)*** and ***B.S.***, there is an onus on the Director to prove, on the balance of probabilities, that the child is in need of protection, but there is no onus to prove a particular parent caused the injuries that led to the finding of need of protection. In such a case as this, where there are unexplained serious injuries to the child, in circumstances where one would expect there should be an explanation, and credible medical evidence exists that the injury was most likely non-accidental, a finding of need of protection should be made.
>
> [Emphasis added.]

[103] And at para. 53, R.R. Smith Prov. Ct. J. commented on the fact-specific nature of unexplained injury cases:

> Both the ***G.(C.)*** and the ***M.R.*** cases are examples of how these unexplained injury cases turn on the facts. In ***G.(C.)*** when Judge Auxier later heard a subsequent application by the Director for a permanent order, new evidence was introduced suggesting that the five year old step sister had caused the injuries to the twins and ultimately that "unexplained injury" case became an "explained injury" case which resulted in a different resolution by the court [1990] B.C.J. No. 2934 and [1991] B.C.D. Civ. 1568-02. In the ***M.R.*** case, the initial finding was that the child was not in need of protection because the injuries were sufficiently explained, and the child was returned to her mother in March of 2000. However in July of 2000 the child suffered fractures to seven ribs and a black eye and two weeks after that she suffered serious injuries to her face, including two black eyes and massive swelling. In a subsequent hearing before me reported at [2001] B.C.J. No. 2456, these more serious injuries were unexplained, and as a result the mother lost the custody of the child.

[104] In this case, the trial judge was entitled to conclude on the evidence before him that there was no plausible explanation advanced by the parents as to how the injuries occurred. Thus, the case was one of serious unexplained injuries.

[105] On the issue of when a continuing custody order will be appropriate for a case of unexplained injuries, the decision of this Court in ***R.L.***, *supra*, is helpful. That was an appeal by the parents and grandmother from the grant of a continuing custody order to the Director. In that case, the father's infant son had died as a result of severe brain injuries and the trial judge attributed responsibility for the death to the parents. At trial, the parents denied the need for counselling, although they had taken steps since the trial to obtain counselling.

[106] The parents had a subsequent child, and the Director removed that child and sought a continuing custody order at the protection hearing. The trial judge granted the continuing custody order and this was upheld on appeal, notwithstanding the many cases in which temporary orders had been tried first before a continuing custody order was sought, and the provisions of the ***CFCSA*** that suggest that every effort should be made to try to use a temporary order to buy time to test strategies for improving the family circumstances.

[107] The trial judge's reasons for granting the permanent order had been that the parents did not acknowledge responsibility for their son's injuries and death and, therefore, they were unlikely to benefit from counselling, and because she found it was in the child's best interests to be available for adoption as quickly as possible because of her young age. Spencer J. concluded that there was nothing clearly wrong about this decision. Thus, in certain circumstances, an immediate continuing custody order may be the appropriate order.

[108] From the above discussion, it is apparent that the law in relation to determining when a child will be in need of protection, when there are unexplained injuries, and when a continuing custody order should issue in favour of the Director, is relatively well settled. It is also highly fact-specific. The trial judge did not need to engage in a significant abstract exercise of statutory interpretation in order to correctly apply section 49. He needed only to consider the factors specifically set out in the legislation and apply these considering the relevant standards of proof set out in the case law and the specific facts of this case. I have found that he did so.

[109] From the above, it is clear that this ground of appeal cannot succeed.

3. Did the trial judge err by disregarding significant material evidence?

[110] The thrust of the appellants' argument on this point is, really, that the experts admitted that certain specific injuries could have had accidental causes, and that the trial judge erred in accepting their opinion that the totality of the circumstances supported a non-accidental cause. The appellant seeks to argue that there were known causes for the bruises, and argues that the situation "is an unfortunate series of events that are coincidental, each of which is related to an active 11 month old at the cruising phase of his life." She does not explain or address the fact that the severe injuries ceased once the child was removed from her care.

[111] The experts did agree that various of Baby M.G.'s injuries could have had accidental causes. In a telling example, the appellant states at paragraph 115 of her submissions:

> Dr. Hlady stated bumps and bruising on the top of Baby M.G.'s head could possibly have occurred from bumping in a crib or crawling and bumping into furniture, however, the latter "may not be impossible" and it was "hard to say."

[112] Similarly, the experts did agree that the subconjuncitva haemorrhaging, bruising on the ear, and wrist fracture could all possibly be innocently explained. The appellant further argues that, since the trial judge did not specifically mention the evidence of Dr. Hlady in his judgment, he disregarded her material evidence as to these potential accidental causes.

[113] This ground of appeal is without merit. The trial judge carefully considered the expert evidence, which included a significant search for any possible medical explanation for the child's condition. The appellant is grasping at straws in arguing that there is any significant evidence that the injuries were accidental. All three experts were of the opinion there was an extremely high probability the injuries were non-accidental, and that the force applied to the child must have been significant. All three were adamant that broken ribs could not be caused by normal handling. They all agreed that there could be innocent explanations for various injuries, individually speaking (specifically the various bruises, broken wrist, and subconjunctiva haemorrhaging). However, they all thought these various innocent explanations were "unlikely," "implausible," or "not probable." On the totality of the evidence and, in the absence of a serious known traumatic event, they all concluded the injuries were most probably non-accidental.

[114] Again, the appellant relies on ***M.R.***, *supra*, for the proposition that the judge is not bound by the totality of the circumstances (see [2000] B.C.J. No. 973 at para. 47). However, as I have explained above, the trial judge in that case accepted the various accidental explanations put forward by the mother, which had been rejected by the expert. Here, the only evidence supporting the accidental causes is the testimony of the Caregivers, which is inconsistent in many ways, and the grudging acceptance by each of the experts that, individually, there could potentially be accidental causes for these injuries. No plausible accidental explanation for the broken ribs was put forward. A finding that the child suffered non-accidental injuries, based on the totality of the injuries, was not only open to the trial judge based on his assessment of the evidence before him, it is the only reasonable conclusion in the face of such overwhelming evidence.

[115] With respect, many of the appellant's submissions really miss the entire force of the three expert opinions in this case: significant force, as exemplified by a fall from six feet or a parent falling on the child and crushing it, would be required to break a child's ribs. The fact that a twelve year-old child might have the strength to cause such injuries, does not indicate that the injuries are minor or could easily have been innocently caused, as the appellant suggests in her submissions. Here, there is no significant known trauma which could reasonably explain these injuries. The experts are unanimous that significant force would be required to cause such injuries.

[116] The most concerning fact to the Court is that these injuries occurred at all, and the forceful circumstances that must have existed to lead to these unexplained injuries. The fact that the parents did not know of or suspect the injuries, while concerning, is not, as the appellant suggests, the primary basis for finding that this child needs protection and that he cannot be protected within the family.

4. *Did the trial judge err by failing to admit relevant evidence?*

[117] The appellant further argues that the learned trial judge erred by failing to admit polygraph evidence from all four Caregivers. Initially, the Caregivers refused to take a polygraph test, as urged by the Director, because of legal advice that it was inadmissible in court, their own personal belief that such tests were not reliable, and because the Director would not consent to the return of Baby M.G., even if the Caregivers passed the test. As the Director was not willing to fund psychological testing and the parents were unable to pay for such an evaluation, the Caregivers eventually did consent to undergo a polygraph test, administered by the R.C.M.P., after the trial judge suggested a polygraph or other form of psychological testing to assist him in determining the risks posed to Baby M.G.

[118] The trial judge subsequently issued reasons on August 16, 2006, finding the polygraph tests inadmissible. I am not persuaded that the learned trial judge committed an error of law in not admitting

the polygraph evidence.

[119] The appellant relies on the cases of ***Walden v. Walden***, [1987] B.C.J. No. 1205 (S.C.) (QL) and ***R.M.C. v. J.R.C.*** reflex, (1995), 12 R.F.L. (4th) 440 (B.C.S.C.) to argue that polygraph evidence should be admissible in family law proceedings where the credibility of a party is in issue, subject of course to a determination of weight by the trier of fact. Both ***Walden*** and ***R.M.C. v. J.R.C.*** dealt with access to children where allegations of sexual abuse were involved. In both cases, polygraph evidence that the fathers did not sexually abuse their daughters was held to be admissible, to be weighed with all of the other evidence in the case.

[120] However, the learned trial judge declined to follow these decisions, and instead followed the reasoning of the majority of the Supreme Court of Canada in ***R. v. Béland***, 1987 CanLII 27 (S.C.C.), [1987] 2 S.C.R. 398, 43 D.L.R. (4th) 641 and the decision of this Court in ***E.W. v. D.W.*** 2005 BCSC 890 (CanLII), (2005), 50 B.C.L.R. (4th) 345, 2005 BCSC 890. The latter case was a family law proceeding dealing with custody and access where the father had allegedly behaved in a sexual manner toward the daughter. The father sought to introduce polygraph evidence to establish that his denials of these allegations were true.

[121] Scarth J. delivered a carefully reasoned decision in which he carefully considered the previous cases of ***Walden*** and ***R.M.C. v. J.R.C.***, *supra*, and held that the polygraph evidence was inadmissible even in a family law proceeding where allegations of sexual abuse were at issue. Of particular relevance here, Scarth J. carefully considered the decision in ***Béland***, *supra*, and considered himself bound by that decision. He stated at para. 4 the reasons why polygraph evidence is not admissible:

> In writing for the majority of the Court Mr. Justice McIntyre gives four basic reasons for excluding the polygraph evidence in the ***Béland*** case: (1) it would offend the rule against oath-helping; (2) it would offend the rule against the admission of past out-of-court consistent statements by a witness; (3) it would offend the rule relating to character evidence; and (4) it would offend the expert evidence rule. At ¶18 Mr. Justice McIntyre states:
>
>> ... it is my opinion, based upon a consideration of rules of evidence long established and applied in our courts, that the polygraph has no place in the judicial process where it is employed as a tool to determine or to test the credibility of witnesses.

[122] At para. 16, Scarth J. carefully set out his reasons for considering himself bound by the reasoning in ***Béland***, *supra*, and for not following this Court's earlier decision in ***R.M.C. v. J.R.C.***, *supra*:

> With the greatest of respect, and mindful of the rule of practice indicated by ***Re Hansard Spruce Mills Ltd.***, [1954] 4 D.L.R. 590 (B.C.S.C.) at p. 592, I am of the opinion firstly that I am bound by the majority judgment in ***Béland***. The foundation of Mr. Justice McIntyre's decision is that polygraph evidence, albeit in a criminal case, would be contrary to certain basic rules of evidence and hence is not admissible. Madam Justice Wilson, in a dissenting opinion, disagreed that those rules would be contravened if the polygraph evidence was admitted. Plainly, however, judges of this Court are bound by the majority decision of the Supreme Court of Canada. Secondly, I am of the view that the fact this is a civil case involving the alleged sexual interference with a child does not serve to distinguish it from the majority decision in ***Béland***. Mr. Justice McIntyre was writing in the context of a criminal case without the involvement of a child or allegations of sexual abuse. But the rules of evidence upon which McIntyre J. based his decision apply equally in both types of proceedings. In particular, the issue of credibility is a matter for the trier of fact based upon his or her common sense and every day experience.

[123] Based on the careful reasoning in that decision, the trial judge was correct in following ***E.W. v. D.W.***, *supra*, and the reasoning of the majority of the Supreme Court of Canada in ***Béland***; and in declining to follow comments of the dissenting justices in ***Béland*** or the earlier decision of this Court in ***R.M.C. v. J.R.C.***, *supra*.

[124] I add that, even if the trial judge did err and if the flexible approach mandated by sub-section 68(2) of the ***CFCSA*** does mean that polygraph evidence is admissible in this type of proceeding, the polygraph evidence sought to be admitted here would not meet the reliability requirement of that section. Here, the four Caregivers were asked sets of questions that were worded differently, which would make interpretation of the results difficult and potentially misleading. The trial judge did not err in holding this evidence to be inadmissible.

5. Did the trial judge err by failing to assess the credibility of witnesses?

[125] The appellant did not make any submissions specifically on this point, but referred to her earlier submissions regarding the trial judge's failure to provide adequate reasons and his failure to analyze and interpret section 49 of the ***CFCSA***.

[126] Again, this ground of appeal is largely an attack on the factual findings of the trial judge. Although the trial judge did not explicitly comment on the credibility of each witness, it is implicit in his reasons that he largely rejected the Caregivers' explanations that the injuries suffered were all accidental and that they did not know, or suspect, anyone of having caused the injuries. The trial judge concluded at para. 10 of his reasons as follows:

> The only reasonable conclusion is that one or more of the Caretakers injured Baby M.G. It is highly improbable that within this close knit group, no one knew or suspected one of the others. The Caretakers had a choice: protect the abuser or protect the child. They chose not to protect the child.

[127] This amounts to an explicit rejection of much of the Caregivers' testimony and, in particular, of those aspects of their testimony relating to how the injuries were caused and who may have caused them. The trial judge had to choose between accepting the experts' opinions that the injuries were non-accidental, or accepting the Caregivers' explanations as to the various cases of the injuries. He clearly and explicitly preferred the expert opinions. He did not fail to assess the credibility of the witnesses. Because the identity of the perpetrator remained unknown, he could not know or comment specifically as to who among the Caregivers provided credible evidence or not. However, as a whole, he found the position put forward by the Caregivers to be untenable, and clearly rejected that position in his decision. There were many inconsistencies and weaknesses in the Caregivers' evidence that could allow the trial judge to reject the version of events they put forward, and he cannot be faulted for doing so. Therefore, this ground of appeal must fail.

6. Did the trial judge err by demonstrating a bias against the Caregivers?

[128] The appellant suggests that the fact that the trial judge suggested that the Caregivers undergo a polygraph, or some other form of psychological testing, to help him determine the kinds of risk faced by the child, then refused to admit such evidence when it suggested the Caregivers were truthful, indicates that he was biased against them.

[129] This ground of appeal cannot be sustained. While the trial judge did suggest that the Caregivers undergo a polygraph test, as urged by the Ministry, or some form of psychological testing, that did not mean he was bound to admit such evidence. Indeed, it was mentioned by counsel for the Director that such evidence would not now assist the Court because it was inadmissible in these types of

proceedings. The Caregivers had also been advised to that effect by their previous counsel. After a careful reflection on the law relating to the admissibility of polygraph evidence, the trial judge concluded, correctly in my view, that the polygraph evidence should not be admitted in this case. This does not indicate a bias against the appellant, but rather a careful and reasoned application of the law. Accordingly, this ground of appeal fails.

CONCLUSION

[130] As I have found that all of the grounds of appeal put forward by the appellant cannot be sustained, it follows that the appeal must be dismissed. Pursuant to sub-section 81(6) of the ***CFCSA***, the suspension granted November 27, 2006 of the operation of the Provincial Court order dated September 25, 2006 with respect to the Director placing Baby M.G. for adoption is cancelled. Pursuant to paragraph 81(7)(a) of the ***CFCSA***, the order of the Provincial Court dated September 25, 2006 is confirmed.

[131] Out of an abundance of caution and to preclude further delays in the inevitable outcome of this case, I add here that even if the Provincial Court order was incorrectly granted pursuant to sub-section 49(5) rather than paragraph 41(1)(d), I would make orders pursuant to paragraph 81(7)(c) of the ***CFCSA*** that:

(1) The child Baby M.G. was in need of protection at the date of his removal, and continues to be in need of protection, pursuant to paragraph 13(1)(a) of the ***CFCSA*** and the principles enunciated by the Court of Appeal in ***B.S.***, *supra*, or alternatively under paragraph 13(1)(d) of the ***CFCSA***, by reason of the risk of serious physical harm to him if he is returned to his parents, even under supervision.

(2) A continuing custody order in favour of the Director is granted pursuant to paragraph 41(1)(d) of the ***CFCSA***, the Court being satisfied pursuant to paragraph 41(2)(c) that the nature and extent of the likelihood that the child will suffer harm is such that there is little prospect it would be in the child's best interests to be returned to the parent. This finding is supported by the factual findings of the trial judge: he carefully considered that Baby M.G.'s best interests lay in adoption, that the circumstances leading to the removal had not and would not change, and that Baby M.G. "might not survive another serious physical attack." This risk of serious and potentially irreparable harm, which I have no difficulty finding on the evidence before me, supports the conclusion that there is little prospect it would be in Baby M.G.'s best interests to be returned to the parents. I am satisfied that this is the conclusion the trial judge reached when determining that adoption, while permanent and irreversible, was the least unacceptable alternative in this case—if there was no prospect that the risky circumstances would change within a reasonable period of time, there is little prospect that Baby M.G.'s best interests lay with his family. As such, a continuing custody order is the appropriate disposition in this case.

[132] The Director has requested costs in this matter, but has not provided any authority on the legal principles applicable to the award of costs in this type of appeal. In the circumstances, I am not prepared to make such an order and, instead, order that each party is to bear its own costs. In this regard, I have found the comments of Barrow J. in ***S.T. v. British Columbia (Director of Child, Family and Community Services)***, 2003 BCSC 1895 (CanLII), 2003 BCSC 1895 at para. 54 to be helpful: an order for costs would serve no practical purpose here and, while I have found that the appeal cannot succeed, the appellant has acted responsibly in bringing the appeal and in undertaking parenting courses and maintaining faithful visitation of Baby M.G. in the interim.

"L. Russell, J."

The Honourable Madam Justice L. Russell

April 20, 2007 – ***Revised Judgment***
Please be advised that the attached Reasons for Judgment of Madam Justice L. Russell dated April 2, 2007 have been edited.

For clarity, all references to the child, M.G., have been replaced with "Baby M.G." throughout the Reasons for Judgment.

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