

**Building Stronger Children:  
Attachment Theory in the Context of Child Protection in Ontario**

**By**

**Karla Christine McGrath**

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## **Abstract**

The psychological concept of attachment began to take hold in the 1950s and 1960s. This time period also began a significant period of social and legislative change impacting on the field of child protection. These social science and legal developments have been mutually reinforcing and this thesis examines those developments over the course of the 60 years since Attachment Theory first emerged from the work of John Bowlby.

This examination will include a review of the fundamentals of Attachment Theory with a particular focus on the implications of those developmental lessons on the circumstances of children removed from the care of their families due to risk or maltreatment. Following a review of the fundamentals of Attachment Theory, this examination will review the influence of those principles on the laws of child protection in Ontario – through changes in the legislation and through decisions of the Supreme Court of Canada and the Courts of Ontario.

Finally, this thesis will examine some of the ways in which the attachment needs of Ontario's children are being served or failed with regard to both the need for early establishment of permanency for children as well as the continuity of the care arrangements for children up to and including the point at which permanent plans are established. This examination of the legislation and the case law will demonstrate that Ontario has seen a progressive shift away from family reunification as a fixed priority and toward the examination of each child's individual developmental needs. This includes an acceptance of the application of Attachment Theory and its principles as one significant means of describing those needs and assessing the best interests of children.

## **Acknowledgements**

A few years ago I was standing with a colleague at a casino overlooking Niagara Falls discussing our mutual interest in the law of child protection. In particular, we were comparing our frustration with still having to convince non-lawyers in the field that the law had long since found Attachment Theory and could be counted on to support decisions favouring continuity of care. I suggested that the topic would make for an interesting LL.M thesis. And once again I changed the course of my life.

My first stop on this new path took me to Professor Nicholas Bala. The consummate educator, Professor Bala is unfailingly generous with his time and encouragement as well as his knowledge and expertise. His own contribution to all matters of law regarding children is staggering and I am ever humbled to be in his purview. Whatever you find right within this thesis, I dedicate to him. All of the rest I am sure I did against his wise counsel.

Although a Master of Laws, this work took me into the field of psychology. I had two experts kind enough to lend a hand by teaching me a small piece of their trade. Dr. Robert Seim of the University of Waterloo was the first to introduce me to Attachment Theory. Listening to him speak on the subject, whether in a courtroom or in a garden, is always a master class. I am grateful to Dr. Sian Phillips for her professional generosity but also for her soothing manner and her confidence in me. I thank Drs. Seim and Phillips for their time and patience.

Throughout this process, I have been supported personally, professionally and academically by a number of legal colleagues and I owe each of them a debt. First in priority is my principal and friend, Colin Wright. His ongoing personal and professional contributions through this and every other ordeal are too numerous to list and too profound to describe. I acknowledge the others, also colleagues and friends, for their various generous contributions of time, skill and counsel all of which was usually served to me with food and drink. I list them here alphabetically: Elizabeth French, Hendrikus (Henny) Harmsen, Lana Latimer, Edward G. (Ted) Lloyd, the Honourable Timothy Minnema, Jack Squire, David Toupin and Leanne Wight. My thanks to them all.

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# **Building Stronger Children<sup>1</sup>: Attachment Theory in the Context of Child Protection in Ontario**

Karla McGrath<sup>†</sup>

## **Chapter 1: Introduction**

Attachment is a psychological concept and field of study that bears significant consequences for all matters involving the care of children. The field of family justice is no exception. Interference with a child's significant relationships – with a child's attachments – has wide reaching developmental implications. Dysfunction and disruption of family are the usual cause and result of child protection intervention and, as a result, nowhere is interference with a child's significant relationships more prevalent and more concerning than within the clinical and legal fields of child welfare. This thesis examines and compares the emergence of Attachment Theory since the middle of the last century and the corresponding developments within the field of child welfare in Ontario during the same time period. This examination is directed at assessing the influence of Attachment Theory on the law of child welfare in Ontario.

In Chapter 2 of this thesis, I introduce the fundamentals of Attachment Theory from within the field of psychology. Attachment Theory has had and continues to have a significant impact on the family justice system, both through legislation and through decisions made in individual cases. Although the fundamental tenets represent, within the field of psychology, settled science, there remains controversy and debate among legal practitioners about the implications and application of Attachment Theory. To

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<sup>1</sup> "It is easier to build strong children than to repair broken men." Frederick Douglass (1818-1895)

<sup>†</sup> Candidate, Master of Laws, Queen's University 2013.

participate in an examination of the impact of Attachment Theory in the context of family justice in Ontario, it is important to first have an understanding of the origins, application and current status of this area of research and clinical practice. These fundamentals are provided in Chapter 2 with a particular focus on the implications of those lessons for children removed from the care of their families due to risk or maltreatment.

The influence of Attachment Theory on child welfare legislation is the focus of Chapter 3. This includes an examination of significant changes in Ontario's child welfare legislation over the sixty years since Attachment Theory was first introduced with a view toward determining whether and how issues of attachment were considered or affected by each of those legislative shifts.

In Chapter 4 of this thesis, I examine the application of Attachment Theory and attachment-related issues in reported decisions from or affecting Ontario. Certain trends within the reported written decisions reflect the changes in the legislation governing those decisions. However, individual outcomes vary and turn on any number of factors. These include whether the available knowledge is brought forward by one of the parties and how Attachment Theory and attachment-related concepts are regarded by the decision maker. Reported decisions represent only a small sample of cases in which attachment issues are employed to direct permanency planning for children. However, reported cases in which Attachment Theory is examined and questioned – by lay witnesses, by experts, by parties as well as by the court – provide insight into the degree to which Attachment Theory has gained acceptance in Ontario child welfare practice. Chapter 4 includes an examination of selected cases.

With attachment being so important to the development of every child, it is important for those who make decisions regarding children to preserve family relationships in a manner that decreases a child's exposure to the stress of separation and impermanent relationships. In Chapter 5, I review the preceding observations regarding the impact of attachment on legislation and case law in Ontario and use those observations to examine how the law of child welfare in Ontario is currently serving or failing attachment goals and how those laws may be amended, interpreted or applied to better serve the attachment needs of Ontario's children. In examining how and whether the attachment needs of children have been served and are being served under Ontario child welfare law, I will attempt to examine the impact of legislation and case law on both aspects of attachment-related planning – the early establishment of permanency for children as well as the continuity of the care arrangements for children up to and including the point at which permanent plans are established.

This examination of the legislation and the case law will demonstrate that Ontario has seen a progressive shift away from family reunification as a fixed priority and toward the examination of each child's individual developmental needs. This includes an acceptance of Attachment Theory and its principles as one significant means of describing those needs and assessing the best interests of individual children. However, in assessing the current state of child welfare law in Ontario, I will reveal areas in which the province has, by the interpretation and the application of existing law, both regressed and failed to progress in its efforts to serve the attachment needs of children whose circumstances cause them to require the services of child protection agencies.

## Chapter 2: Attachment Theory and Child Protection

### A. The Fundamentals of Attachment Theory

Attachment Theory falls within the discipline of psychology and more particularly within the psychological field of child development. An interpersonal attachment can be defined as a “strong, affectionate tie we have with special people in our lives that leads us to feel pleasure when we interact with them and to be comforted by their nearness during times of stress.”<sup>2</sup> For an infant or a young child, however, attachment is far more than simply the experience of affection for others. According to the basic precepts of Attachment Theory, attachment is a formative developmental process affecting all areas of a child’s development. The nature and quality of a child’s early attachment to a primary caregiver is a significant part of the foundation for adulthood, affecting the child’s cognitive, emotional, psychological and social functioning.<sup>3</sup>

Parties, advocates and decision makers in the Family Court are responsible for many decisions regarding the welfare of young children. An understanding of this pervasive developmental influence is an important asset for all practitioners within Family Law.

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<sup>2</sup> Laura E. Berk & Stuart G. Shanker, *Child Development (2<sup>nd</sup> Can. Ed.)*, (Toronto: Pearson, 2006) at 419.

<sup>3</sup> Daniel A. Hughes, *Attachment Focused Parenting: Effective Strategies to Care for Children* (New York: W.W. Norton & Company 2009) at 9 (“[i]n understanding the nature of the parent-child relationship and the pivotal role of attachment, we are able to see its impact on a child’s emotional, cognitive, social, communicative, and even psychological and neurological development”) and at 10 (stating that a secure attachment “facilitates many areas of development in the child [including] psychological and emotional regulation, self-reliance, resilience, social competence with peers, empathy for others, symbolic play, problem solving, intellectual development, communication and language skills, and self-integration and self-worth.”); Paul Steinhauer, *The Least Detrimental Alternative: A Systematic Guide to Case Planning and Decision Making for Children in Care*, (Toronto: University of Toronto Press, 1993) at 14 (“A secure attachment is crucial to the development of trust and the capacity for intimacy.”).

The founder of Attachment Theory is John Bowlby (1907-1990), a child psychiatrist whose early work focused on children in institutional care, such as those being raised in orphanages after the Second World War and those denied contact with their parents during extended hospital stays.<sup>4</sup> Bowlby observed and recorded the various negative outcomes for children forced to endure prolonged, repeated or permanent separation from a primary caregiver. By 1951, Bowlby had developed his work into a best-selling book regarding this issue that he termed “maternal deprivation.”<sup>5</sup> His central message at that time was that, in order to achieve normal development, a child must experience a “warm, intimate, and continuous relationship with his mother (or permanent mother substitute).”<sup>6</sup> Attachment Theory emerged from Bowlby’s early work and remains an ongoing effort to explain the theoretical underpinnings and finer points of his initial thesis.<sup>7</sup>

Bowlby steeped his developing theory in a human child’s evolutionary need for sustenance and protection from predators and that child’s resulting need for proximity to and engaged attention from a protective primary caregiver.<sup>8</sup> In this context, attachment results from a child’s innate biological drive for self-preservation. The child is driven to

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<sup>4</sup> Susan Goldberg, *Attachment and Development*, (London: Arnold, 2000) at 6; Mary Main, Erik Hesse & Siegfried Hesse, “Attachment Theory and Research: Overview with Suggested Applications to Child Custody” (2011) 49 Fam Ct Rev 426 at 428 - 437.

<sup>5</sup> John Bowlby & Mary Ainsworth, *Child Care and the Growth of Love*, 2<sup>nd</sup> Ed., (Harmondsworth: Penguin Books, 1965) at 7 – 10.

<sup>6</sup> Susan Goldberg, *Attachment and Development*, (London: Arnold, 2000) at 6.

<sup>7</sup> *Ibid* at 14 (“Attachment theory is no longer a single theory. There are as many versions of attachment theory as there are attachment researchers.”).

<sup>8</sup> *Ibid* at 8 (“Since human infants do not survive without adult care, our evolutionary history has selected ‘prewired’ dispositions on the part of both infants and adults to behave in ways that increase the likelihood of the infant’s survival”) and at 239-240; Mary Main, Erik Hesse & Siegfried Hesse, “Attachment Theory and Research: Overview with Suggested Applications to Child Custody” (2011) 49 Fam Ct Rev 426 at 439 (“[A]ttachments are not rationally based but rather arise from biological [evolutionary] propensities to form specific ties to older, even if only potentially protective figures, rooted in the requirements of survival.”); Laura E. Berk & Stuart G. Shanker, *Child Development (2<sup>nd</sup> Can. Ed.)*, (Toronto: Pearson, 2006) at 420; Allan Schore & Jennifer McIntosh, “Family Law and the Neuroscience of Attachment, Part I” (2011) 49 Fam Ct Rev 501 at 501.

ensure that his or her needs are met by maintaining a close, nurturing and protective relationship with a particular trusted caregiver or caregivers.<sup>9</sup> This need is primal and there is research to suggest that a child's drive to elicit nurturance and protection is even more powerful than the drive to obtain food.<sup>10</sup> Bowlby and subsequent attachment theorists concluded that separating a child from a primary caregiver creates varying degrees of stress for the child and further that repeated, prolonged or permanent separations can cause intolerable stress resulting in a profound negative impact on all aspects of the child's emotional, cognitive, physical and social development.<sup>11</sup>

As an infant or small child interacts with his or her environment, the child will encounter changes that generate stress. The child will become hungry, thirsty, cold, wet, fearful or alarmed. The child instinctively seeks a return to a state of calm comfort<sup>12</sup> but requires a caregiver to provide or assist with providing that relief. The caregiver's role is to be attuned to and respond to the child's indications of unmanaged stress and do or assist in doing what is necessary to return the child to his or her required state of calm

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<sup>9</sup> Susan Goldberg, *Attachment and Development*, (London: Arnold, 2000) at 8; Mary Main, Erik Hesse & Siegfried Hesse, "Attachment Theory and Research: Overview With Suggested Applications to Child Custody" (2011) 49 Fam Ct Rev 428.; See Paul Steinhauer, *The Least Detrimental Alternative: A Systematic Guide to Case Planning and Decision Making for Children in Care*, (Toronto: University of Toronto Press, 1993) at 13 ("The infant's first basic need, a prerequisite for optimal development, is for a secure attachment to a primary caregiver, usually, but not necessarily, the mother.").

<sup>10</sup> Melvin Konner, *The Evolution of Childhood: Relationships, Emotion, Mind*, (Cambridge: The Belknap Press of Harvard University Press, 2010) at 231-233 (A baby monkey given a bare wire structure that emits milk and a wire structure covered in cloth will cling to the cloth structure generally and particularly in times of distress and will rely on the bare structure only periodically for food); see also Laura E. Berk & Stuart G. Shanker, *Child Development (2<sup>nd</sup> Can. Ed.)*, (Toronto: Pearson, 2006) at 419.

<sup>11</sup> Susan Goldberg, *Attachment and Development*, (London: Arnold, 2000) at 12; Paul Steinhauer, *The Least Detrimental Alternative: A Systematic Guide to Case Planning and Decision Making for Children in Care*, (Toronto: University of Toronto Press, 1993) at 65-66 (Some of the positive results can be unexpected and yet wide-reaching. For example, depending on the temperament of the child, the failure of a secure attachment may lead to "generalized withdrawal from and avoidance of unfamiliar situations, peers, and activities. Such avoidance will interfere with the development of motor, athletic, and social skills and ultimately, [with] the child's sense of mastery, and, in turn, will undermine the child's confidence, further disadvantaging him or her in relating to other children.").

<sup>12</sup> Susan Goldberg, *Attachment and Development*, (London: Arnold, 2000) at 183 (defining that state of calm comfort as "homeostasis").

comfort. An infant may cry out for relief from hunger but what he or she actually seeks is relief from the intolerable stress that is caused by the hunger. It is the attachment figure's role to be attuned to and to address the stressors and thereby regulate the child's exposure to stress.<sup>13</sup> The adult caregiver's attunement and the appropriateness and consistency of the adult caregiver's responses to the child's cues are a measure of the adult's success in protecting the child from intolerable stress; the sufficiency of the adult's response determines the nature and quality of the attachment relationship.<sup>14</sup>

Some amount of stress through separation from a caregiver is tolerable for even the youngest child and in fact is a necessary part of the child's process of learning self-regulation of his or her stress responses.<sup>15</sup> As children mature and become better able to rely on past experiences to define their expectations, they learn to manage their own stress response by relying on their relationship to trusted caregivers even during periods of separation.<sup>16</sup> It is not simply the stress of separation for the child that is the issue. It is repeated or prolonged exposure to intolerable amounts of stress that will have a negative impact on the child's development.<sup>17</sup>

To avoid the stress of separation, an infant or young child relies on physical proximity for reassurance about the presence of a caregiver. The child uses that physical

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<sup>13</sup> See Susan Goldberg, *Attachment and Development*, (London: Arnold, 2000) at 134 to 139.

<sup>14</sup> *Ibid* at 183-184 ("The primary function of an attachment figure is to provide comfort in times of stress or danger. The presence of this figure initiates processes that reduce and eventually terminate the psychological arousal that occurs in response to stress and danger. In addition, the confidence that an individual develops in the availability and effectiveness of an attachment figure can modify their perception of stress and hence their stress responses. If help and relief from distress are anticipated as being readily accessible, their initial stress reactions are likely to be contained.").

<sup>15</sup> Paul Steinhauer, *The Least Detrimental Alternative: A Systematic Guide to Case Planning and Decision Making for Children in Care*, (Toronto: University of Toronto Press, 1993) at 60 ("[N]o infant goes without experiencing some frustration. Infants can tolerate a reasonable amount of frustration without suffering ill effects; in fact learning to soothe themselves when frustrated is an important aspect of emotional development.")

<sup>16</sup> Laura E. Berk & Stuart G. Shanker, *Child Development (2<sup>nd</sup> Can. Ed.)*, (Toronto: Pearson, 2006) at 421.

<sup>17</sup> *Ibid*.

proximity to the caregiver to regulate his or her own stress and, as the child matures, he or she comes to rely on her past experiences with the primary caregiver to define his or her expectations. The child learns from experience about the availability and responsiveness of a caregiver upon which he or she seeks to rely.

From his or her experience with caregivers, the child internalizes an understanding of relationships in general and forms for him or herself what is referred to as the child's "internal working model" of relationships.<sup>18</sup> This internal working model represents the child's expectation of others, it lays the foundation for the child's perception of his or her own self and it sets the stage for the child's views of and interactions in all relationships. An individual's internal working model, while not indelible, is largely fixed during the first three to four years of life. It is during this "sensitive period" that factors that positively or negatively affect attachment will have the greatest impact on a child's development.<sup>19</sup>

The critical period for attachment formation coincides with the period of the most rapid brain maturation.<sup>20</sup> As a result, the study of attachment has become closely linked to the study of brain development.<sup>21</sup> Brain growth is driven by experiences and experiences at early stages of development have a far more significant and lasting impact

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<sup>18</sup> *Ibid.*

<sup>19</sup> Paul Steinhauer, *The Least Detrimental Alternative: A Systematic Guide to Case Planning and Decision Making for Children in Care*, (Toronto: University of Toronto Press, 1993) at 18 ("During those years, children are, because of their stage of cognitive and emotional development, particularly vulnerable to separation, as they are intensely dependent, physically and emotionally, on the primary caretaker.")

<sup>20</sup> Allan Schore & Jennifer McIntosh, "Family Law and the Neuroscience of Attachment, Part I" (2011) 49 Fam Ct Rev 501 at 502 (The human brain's most significant period of growth occurs in early childhood, with five sixths of brain development happening in the first three years.).

<sup>21</sup> Susan Goldberg, *Attachment and Development*, (London: Arnold, 2000) at 183-184; See Allan Schore & Jennifer McIntosh, "Family Law and the Neuroscience of Attachment, Part I" (2011) 49 Fam Ct Rev 501 at 502; Lyons T. Hardy, "Attachment Theory and Reactive Attachment Disorder: Theoretical Perspectives and Treatment Implications" (2007) 20 JCAPN 27 at 28.

than those occurring in later stages.<sup>22</sup> Because this impact is so significant, early exposure to intolerable amounts of stress through separation from a caregiver or experiences such as child abuse, neglect or family violence can measurably stunt normal brain growth.<sup>23</sup> By comparison, a child raised in healthy circumstances and allowed to develop an effective stress response through attachment to a nurturing and consistent caregiver is better set for optimal brain development and mental health.<sup>24</sup>

## **B. Patterns of Attachment**

### **i. Assessment of Attachment Patterns and the formation of the “Internal Working Model”**

As stated, Bowlby’s early research began with observations regarding the tragic developmental outcomes for children deprived of the opportunity to form an early attachment. Attachment researchers went on to determine that the fact that a child is raised in a family environment with a primary caregiver is not an assurance of attachment and healthy development. One early but still-developing phase of attachment research has been the measurement of the type and quality of a child’s attachment to a caregiver and the implications of attachment style for long-term outcomes.

A variety of assessment tools have been developed to classify individuals according to their “attachment styles.”<sup>25</sup> Using these tests and considering a child’s

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<sup>22</sup> Daniel Siegal & Jennifer McIntosh, “Family Law and the Neuroscience of Attachment, Part II” (2011) 49 Fam Ct Rev 513 at 519-520.

<sup>23</sup> *Ibid* at 519-520.

<sup>24</sup> *Ibid*.

<sup>25</sup> Mary Main, Erik Hesse & Siegfried Hesse, “Attachment Theory and Research: Overview with Suggested Applications to Child Custody” (2011) 49 Fam Ct Rev 426 at 427-428 (listing the three major measures as Strange Situation, the Adult Attachment Interview and Attachment Q-Sort and stating that additional measures are under development and review); see also Laura E. Berk & Stuart G. Shanker, *Child*

behaviour in the context of known patterns of behaviour for children, mental health professionals can assess individual attachment relationships and categorize a child's attachment styles as secure (healthy), insecure (unhealthy but still within the normal range of functioning) or disorganized (unhealthy to the point of impeding most if not all aspects of a child's development and indicating experience with neglect or abuse)<sup>26</sup>

A particular attachment style is not a characteristic inherent in the individual child which is to say that the child is not born with it. Although a child's inherent and unique characteristics – his or her temperament or personality – will have an impact on the formation of his or her attachment style, the child acquires his or her attachment style through experience.<sup>27</sup> The child's attachment style results from the relationship with the caregiver and *becomes* part of the child. During testing, an assessor observes the child's behavior to determine the nature and quality of the child's attachment but what is assessed is not the child but rather the nature and quality of the attachment relationship with a particular caregiver and the child's interaction within that relationship.<sup>28</sup>

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*Development* (2<sup>nd</sup> Can. Ed.), (Toronto: Pearson, 2006) at 421 – 422; Susan Goldberg, *Attachment and Development*, (London: Arnold, 2000) at 18-51.

<sup>26</sup> Susan Goldberg, *Attachment and Development*, (London: Arnold, 2000) at 21-25; and see at 205-206 (clarifying that “insecure attachment” is not a disorder or a disturbance).

<sup>27</sup> Laura E. Berk & Stuart G. Shanker, *Child Development* (2<sup>nd</sup> Can. Ed.), (Toronto: Pearson, 2006) at 425-426; Alicia Lieberman, Charles Zeanah & Jennifer McIntosh, “Attachment Perspectives on Domestic Violence and Family Law” (2011) 49 Fam Ct Rev 529 at 536; see Paul Steinhauer, *The Least Detrimental Alternative: A Systematic Guide to Case Planning and Decision Making for Children in Care*, (Toronto: University of Toronto Press, 1993) at 61 (“In contrast [to the child with a secure attachment], the child with an insecure primary attachment will lack much of the confidence and support needed to explore the environment boldly. This lack can be particularly limiting for a child whose basic temperament predisposes to anxiety.”).

<sup>28</sup> Mary Main, Erik Hesse & Siegfried Hesse, “Attachment Theory and Research: Overview with Suggested Applications to Child Custody” (2011) 49 Fam Ct Rev 426 at 433; Everett Waters & Jennifer McIntosh, “Are We Asking the Right Questions About Attachment?” (2011) 49 Fam Ct Rev 474 at 478 (noting the necessity of clinical evaluation of results); Laura E. Berk & Stuart G. Shanker, *Child Development* (2<sup>nd</sup> Can. Ed.), (Toronto: Pearson, 2006) at 425.

In any circumstance, including within intact families, there are factors that can interfere with the formation of healthy attachment.<sup>29</sup> Examples of fixed factors that will influence attachment formation are a child's temperament and a parent's attachment history, mental health and cognitive ability.<sup>30</sup> A child who is, by his or her nature, resistant to change or who tends toward extreme reactions to distress requires a caregiver with more skill, attunement and patience. A parent who has his or her own difficulty forming relationships or who suffers cognitive deficiencies is likely to face a greater struggle recognizing and meeting the needs of any child in a reliable and consistent manner.<sup>31</sup>

There are also external factors that can interfere with parenting and therefore with attachment. Illness, financial stress or other family hardships can cause stress and make a caregiver less able to be fully responsive to the needs of a child.<sup>32</sup> Where there is financial hardship, there may be increased reliance on childcare combined with a lack of access to consistent quality childcare. Financial hardship may also mean an absence of stable housing which creates the stress of change for the child and a separate measure of stress for the caregiver who bears responsibility for comforting the child. The negative effects of such circumstances on attachment formation are one part of a complex

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<sup>29</sup> Laura E. Berk & Stuart G. Shanker, *Child Development (2<sup>nd</sup> Can. Ed.)*, (Toronto: Pearson, 2006) at 423-428 (listing and describing five factors affecting attachment security as opportunity for attachment, quality of caregiving, infant characteristics, family circumstances and the parent's own internal working model).

<sup>30</sup> *Ibid* (Those internal factors may, in turn, have external causes such as fetal alcohol spectrum disorder.).

<sup>31</sup> Laura E. Berk & Stuart G. Shanker, *Child Development (2<sup>nd</sup> Can. Ed.)*, (Toronto: Pearson, 2006) at 426; Allan Schore & Jennifer McIntosh, "Family Law and the Neuroscience of Attachment, Part I" (2011) 49 *Fam Ct Rev* 501 at 505.

<sup>32</sup> Everett Waters & Jennifer McIntosh, "Are We Asking the Right Questions About Attachment?" (2011) 49 *Fam Ct Rev* 474 at 475 (stating that "a parent cannot be an effective secure-base for exploration if she or she is angry, impatient, selfish, frightened, or exhausted").

explanation for why attachment difficulties are found more often among those who were children in families with a lower socioeconomic status.<sup>33</sup>

Although elements of attachment formation are believed to commence *in utero*<sup>34</sup>, a child's attachment to a particular caregiver is only reliably measured from the age of approximately six months through the observation of the child's attachment-seeking behaviours.<sup>35</sup> Since attachment is a learned characteristic based on experiences, attachment styles can change to some degree – become more or less healthy. Such changes can occur as people experience changes in their closest relationships and in other circumstances.<sup>36</sup> However, as already noted, early life experiences have a far more significant and lasting impact on outcomes than do any later experiences. It is during the critical or sensitive period of the first four years that the child is forming his or her lasting means of understanding and interacting in relationships generally.<sup>37</sup> Once set, an unhealthy attachment pattern is difficult to treat and so the best opportunity to avoid the

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<sup>33</sup> Susan Goldberg, *Attachment and Development*, (London: Arnold, 2000) at 118-119 (“[S]ocial disadvantage does not inevitably compromise infant attachment. Rather, the extent to which multiple risks are present and the resources and supports that are available to meet such challenges determine whether the [attachment figure] is able to provide good care.”); See also Laura E. Berk & Stuart G. Shanker, *Child Development (2<sup>nd</sup> Can. Ed.)*, (Toronto: Pearson, 2006) at 422; Alan Stroufe & Jennifer McIntosh, “Divorce and Attachment Relationships: The Longitudinal Journey” (2011) 49 Fam Ct Rev 464 at 465.

<sup>34</sup> Allan N. Shore & Ruth P. Newton, “Using Modern Attachment Theory to Guide Clinical Assessments of Early Attachment Relationships” in Joanna Ellen Bettmann & Donna Demetri Friedman, ed., *Attachment-based Clinical Work with Children and Adolescents* (New York: Springer 2001) 61 at 70 (approaching assessment of prenatal and neonatal relationship formation from the perspective of neurobiology).

<sup>35</sup> Paul Steinhauer, *The Least Detrimental Alternative: A Systematic Guide to Case Planning and Decision Making for Children in Care*, (Toronto: University of Toronto Press, 1993) at 18.

<sup>36</sup> *Ibid.* at 63 (drawing in attachment-related ideas such as “self-concept” and “self-esteem” stating that “these things can change over time with outside factors such as a good or bad marriage, sustained success or failure at work or school or other life events.”); See also Susan Goldberg, *Attachment and Development*, (London: Arnold, 2000) at 171 (“[E]arly attachments provide a foundation upon which subsequent social encounters build. However, these basic attitudes and skills may well be modified by experiences with peers, teachers and other adults.”).

<sup>37</sup> See Susan Goldberg, *Attachment and Development*, (London: Arnold, 2000) at 133; Laura E. Berk and Stuart G. Shanker, *Child Development (2<sup>nd</sup> Can. Ed.)*, (Toronto: Pearson, 2006) at 501; Paul Steinhauer, *The Least Detrimental Alternative: A Systematic Guide to Case Planning and Decision Making for Children in Care*, (Toronto: University of Toronto Press, 1993) at 18.

pervasive long-term impact of unhealthy attachment is by prevention – minimizing children’s exposure to those factors that interfere with healthy attachment formation.<sup>38</sup>

## ii. Healthy Attachment

Most parents engage with their children in a way that facilitates a healthy attachment and the majority of young children assessed with their primary caregivers are found to have a secure attachment style.<sup>39</sup> This healthy attachment forms when the child enjoys engaged parenting marked by attuned and consistent provision of nurturance, protection and affection.<sup>40</sup> A securely attached child is confident in the presence of his or her primary caregiver because he or she has learned to associate the caregiver with relief and reward and he or she has learned to trust that the attachment figure will be reliable and responsive to his or her needs.<sup>41</sup>

Building on the predictability of a comforting relationship with a primary caregiver, the child learns to rely on relationships generally and gradually learns to “self regulate” or manage his or her own responses in a way that is flexible, adaptive and

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<sup>38</sup> Lyons T. Hardy, “Attachment Theory and Reactive Attachment Disorder: Theoretical Perspectives and Treatment Implications” (2007) 20 JCAPN 27 at 33-35.

<sup>39</sup> *Ibid* at 11; Laura E. Berk & Stuart G. Shanker, *Child Development (2<sup>nd</sup> Can. Ed.)*, (Toronto: Pearson, 2006) at 422-423; Paul Steinhauer, *The Least Detrimental Alternative: A Systematic Guide to Case Planning and Decision Making for Children in Care*, (Toronto: University of Toronto Press, 1993) at (“good enough” parenting leads to secure attachment).

<sup>40</sup> Mary Main, Erik Hesse & Siegfried Hesse, “Attachment Theory and Research: Overview with Suggested Applications to Child Custody” (2011) 49 Fam Ct Rev 426 at 437 and 439 (stating that “infants did not form attachments to mothers who provided only routine care [such as] feeding or bathing absent social interaction”); Carol George, Judith Solomon & Jennifer McIntosh, “Divorce in the Nursery: On Infants and Overnight Care” (2011) 49 Fam Law Rev 521 at 523 -524 (stating that “bathing, diapering and playing” are proven to contribute to attachment and further that there can be secure attachment formation with another caregiver but that it is important to have that first attachment).

<sup>41</sup> Laura E. Berk & Stuart G. Shanker, *Child Development (2<sup>nd</sup> Can. Ed.)*, (Toronto: Pearson, 2006) at 421.

balanced.<sup>42</sup> With the assistance of the adult attachment figure, the securely attached child learns to develop his or her own self-regulation skills and moves freely and appropriately between autonomy and dependence.<sup>43</sup> The healthy, positive or “secure” attachment is the developmental goal and, although secure attachment is not a guarantee of mental health,<sup>44</sup> those who are secure in their early attachments are generally healthier and more capable throughout their lives.<sup>45</sup>

### iii. Unhealthy Attachments Generally

The remaining recognized attachment styles make up the minority of assessed pairs of children with their primary caregivers and represent those relationships in which the child has failed to form a secure attachment to their parent or caregiver.<sup>46</sup> These are children who do not have their needs met by the primary caregiver or for whom the

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<sup>42</sup> Daniel A. Hughes, *Attachment Focused Parenting: Effective Strategies to Care for Children* (New York: W.W. Norton & Company, 2009) at 11.

<sup>43</sup> *Ibid.*

<sup>44</sup> Susan Goldberg, *Attachment and Development*, (London: Arnold, 2000) at 210 (Secure attachments are found in clinical populations however they are relatively rare.).

<sup>45</sup> Paul Steinhauer, *The Least Detrimental Alternative: A Systematic Guide to Case Planning and Decision Making for Children in Care*, (Toronto: University of Toronto Press, 1993) at 23 (“securely attached infants [grow to be] more competent, intellectually and socially, than those whose attachments are insecure or disorganized”); Mary Main, Erik Hesse & Siegfried Hesse, “Attachment Theory and Research: Overview with Suggested Applications to Child Custody” (2011) 49 Fam Ct Rev 426 at 433-434; Laura E. Berk & Stuart G. Shanker, *Child Development (2<sup>nd</sup> Can. Ed.)*, (Toronto: Pearson, 2006) at 428; Everett Waters & Jennifer McIntosh, “Are We Asking the Right Questions About Attachment?” (2011) 49 Fam Ct Rev 474 at 482 (“[t]o have a secure-base in childhood is an asset that I would like a child to have, on par with having an education, good health, and a safe neighbourhood”); Allan Schore & Jennifer McIntosh, “Family Law and the Neuroscience of Attachment, Part I” (2011) 49 Fam Ct Rev 501 at 503 (“There is now agreement in [the] field [of neuropsychology] that the essential task of the 1<sup>st</sup> year of human life is the co-creation of a secure attachment bond of emotional communication between the infant and his/her primary caregiver.”); and see Susan Goldberg, *Attachment and Development*, (London: Arnold, 2000) at 202

<sup>46</sup> Daniel A. Hughes, *Attachment Focused Parenting: Effective Strategies to Care for Children* (New York: W.W. Norton & Company 2009) at 11; (The three unhealthy attachment styles are “insecure-ambivalent” (also labeled “insecure-resistant”), “insecure-avoidant” and “disorganized” (also labeled “disoriented” and “disordered”).

attachment relationship is unpredictable or frightening.<sup>47</sup> The child with an unhealthy attachment has learned that he or she cannot rely on his or her caregiver as a secure base from which to explore the world and build other healthy relationships.<sup>48</sup> Although still within a normal range of functioning, the child with an unhealthy attachment is at risk for a broad range of maladaptive outcomes<sup>49</sup> that can extend well beyond his or her capacity for functioning in relationships.<sup>50</sup>

#### **iv. Insecure Attachments**

An insecure attachment is characterized by a child's adaptive pattern of response to a caregiver who has not been reliably attuned, available and nurturing. This form of attachment is unhealthy and lacks the broad range of positive aspects of the secure attachment but a person with insecure attachments remains within the normal range of risk and functioning.<sup>51</sup> A child whose attachment to a caregiver is insecure may adapt by clinging to the caregiver in an effort to ensure proximity. That child is expected to

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<sup>47</sup> See Judith C. Baer, "Child Maltreatment and Insecure Attachment: A Meta-analysis" (2006) 24(3) *J Reprod Infant Psych* 187 (concluding that infants who suffered abuse or neglect were significantly more likely to have an insecure attachment).

<sup>48</sup> *Ibid.* ("[A]bout two thirds of all children manifest attachment security [and] the other third have attachments characterized by insecurity.").

<sup>49</sup> See Susan Goldberg, *Attachment and Development*, (London: Arnold, 2000) at 202 ("[Since] secure attachment confers specific advantages in the development of social competence, [one may infer] that insecure attachment entails specific handicaps or threats to mental well-being . . . . The more commonly accepted view is that early attachment is one factor among many that either add protection or increase vulnerability to subsequent disorders."); and see Machteld Hoeve et al "A Meta-Analysis of Attachment to Parents and Delinquency" (2012) 40(5) *J Abnorm Child Psych* 771 (concluding that youth criminal activity is significantly linked to poor attachment).

<sup>50</sup> Jennifer Puig et al, "Predicting Adult Physical Illness From Infant Attachment: A Prospective Longitudinal Study" (2013) 32(4) *Health Psychol* 409 (concluding that insecure attachment in infancy is predictive of comparatively poor physical health in adulthood).

<sup>51</sup> Susan Goldberg, *Attachment and Development*, (London: Arnold, 2000) at 21-25; and see at 205-206 (clarifying that "insecure attachment" is not a disorder or a disturbance).

develop with a lack of independence and a preoccupation with relationships generally.<sup>52</sup>

With the other manifestation of the insecure attachment, the child will adapt to the unreliable caregiving relationship by turning away from the caregiver to avoid possible rejection. Such a child presents with an excess of independence. The child's rejection of the caregiver masks the stress that has not been relieved. This adaptive response to the unreliable attachment relationship is expected to develop into a lack of healthy reliance on relationships generally.<sup>53</sup>

#### **v. Attachment Disorders**

Of far greater concern than either of the two insecure attachment styles are attachment disorders. Unlike insecure attachments, attachment disorders represent significant developmental impediments. The implications of attachment disorders are severe and pervasive enough to negatively impact on all aspects of a child's development. A child suffering an attachment disorder is outside normal parameters of developmental risk and functioning, will present with significant behavioural issues and is at serious risk for emotional disturbance and mental illness. Since attachment dysfunction is considered "the rule rather than the exception" for children removed from the care of their parents due to abuse and neglect,<sup>54</sup> it is this aspect of attachment that is of particular concern to

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<sup>52</sup> *Ibid.*; and see Susan Goldberg, *Attachment and Development*, (London: Arnold, 2000) at 23 ("The secure infant explores freely and seeks contact with the attachment figure as necessary. The avoidant infant focuses on exploration, and monitors and maintains proximity to the attachment figure, but does not express attachment needs in order to avoid risking rejection. The resistant infant is preoccupied with the availability of an inconsistent caregiver, making repeated high-intensity demands to ensure that at least some of the latter elicit attention.").

<sup>53</sup> *Ibid.*

<sup>54</sup> Lyons T. Hardy, "Attachment Theory and Reactive Attachment Disorder: Theoretical Perspectives and Treatment Implications" (2007) 20 JCAPN 27 at 38.

all those engaged in the intersecting fields of child protection and children’s mental health.

The only official diagnosis for a mental health disorder relating to attachment is Reactive Attachment Disorder (RAD). RAD is broadly defined with symptoms of early relationship impairment and the conclusion that observed symptoms cannot be explained by some other diagnosis.<sup>55</sup> A diagnosis of RAD may be likely for the forms of disordered attachment discussed herein but, since RAD is so broadly defined, the particular diagnosis has limited utility for this discussion.<sup>56</sup> The diagnosis of RAD is therefore noted as common terminology for severe attachment dysfunction but will not be relied upon herein.

Attachment theorists have not arrived at a universal method of sorting or defining variations in disordered attachment.<sup>57</sup> However, the causes and symptoms of attachment disorders are closely related to issues of child protection and so, for the purpose of discussing different concerns and fact patterns herein, some effort at categorizing these disorders is important. One such effort to sort and explain attachment disorders by cause is adopted here for the purpose of examining these more serious attachment risks in the child welfare context.

In the first of these three categories of attachment disorder is the disorganized (or disoriented or disordered) attachment.<sup>58</sup> An attachment has formed but the child fails to

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<sup>55</sup> *Ibid* at 30 –31 (stating that the only diagnosable disorder relating to attachment is reactive attachment disorder which includes those who behave with extreme interpersonal inhibition or disinhibition depending on the type of relationship the child had with his or her caregiver during the formative period of attachment).

<sup>56</sup> *Ibid* at 32-34.

<sup>57</sup> Susan Goldberg, *Attachment and Development*, (London: Arnold, 2000) at 206-207.

<sup>58</sup> Daniel A. Hughes, *Attachment Focused Parenting: Effective Strategies to Care for Children* (New York: W.W. Norton & Company 2009) at 11 (describing it as “disorganized” and noting that it is also labeled “disoriented” and “disordered”); Susan Goldberg, *Attachment and Development*, (London: Arnold, 2000) at

achieve any organized pattern of response to his or her attachment figure. This form of attachment is associated with experiences of maltreatment by the caregiver and so the child is caught in an unsolvable dilemma – seeking safety and comfort from a person who is subtly or overtly frightening to the child.<sup>59</sup> The child’s behaviour in the face of the dilemma lacks coherence or a predictable pattern (i.e. both reaching for and turning away from the caregiver).<sup>60</sup> The attachment that develops is unhealthy to the point of impeding most aspects of a child’s development and one predicted result is a significant risk for psychopathology in adulthood.<sup>61</sup> Since this form of attachment disorder is associated with neglect and abuse, it is a matter of significant concern for those engaged in the field of child protection.

Attachment disorder may also result when the child has formed no attachment at all.<sup>62</sup> This would be expected in a population of institutionally raised children such as those who were the subjects of Bowlby’s early work or among children who were moved frequently among foster placements during the sensitive period of attachment development. For the most part, North American child welfare professionals have learned the difficult lesson of attempting to raise children without attachment figures.<sup>63</sup>

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206-207 (describing it as “disordered attachment”); Lyons T. Hardy, “Attachment Theory and Reactive Attachment Disorder: Theoretical Perspectives and Treatment Implications” (2007) 20 JCAPN 27 at 28 (describing it as “disorganized-disoriented”).

<sup>59</sup> Susan Goldberg, *Attachment and Development*, (London: Arnold, 2000) at 206-207; Lyons T. Hardy, “Attachment Theory and Reactive Attachment Disorder: Theoretical Perspectives and Treatment Implications” (2007) 20 JCAPN 27 at 28.

<sup>60</sup> Susan Goldberg, *Attachment and Development*, (London: Arnold, 2000) at 206-207; Lyons T. Hardy, “Attachment Theory and Reactive Attachment Disorder: Theoretical Perspectives and Treatment Implications” (2007) 20 JCAPN 27 at 28.

<sup>61</sup> Susan Goldberg, *Attachment and Development*, (London: Arnold, 2000) at 206-207; Lyons T. Hardy, “Attachment Theory and Reactive Attachment Disorder: Theoretical Perspectives and Treatment Implications” (2007) 20 JCAPN 27 at 28.

<sup>62</sup> Susan Goldberg, *Attachment and Development*, (London: Arnold, 2000) at 206-207.

<sup>63</sup> *Ibid* at 123 (noting that the early research that led to the development of Attachment Theory also led to the “demise of institutional care in much of the Western world, in favour of foster care arrangements”).

Nevertheless, the absence of attachment remains a current child welfare concern since it is also one possible result of neglect and abuse.<sup>64</sup>

The third and final category of attachment disorder is the disrupted attachment. This is the “grief response of children who have lost a [primary] caregiver.”<sup>65</sup> This is not a chronic condition in and of itself but rather an acute condition that, if not avoided or properly managed, can lead to more serious and lasting concerns. The long-term outcome for a child with a disrupted attachment will depend on factors such as the child’s age, the child’s attachment history prior to the loss, the sensitivity of the substitute primary caregiver and the availability of treatment to assist the child’s mourning.<sup>66</sup>

Since attachment is formed in early childhood and early childhood experiences have the most enduring impact, attachment disorders are among the most difficult to treat.<sup>67</sup> Any attempt to treat attachment disorders requires significant resources of time and personnel as well as, most importantly, the placement of the child with an attuned and nurturing caregiver for the formation of a lasting attachment relationship.<sup>68</sup>

### **C. Attachment and Child Protection**

From the perspective of child development generally and attachment specifically, when children are removed from the care of their families due to risk or maltreatment, those children are triply at risk. First, all but the very youngest of these children endure

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<sup>64</sup> Lyons T. Hardy, “Attachment Theory and Reactive Attachment Disorder: Theoretical Perspectives and Treatment Implications” (2007) 20 JCAPN 27 at 30.

<sup>65</sup> Susan Goldberg, *Attachment and Development*, (London: Arnold, 2000) at 206-207.

<sup>66</sup> See Paul Steinhauer, *The Least Detrimental Alternative: A Systematic Guide to Case Planning and Decision Making for Children in Care*, (Toronto: University of Toronto Press, 1993) at 18-26.

<sup>67</sup> Lyons T. Hardy, “Attachment Theory and Reactive Attachment Disorder: Theoretical Perspectives and Treatment Implications” (2007) 20 JCAPN 27 at 33-35.

<sup>68</sup> *Ibid.*

the trauma of separation from their known primary caregiver as well as from their home and familiar family circumstances. Even an infant younger than six months of age, when faced with a change in primary caregiver, can present with observable negative reactions such as irritability, sleep disruptions and loss of appetite.<sup>69</sup> The risks associated with such separations are always present and are heightened throughout the child's sensitive period of attachment (up to four years of age).<sup>70</sup>

The second reason that children who encounter child protection intervention are at greater risk for attachment disruption is that most have suffered or have been exposed to physical and/or emotional abuse or neglect prior to being removed from their family of origin.<sup>71</sup> Having spent some part of their early impressionable period with negative caregiver experiences, these children enter the child protection system already at risk for developmental impairments resulting from and relating to a multitude of factors including, possibly, an unhealthy attachment. A child who has enjoyed healthy mental and emotional development will be more resilient and better able to respond to and recover from stress and trauma.<sup>72</sup> Yet it is necessarily the most compromised children who must be removed from their homes and families. Children removed following a prolonged period of abuse and/or neglect will not have developed the strong foundation

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<sup>69</sup> Paul Steinhauer, *The Least Detrimental Alternative: A Systematic Guide to Case Planning and Decision Making for Children in Care*, (Toronto: University of Toronto Press, 1993) at 18.

<sup>70</sup> *Ibid.*

<sup>71</sup> Susan Goldberg, *Attachment and Development*, (London: Arnold, 2000) at 127 (“Children are removed from their parents only when to remain with them would threaten their well-being. Thus even the very young infants taken into foster care have already experienced inappropriate care.”).

<sup>72</sup> Paul Steinhauer, *The Least Detrimental Alternative: A Systematic Guide to Case Planning and Decision Making for Children in Care*, (Toronto: University of Toronto Press, 1993) at 17 (“While individual children's reactions to separation may vary, there is little doubt that the traumatic effects of separation will be intensified by conflict and discord that have preceded it.”); Paul Steinhauer, *The Least Detrimental Alternative: A Systematic Guide to Case Planning and Decision Making for Children in Care*, (Toronto: University of Toronto Press, 1993) at 59 (noting that “good enough” parenting leads to secure attachment and resilience whereas abuse and neglect leaves children fundamentally vulnerable).

of a securely attached child raised with “good enough” parenting.<sup>73</sup> A child with negative caregiver experiences is compromised in his or her ability to make use of relationships for comfort and regulation.<sup>74</sup> This can make those children difficult to parent. If the child then struggles in their foster relationship, difficulties in that relationship will confirm the child’s lack of trust in relationships generally.

The third reason why children are at particular risk for attachment dysfunction when removed from parental care is that, once removed, these children enter into a system that is premised on temporary care. Healthy attachments require continuous, quality nurturance and the resulting development of trust in relationships and yet children in foster care are denied that element of continuity. Foster care may protect a child from abuse and offer an improvement in the quality of basic care but, by their very role, most foster parents cannot offer the certainty and permanence that is the foundation of attachment and a staple of most family relationships.<sup>75</sup>

Compounding the temporary nature of foster care is the behaviour of the children themselves. These children enter the foster care system bearing the weight of combined psychological stressors – the trauma of separation and the preceding negative caregiving experiences – and will often present with challenging behaviours requiring exceptionally sensitive care. These behaviours may exceed the abilities of even the most well-meaning

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<sup>73</sup> *Ibid* at 64 (the vulnerability resulting from abuse and neglect exacerbates the existing problem of severed or interrupted attachments and “[m]ost children entering foster care do so following a long period of privation, neglect, and/or abuse within a seriously disorganized and conflicted natural family. Such children lack the ‘good-enough’ parenting needed to develop basic trust and a secure attachment.”)

<sup>74</sup> R. Kok et al, “Attachment Insecurity Predicts Child Active Resistance to Parental Requests in a Compliance Task (2013) 39(2) Child Care Hlth Dev 277 (observing that children with an insecure attachment to their primary caregiver were more actively resistant to instruction and cooperation and concluding that secure attachment is predictive of successful socialization).

<sup>75</sup> Paul Steinhauer, *The Least Detrimental Alternative: A Systematic Guide to Case Planning and Decision Making for Children in Care*, (Toronto: University of Toronto Press, 1993) at 66 (describing negative outcomes for children coming in and out of foster care).

foster care provider thereby putting the behaviourally challenging child at risk of multiple placement breakdowns.<sup>76</sup>

The basic principles of Attachment Theory are well-established – nurturance and continuity of care are key to building trust in relationships, and healthy engagement in relationships is necessary for long-term health and well being. Continuity of care is a developmental premium for young children and yet, due to the nature and purpose of child protection intervention, the child’s experience within that intervention is fraught with disruptions of the child’s relationships. Children are removed from the care of their parents and placed in foster care or into the care of family or community members. They may be moved among temporary placements. They may be placed in adoptive homes pending the outcome of litigation regarding their permanent plan. If the child is returned to the care of his or her parents, there remains the risk that he or she may be removed again due to the reoccurrence of problems that led to the initial removal.

For Attachment Theory to have an impact on the end result in child welfare, it must first be understood and accepted by professionals trained in fields other than psychology. Child protection workers, managers, foster parents, legislators, lawyers and judges all seek to achieve a result that serves the “best interests of the child” and all attempt to do so in the context of their own competing priorities – not the least of which is the sufficiency of financial resources. Professionals in the child welfare field face the significant challenge of serving the best interests of children when circumstances are such

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<sup>76</sup> *Ibid* at 17-18 (“Less committed [foster parents] are often put off by children’s repeated provocations and rejections. All too often, they respond with increasing frustration and insensitivity, leading in time, to withdrawal, rejection, or even renewed abuse.”); See also Lyons T. Hardy, “Attachment Theory and Reactive Attachment Disorder: Theoretical Perspectives and Treatment Implications” (2007) 20 JCAPN 27 at 34-36.

that this one basic need – continuity of care – is always difficult and often impossible to achieve.

#### **D. The Language of Attachment**

When John Bowlby named his developing field of research “Attachment Theory” he did so deliberately. It was his view that a field of research named for him would rely too heavily on his approval of developments and so would stagnate after his death.<sup>77</sup> Inasmuch as Bowlby sought to ensure the health of his developing science, he was a success. More than sixty years following his early publications on the subject, Attachment Theory remains a subject marked by multi-disciplinary research, discussion, publication and controversy.

There is, however, at least one downside to Bowlby having encouraged an unrestricted approach to his emerging field of study. In the absence of some clearer direction, there has emerged significant disagreement and confusion regarding the use of terms relating to attachment. In naming his emerging theory, Bowlby chose a term that shares a lay meaning the use of which can be confused with any specific scientific definition of that term. That said, it is not simply a matter of those outside the field of psychology using technical terms incorrectly. There is a lack of agreement within the

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<sup>77</sup> Richard Bowlby & Jennifer McIntosh, “John Bowlby’s Legacy and Meanings for the Family Law Field: In Conversation with Sir Richard Bowlby” (2011) 49 Fam Ct Rev 549 at 556 (“He said at supper one evening, and I’ll never forget this: I have to find a new term, because traditionally what happens is a theory gets named after the person who first came up with the explanation. And if that happens, when I die, it’ll basically stop developing at that point because I am not there to sanction the new concepts. So I have to divorce myself from getting my name on it. I used to call it love, then I called it a tie, now I am thinking of calling it attachment.”).

mental health profession about the proper definition and use of attachment-related terms.<sup>78</sup>

Bowlby and Ainsworth defined “attachment” as “a tie or a bond.”<sup>79</sup> However, many mental health professionals distinguish “attachment” from “bonding.” One approach is to describe the former as the developmental process undergone by the child and the latter as a corresponding process undergone by the caregiving adult.<sup>80</sup> Since child protection litigation is an examination of the sometimes-competing factors of parents’ rights and children’s best interests, it is useful to make a clear distinction between the psychological needs and processes of the child and those of the parent. However, this use of the terms “attachment” and “bonding,” while potentially useful, is not universally accepted within the field.<sup>81</sup> In addition to “bonding” and “attachment” being used interchangeably or “bonding” being defined as the parental response to a child, there are professionals who define “bonding” as a subset of “attachment”<sup>82</sup> and still

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<sup>78</sup> James Kenny & Lori Groves, *Bonding and the Case for Permanence: Preventing Mental Illness, Crime, and Homelessness Among Children in Foster Care and Adoption*, (Rensselaer: ACT Publications, 2010) at 21 (“The word attachment can have several meanings. Even in professional discussion, it is often loosely substituted for bonding, relationships, or affection. Each of these can be considered a component of attachment but, . . . clarity of definition is essential.”).

<sup>79</sup> *Ibid* at 23.

<sup>80</sup> See Susan Goldberg, *Attachment and Development*, (London: Arnold, 2000) at 8 (“Sometimes the concepts of attachment theory are confused with those of bonding . . . . The latter was introduced to describe the emotional bonds that parents form with their children, and the processes by which this occurs. . . . In contrast, attachment theory has focused on the processes whereby infants and young children develop confidence in their parents’ protection.”); Paul Steinhauer, *The Least Detrimental Alternative: A Systematic Guide to Case Planning and Decision Making for Children in Care*, (Toronto: University of Toronto Press, 1993) at 71; James Kenny & Lori Groves, *Bonding and the Case for Permanence: Preventing Mental Illness, Crime, and Homelessness Among Children in Foster Care and Adoption*, (Rensselaer: ACT Publications, 2010) at 23 (Attachment is “[t]he trust and love that an infant feels toward the parent who meets its needs” whereas bonding is defined as “[t]he loving return commitment by the parent to meet the child’s needs.”).

<sup>81</sup> *Ibid* at 20-21 (“Bonding . . . should be reserved to identify a significant attachment, one that is expected to last a lifetime and whose disruption is likely to cause serious and long-lasting trauma.”).

<sup>82</sup> *Ibid* at 20-21.

others who define “attachment” as a subset of “bonding.”<sup>83</sup> Further confusing matters, even those mental-health professionals who espouse a particular definition can slip into a vernacular use of the terms “attachment” or “bonding.”<sup>84</sup>

This problem of attachment language becomes more apparent in child protection litigation.<sup>85</sup> In a 2006 case, the child protection worker described a non-verbal three-year old child as demonstrating a “positive attachment” to her prior foster family upon being returned to their care following a period of time in the care of her family. The worker demonstrated some familiarity with the literature when she explained that the apparent “positive attachment” was evidenced by the child appearing “happy” and “well-settled” and “show[ing] many positive behaviours such as seeking affect[ion] and reassurance from her foster parents . . . .”<sup>86</sup> In that same case, the court-appointed assessor described the child as “remain[ing] attached to her [birth]mother” and explained that the attachment

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<sup>83</sup> James Kenny & Lori Groves, *Bonding and the Case for Permanence: Preventing Mental Illness, Crime, and Homelessness Among Children in Foster Care and Adoption*, (Rensselaer: ACT Publications, 2010) at 23 (“Attachment is a unique form of affectional bond; the term should not be used for affectional bonds in general.”).

<sup>84</sup> See Paul Steinhauer, *The Least Detrimental Alternative: A Systematic Guide to Case Planning and Decision Making for Children in Care*, (Toronto: University of Toronto Press, 1993) at 157 (“[The child] began showing signs of an early selective bonding to [the group home worker] who was becoming her favourite worker.”); and see *ibid* at 10 (“By that time, [the child] was securely bonded to a foster mother in whose care she had thrived but who, at age fifty-seven, was unprepared to adopt her.”); and see *ibid* at 228 (“Adoption may offer more than planned permanent foster care . . . if the child is young enough [i.e. under the age of three or four] and legally and psychologically free to form the kind of total attachment that almost all adoptive parents need and expect . . . .”).

<sup>85</sup> See eg. *Children's Aid Society of Simcoe (County) v. S. (M.)* [2006] W.D.F.L. 1817, 146 A.C.W.S. (3d) 284 affirmed by *Children's Aid Society of Simcoe (County) v. S. (M.)* 2007 [2008] W.D.F.L. 1104, 157 A.C.W.S. (3d) 986 at para 103 (stating as well that “[h]er credentials are impeccable”); See also *Children's Aid Society of Ottawa v. B. (M.)* 206 CarswellOnt 3006, [2006] W.D.F.L. 2774, 2775 (*Ottawa CAS 2006*) at para 63 and 98 (The court had two psychologist who had been called as experts and who had provided assessments, one favouring the child's continued placement with the parents and the other favouring permanent removal of the child from the parents' care so that the child could be placed for adoption. The court accepted that the first expert, an experienced clinical psychologist, was using the word “attachment” differently than was the second expert who was a noted researcher and practitioner in the field of Attachment Theory. The court further accepted the first expert's use of the expression “small ‘a’ attachment” to distinguish her use of the term from that of the other expert and went on to use the upper case designation when the term was used in the context of researched field of “Attachment Theory.”)

<sup>86</sup> *Children's Aid Society of Kingston (City) & Frontenac (County) v. M. (S.)*, 206 CarswellOnt 1161, [2006] W.D.F.L. 1585, [2006] W.D.F.L. 1586 at para 41.

was evidenced by the “distress and sadness” that the child reportedly showed following contact with her birthmother.<sup>87</sup> The court also noted that a previous assessor had offered a number of observations and conclusions including one that the child “lacked ‘stranger anxiety’ which leads to concerns about attachment and safety.”<sup>88</sup>

The child protection worker and the assessors had each framed their views of the child and her needs in their understanding of the child’s attachment to caregivers. From the body of the decision it appears that these professionals did not first define their own understanding of the terms being used and nor did they make any direct reference to their training in or knowledge of Attachment Theory as a body of research. There is no indication from the decision that any of the known methods of formal attachment measurement were utilized to assess the nature and quality of the attachments that were being attributed to the child. Although couched in some of the language of Attachment Theory, the term “attachment” in this context appeared to be interchangeable with the child’s sense of familiarity with adult caregivers. It is unclear how and whether the issue of attachment influenced the court’s decision regarding the child’s future relationship to her family of origin.

In another recent case, a seven-year old child and two younger siblings had been placed with foster parents who sought to adopt.<sup>89</sup> The lawyer appointed to represent the seven-year old in the adoption could not convey the seven-year old child’s required consent to the adoption because she was not convinced that the child understood the

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<sup>87</sup> *Ibid* at para 40.

<sup>88</sup> *Ibid* at para 32.

<sup>89</sup> *Children’s Aid Society of London & Middlesex, Re* [2010]W.D.F.L. 2633, [2010] W.D.F.L. 2632, 85 R.F.L. (6<sup>th</sup>) 95.

process and could give instructions.<sup>90</sup> In making the determination that the consent was sufficient and that the adoption was in the best interest of the child, the court took into consideration the importance of the child’s “bonding”<sup>91</sup> and “attachment.”<sup>92</sup> Referring to and relying on Supreme Court of Canada cases from 1983 and 1994, the judge ruling on the matter noted that “[t]he Supreme Court of Canada has emphasized the importance of *bonding* when determining the best interests of a child.”<sup>93</sup> The court went on to explain that in 1994 “the Supreme Court had reiterated the importance of *attachment* in determining the best interests of a child.”<sup>94</sup>

There are still other examples of inconsistent and imprecise use of attachment language and the risk is that this both confuses and dilutes the impact of attachment-related issues outside of the mental-health realm. In particular, these difficulties of language may interfere with effective advocacy regarding these concepts within the legal process. For attachment to have a greater impact on legal decisions, it is the responsibility of mental health researchers, assessors and service providers to arrive at and implement a more universal set of terminology to describe this known process. The inconsistency and imprecision of attachment language represents a significant gap in the mental health field’s advocacy regarding the best interests of children.

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<sup>90</sup> *Ibid* at para 3.

<sup>91</sup> *Ibid* at para 17 and para 22.

<sup>92</sup> *Ibid* at para 16 and 18.

<sup>93</sup> *Ibid* at para 17 (emphasis added).

<sup>94</sup> *Ibid* at para 18.

### Chapter 3: Attachment Theory and Legislative Change in Ontario

We have come a long way from the time when blood ties were routinely given a higher priority than psychological ties, thanks to the wider general appreciation of the developmental importance of attachment and bonding, and the introduction . . . of the concept of the psychological parent.<sup>95</sup>

In the more than half century since the first articulation of Attachment Theory, there has been significant, ongoing debate in Ontario regarding all aspects of efforts to protect children from neglect, abuse and abandonment. The Ontario *Child Welfare Act* of 1954, and more particularly the 1965 amendments to the *Act*, began a period of significant formalization of processes and procedures for state intervention into the lives of Ontario families.<sup>96</sup> These changes set forth the province's move away from a nineteenth century tradition of extreme deference toward the sanctity of the family.<sup>97</sup> Also noted during this time period was the province's move away from a longstanding reliance on private charitable and religious organizations and toward an increase in the state's role in efforts relating to child welfare.<sup>98</sup> With the increase in state intervention

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<sup>95</sup> Paul Steinhauer, *The Least Detrimental Alternative: A Systematic Guide to Case Planning and Decision Making for Children in Care*, (Toronto: University of Toronto Press, 1993) at 83.

<sup>96</sup> Nicholas Bala, "Reforming Ontario's Child and Family Services Act: Is the pendulum swinging back too far?" (1999) 17 C.F.L.Q. 121 at 5 (noting that this time period reflected both a "discovery" of physical abuse against children and an atmosphere of recognizing the civil rights of individuals ).

<sup>97</sup> See Paul Steinhauer, *The Least Detrimental Alternative: A Systematic Guide to Case Planning and Decision Making for Children in Care*, (Toronto: University of Toronto Press, 1993) at 201 ("Society has traditionally held that a man's home is his castle and that the state has the right to interfere in the affairs of the family only in exceptional circumstances. This belief is reflected in law, which has presumed that it is the role of parents, not that of the state, to protect the best interests of children.")

<sup>98</sup> Ontario, Ministry of Community and Social Services Children's Services Division, *A Discussion Paper, Child Welfare in Ontario: Past, Present and Future, A Study of Structure and Relationships* (September 1979) at 12; See also Nicholas Bala, ed., *Canadian Child Welfare Law: Children, Families and the State*, 2<sup>nd</sup> ed (Toronto, Thompson Educational Publishing, Inc.) at 3.

came state funding, stewardship and oversight of child protection processes in Ontario as well as elsewhere in North America.<sup>99</sup>

So began more than 60 years of amendments to the provincial legislation – both wholesale restructuring and occasional refinements – in the still ongoing effort to strike the correct balance between the responsibility of the state to protect its most vulnerable population and the rights of all children, parents and others to maintain relationships with members of their own family, safe from unnecessary or even harmful state intervention.<sup>100</sup> Within this complex effort to balance competing interests are the often conflicting needs of children to have both a relationship with their family members, and a safe, nurturing and stable home environment in which to achieve optimum development.

Changes to child welfare legislation in the 1950s and 1960s coincided with John Bowlby's early work in the then-emerging psychological field of attachment. At the same time, the Ontario child welfare system was developing in an atmosphere of significant social change affecting children. In some jurisdictions, including Ontario, single mothers acquired the new option of receiving some financial assistance from the state if they chose to raise their children rather than place them for adoption. Among some of the results of this seemingly progressive social development was a growth in the number of poor, single mother households. With fewer infants being placed by their mothers for adoption, there was also a substantial reduction in what had been the

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<sup>99</sup> Ontario, Ministry of Community and Social Services Children's Services Division, *A Discussion Paper, Child Welfare in Ontario: Past, Present and Future, A Study of Structure and Relationships* (September 1979) at 12; See also Nicholas Bala, ed., *Canadian Child Welfare Law: Children, Families and the State*, 2<sup>nd</sup> ed (Toronto, Thompson Educational Publishing, Inc.) at 5.

<sup>100</sup>See eg. Nicholas Bala, "Reforming Ontario's Child and Family Services Act: Is the pendulum swinging back too far?" (1999) 17 C.F.L.Q. 121 at 34 (asking at the time of the 1999 amendments to the Child and Family Services Act "Have we got the balance right?" and cautioning against "substantial policy changes" in the absence of clear research supporting the need for and anticipated benefits of proposed changes in the measure of intervention being offered by the state and allowed by the legislation).

children's aid societies' significant role of providing care for and placing infants born to single mothers.<sup>101</sup>

While Bowlby's early work focused on the impact of abandonment, emotional neglect and institutional care on outcomes for children, others within the child welfare field had begun to pay closer attention to physical abuse of children at the hands of parents and caregivers. With heightened awareness of abuse issues came a growth in the understanding and acceptance of the need for involuntary intervention in families including the removal of children from their families due to mistreatment.<sup>102</sup> As a result, the role of children's aid societies shifted from its early role as charity-based receiver of abandoned children and children born to single mothers to its modern role of agent of the state actively investigating and assessing the safety and well being of children.

By the time the Ontario Legislature began to consider the 1965 amendments to the *Child Welfare Act*, Bowlby's initial work on the effects of "maternal deprivation"<sup>103</sup> had moved into second edition with additional chapters added by Bowlby's student and collaborator Mary Ainsworth.<sup>104</sup> Ainsworth, often referred to as a cofounder of Attachment Theory, added to Bowlby's earlier work by detailing challenges and changes in the study of child development in the dozen years since Bowlby's first publication.<sup>105</sup> In this expansion of Bowlby's early work, Ainsworth foreshadowed some of the

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<sup>101</sup> Nicholas Bala, ed., *Canadian Child Welfare Law: Children, Families and the State*, 2<sup>nd</sup> ed (Toronto, Thompson Educational Publishing, Inc.) at 5.

<sup>102</sup> Nicholas Bala, "Reforming Ontario's Child and Family Services Act: Is the pendulum swinging back too far?" (1999) 17 C.F.L.Q. 121 at 4 – 5. See also Ontario, Department of Public Welfare, *The Report of the Minister's Advisory Committee on Child Welfare to The Honourable Louis P. Cecile Q.C. Minister of Public Welfare* (May 1964) at 4.

<sup>103</sup> John Bowlby, *Child Care and the Growth of Love*, (Harmondsworth: Penguin Books, 1953) (based on the World Health Organization Report *Maternal Care and Mental Health*).

<sup>104</sup> John Bowlby & Mary Ainsworth, *Child Care and the Growth of Love*, 2<sup>nd</sup> Ed., (Harmondsworth: Penguin Books, 1965).

<sup>105</sup> *Ibid* at 189 – 235.

attachment research yet to come when she differentiated among various forms of “maternal deprivation” and introduced the complexity of this child development issue that could not be resolved simply by avoiding institutional care of infants and young children.<sup>106</sup>

Although still in a state of relative infancy in the 1960s,<sup>107</sup> Bowlby’s and Ainsworth’s work had gained enough attention that these two mental health researchers were among those specifically relied upon in the *Report of the Advisory Committee on Child Welfare*.<sup>108</sup> This was the report to the Ontario Minister of Public Welfare in 1964 (the 1964 *Advisory Report*) which influenced the 1965 amendments to the legislation.<sup>109</sup> At the time the 1965 child welfare amendments were under consideration, Bowlby’s work was still being framed in the context of “maternal deprivation;” however, he had made allowance for the possibility of a “permanent mother substitute.”<sup>110</sup>

The 1964 *Advisory Report* interpreted the works of Bowlby and others in the emerging field of child development to reflect the importance of protecting the child’s relationship to his or her family of origin. The authors of the 1964 *Advisory Report* drew on this interpretation to support their recommendation against an over-reliance on foster

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<sup>106</sup> John Bowlby & Mary Ainsworth, *Child Care and the Growth of Love*, 2<sup>nd</sup> Ed., (Harmondsworth: Penguin Books, 1965) at 13 (“For the moment it is sufficient to say that what is believed to be essential for mental health is that an infant and young child should experience a warm, intimate, and continuous relationship with his mother (or permanent mother-substitute – one person who steadily ‘mothers’ him) in which both find satisfaction and enjoyment.”); see also *ibid* at 193 (Ainsworth referring to “Bowlby’s emphasis on the desirability of continuity in the relations between a child and his mother (or substitute mother)” within her discussion of the still controversial issue of “multiple mothers”).

<sup>107</sup> Bowlby would eventually go on to develop Attachment Theory in a trilogy of books entitled “Attachment and Loss” published in three volumes in 1969, 1973 and 1980.

<sup>108</sup> Ontario, Department of Public Welfare, *The Report of the Minister’s Advisory Committee on Child Welfare to The Honourable Louis P. Cecile Q.C. Minister of Public Welfare* (May 1964) at 3.

<sup>109</sup> *Ibid* (“Over the past 25 years knowledge of children and their behaviour has grown considerably. Particular enlightenment has occurred through the work of Bowlby, Wineman & Ainsworth, etc., in the area of mental health in children and our awareness of the serious damage caused to children through deprivation of love and stimulation from the earliest age.”)

<sup>110</sup> John Bowlby & Mary Ainsworth, *Child Care and the Growth of Love*, 2<sup>nd</sup> Ed., (Harmondsworth: Penguin Books, 1965) at 13.

care and in favour of an increased focus on maintaining the child within the family of origin wherever possible.<sup>111</sup> In recognition of this family unity goal for the benefit of the child, the authors of the 1964 *Advisory Report* called for a conceptual change from one of “child welfare” to one of “family welfare.”<sup>112</sup> In furtherance of this goal, they went on to emphasize the need for prevention of family breakdown by the dedication of the resources necessary to address factors contributing to or causing the removal of children from the care of their parents.<sup>113</sup>

The authors of the 1964 *Advisory Report* list, discuss and, in some cases, append a number of the written resources that went into their deliberations. Among the resources appended to the report is a 1963 study entitled *A Study of Permanent Wards in the Care of Children’s Aid Societies in the Province of Ontario (Study of Permanent Wards)*.<sup>114</sup> A report within a report, the *Study of Permanent Wards* was prepared by an officer of the province’s Department of Public Welfare and includes statistics, regional comparisons, trend observations and discussions of various child welfare issues of the day. Although the *Study of Permanent Wards* does not make specific references to child psychology or attachment, it does address the impact of impermanence on children.

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<sup>111</sup> See eg. Ontario, Department of Public Welfare, *The Report of the Minister’s Advisory Committee on Child Welfare to The Honourable Louis P. Cecile Q.C. Minister of Public Welfare* (May 1964) at 3 (“[N]ew knowledge has created grave concern over a willingness to deprive the neglected child of what little good there may be in his own home by removing him without first making every effort to repair the defects and rehabilitate that home.”; “[Child welfare] is in fact a misnomer [because] the child’s welfare cannot be considered separate from the welfare of the family of which he is an integral and qualifying part.”).

<sup>112</sup> *Ibid* at at 49 (although at the same page the report lists as a priority that “more effort be devoted to making permanent long-range plans as early as possible for the child in care”).

<sup>113</sup> *Ibid* at at 32 and 33.

<sup>114</sup> Harold B. Treen, *A Study of Permanent Wards in the Care of Children’s Aid Societies in the Province of Ontario carried out at the request of The Minister’s Advisory Committee on Child Welfare*, Department of Public Welfare, Province of Ontario, July 1963, reprinted in Ontario, Department of Public Welfare, *The Report of the Minister’s Advisory Committee on Child Welfare to The Honourable Louis P. Cecile Q.C. Minister of Public Welfare* (May 1964), Appendix I at 75.

At that early stage in the development of child welfare theory and practice, it was still necessary to discuss and explain the importance of adoption for children who had been permanently removed from the care of their families of origin.<sup>115</sup> Among reasons listed for a preference for adoption over permanent wardship were some “obvious difficulties” for permanent wards such as the child having a different surname than the foster parents and the child obtaining his clothing by way of a voucher system: both of which were considered potential points of embarrassment for the child.<sup>116</sup>

Also listed were some “subtle difficulties” for children remaining in long-term group home or foster care. It is at this point that the *Study of Permanent Wards* reveals an emerging awareness of problems that would currently be described as issues of attachment.<sup>117</sup> Among the difficulties noted were a child’s “feelings of inferiority” that come with being moved among foster homes and not being adopted, and the lack of a sense of security that would come from knowing that one is so important to the family that one’s departure from the family would be an “unthinkable loss.” The *Study of Permanent Wards* relied on “[u]p to date knowledge from many sources,” which linked a lack of stability in childhood to moderate to severe behavioural and mental health issues. Although not citing Bowlby, the report demonstrates clear deference to his emerging work, applying the concept of “maternal deprivation” beyond the context of institutional care and applying it also to transience within a foster care, stating:

Maternal deprivation is not only found in the institutional setting, but can be easily produced by moving a child around from one place to another which can create in him fear, mistrust, apprehension and hate. If a child feels the world is cold, hard and rejecting then he may very well project these feelings back on the

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<sup>115</sup> *Ibid* at 20-22 (providing a detailed defence for the position that adoption is preferable to continued foster care for permanent wards).

<sup>116</sup> *Ibid* at 21.

<sup>117</sup> *Ibid* at 22.

world in many undesirable ways. Such children, when older, generally make poor parents and hence often perpetuate the vicious circle.<sup>118</sup>

Having identified problems that emanate from depriving children of stability, the report offers a poignant plea for children in foster care by describing the impact of that deprivation:

There is nothing more sad or depressing than to witness a frightened and unhappy child who is surrounded by well meaning people, but who is unable to relate, trust or respond to any of them. It becomes imperative that measures be taken to insure that fewer children who become permanent wards of Children's Aid Societies end up as primitive creatures, like the angleworm, which goes on living though 'cut in half.'<sup>119</sup>

In this examination of child welfare practice at the time, the *Study of Permanent Wards* goes on to cite primary source evidence – three pages containing fifteen brief file summaries of children placed in government care – to support the broad observation that there had been and continued to be a “misuse of institutional care for children in Ontario.”<sup>120</sup> The bare facts provided in those case summaries, when viewed through the current lens of Attachment Theory, show clear and even classic signs of the risks and the dysfunction expected to result from a child suffering multiple placement changes, thereby being denied the opportunity to form a sustained attachment with a caregiver.

Among the examples provided was that of a child named George who was born in 1948, remained in care from birth and was made a permanent ward at the age of two years.<sup>121</sup> Despite testing “well within the normal range” and being “described as having a pleasing personality,” George was not considered an appropriate candidate for adoption

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<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid* (Appendix I, page iv).

<sup>121</sup> *Ibid* at 30

because he was “illegitimate” and because his maternal grandfather had been diagnosed with epilepsy (a condition that did not ever manifest in the child).<sup>122</sup> By the time of the report, George was fifteen years old and in his thirteenth foster placement. He was exhibiting behaviour such as “stealing, lying, [being] overactive, bedwetting, [and being] quarrelsome and cruel.”<sup>123</sup>

There is a ready attachment analysis when comparing George’s outcome to that of the thirteen-year-old child, Billy.<sup>124</sup> Adoption was not an option for Billy because there was a “possibility that he was conceived of an incestuous union” and he was expected to be of low intelligence.<sup>125</sup> Billy remained in the same foster home throughout his childhood and at the age of twelve he tested as having normal intelligence. The one time that Billy was removed from his foster home to be placed in another foster home, he had a “violent reaction” including a refusal to eat.<sup>126</sup> He was then returned to his original foster home where he remained thereafter and, at the time of the report, he was described simply as “doing well.”<sup>127</sup>

One of the other resources relied upon by and appended to the 1964 *Advisory Report* includes an impassioned description of the separation of a child from a caregiver on apprehension:

Any child who is placed away from his own home suffers a profound loss socially and emotionally. Because of the completeness of change there is a shock to the child which in intensity, we believe, is equivalent to a major surgical operation. Everything the child has known in the past disappears. Everything he now experiences is strange – the bed he sleeps in, the location of the bathroom and the closet for his clothes, the food, the family routine, the toys, the yard, the school,

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<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid* at 29.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*

the people in close proximity to him. Nothing which happens from day to night is the same and there is no person to look to for a familiar response. The child feels bewildered and lost, his whole world is upset and he has lost his sense of security. He does not understand why this has happened to him.<sup>128</sup>

This contributor, Esther P. Hill, is quoted from her article “Is Foster Care the Answer?” (no citation) in which she speaks of the trauma to a child upon separation from his or her family and resulting placement in foster care. She introduces her description with “What does foster care mean to the child?”<sup>129</sup>

The observable manifestation of the trauma of separation from parents and replacement are myriad and vary according to age. The baby may cry constantly, stop feeding, stop sleeping, he does not respond or smile; he becomes listless and apathetic. The toddler may become more fearful, cling to the new mother, unable to bear to have her out of sight. The run-about resorts to wetting or soiling. The older child often reacts with inordinate appetite, stuffing himself as if starved in his last placement. Eneuresis, destructfulness, fire setting, stealing, these are common reactions of the replaced child that tells us better than words how hard this is for the child.<sup>130</sup>

This is framed as a description of the impact of apprehension from parental care. However, this description is, in the current understanding, a powerful and evocative description of the impact of change and loss during a developmental period when the highest premium is on predictability and security. Despite casting her observations in the light of the child’s removal from the family of origin, this contributor appears to acknowledge that it is, in fact, the child’s separation from settled caregiving relationships that is the problem. She further offers:

As time goes on [the child] becomes accustomed to his new life . . . . With time and a favourable placement the child’s faith is restored, but he is tentative and testing before he develops trust. If this new life and these new attachments are

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<sup>128</sup> *Ibid* at Appendix D (quoting Esther B. Hill, *Is Foster Care the Answer?*, *Public Welfare*, Chicago, April 1957, Vol.15, No. 2.)

<sup>129</sup> *Ibid* at 39.

<sup>130</sup> *Ibid*.

disrupted by second or further moves, his trust is shattered, his worst convictions about himself are reconfirmed, the original trauma is re-enacted in a more compelling way. The child then adapts to or fights any new situation but he cannot incorporate it, he cannot trust, he cannot love, he cannot risk new attachments. He is well on the way toward dependent, inadequate, unfulfilled adulthood.<sup>131</sup>

The authors of the 1964 *Advisory Report* had before them evidence that the particular problem for these children was not removal from their families of origin, *per se* (although, admittedly, those removals are significant stressors and emotional traumas for children now, just as they were then). Nor was the problem the fact that, thereafter, the children remained in foster care (although it is considered true now, as it was suggested then, that the permanency of adoption is generally preferable to long-term foster care). Viewed in light of current research, it is apparent that the significant problem being demonstrated by the available evidence was the common result of government care: multiple changes in caregiver relationships.

Ontario's 1965 legislative amendments were developed and implemented during the early emergence of widespread North American recognition of the physical abuse of children.<sup>132</sup> During consultation regarding the 1965 amendments, however, mention of this serious child welfare issue is noticeably absent from discussions regarding the need for legislative change at that time. Then, in the early 1980s, in the context of this acknowledgement of child physical abuse coupled with the incipient awareness of the problem of child sexual abuse, Ontario undertook a wholesale legislative overhaul which

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<sup>131</sup> *Ibid.*

<sup>132</sup> Nicholas Bala, ed., *Canadian Child Welfare Law: Children, Families and the State*, 2nd ed (Toronto, Thompson Educational Publishing, Inc.) at 3 (citing H.C.Kempe, "The Battered Child Syndrome"(1962) 181 *Journal of the American Medical Association* 17).

resulted in the 1984 *Child and Family Services Act* and which, as amended, remains in force today.

Notwithstanding the pressing need to address serious emergent risks to children resulting from the recognition of the societal problems of physical and sexual abuse, the passage of the 1984 *Child and Family Service Act* came with a competing priority – a renewed push for a focus on family preservation. The view that had been articulated in the 1964 *Advisory Report* had finally taken firm hold – the separation of children from their families of origin, even in the face of abuse and neglect, will, in some cases, cause a child more harm than good.<sup>133</sup>

Those behind the legislative amendments in the 1980s described a need to correct “the historical legacy that [had been] biased towards removing the child from the family.”<sup>134</sup> As previously noted, during consideration of the amendments in the 1960s, there had been some acknowledgment that there was harm to a child from being brought into government care, even when the child was being removed from less than ideal or even abusive circumstances. Although not reflected in the legislative reforms of 1965, that concern for the impact of government care on children continued to gather steam and it became one of the driving forces for change in the 1980s.<sup>135</sup> With a “rights” focused

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<sup>133</sup> Nicholas Bala, “Reforming Ontario’s Child and Family Services Act: Is the pendulum swinging back too far?” (1999) 17 C.F.L.Q. 121 at 4 (stating that “arguments in favour of leaving children in parental care in all but the clearest of cases of abuse and neglect” had been made by leaders in the field of mental health and that those ideas lead to concepts of “permanency planning”).

<sup>134</sup> Ontario, Ministry of Community and Social Services Children’s Services Division, *Consultation Paper: Children’s Services, Past, Present and Future* (December 1980).

<sup>135</sup> See eg. Ontario, Ministry of Community and Social Services, *The Children’s Act: A Consultation Paper*, October 1982 at 14-15 (recommending the adoption of principles of family preservation such as “Services to Children should support, enhance, and supplement the family, whenever possible, rather than compete with the family by providing alternative care and supervision.”; “Any process of involuntary intervention involving a child or family should be based on a strong presumption of family autonomy and family integrity.”).

political atmosphere in the 1980s,<sup>136</sup> there emerged an opportunity to effect change on behalf of a perpetually disenfranchised and vulnerable population: children whose lives were marked by poverty, many of whom were being raised by single mothers and a disproportionate number of whom were aboriginal or from other racial and cultural minorities.<sup>137</sup>

The enactment of the *Child and Family Services Act* in 1984 commenced a family-preservation phase of Ontario child welfare during which there was a drastic reduction in the number of children who were brought into state care and during which significant resources were dedicated to support children in the care of their own families.<sup>138</sup> As had been the case in the 1960s, the concern regarding government care of children was acknowledged.<sup>139</sup> However, this time the acknowledgment came with action. With this overhaul of the legislation in the 1980s, concern regarding the negative impact of government care was addressed by way of an increased focus on family support and preservation.

Still largely absent from this substantial redesign of Ontario's child welfare practice and policy was clear direction regarding what would be done in those cases where family preservation could not be safely achieved. Although enactment of the 1984 legislation included a clearly stated principle in favour of respecting "children's needs for

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<sup>137</sup> Nicholas Bala, ed., *Canadian Child Welfare Law: Children, Families and the State*, 2<sup>nd</sup> ed (Toronto, Thompson Educational Publishing, Inc.) at 2-12.

<sup>138</sup> Nicholas Bala, "Reforming Ontario's Child and Family Services Act: Is the pendulum swinging back too far?" (1999) 17 C.F.L.Q. 121 at 5-6 (noting that while there was an increase in the number of children receiving child welfare services, there was a drastic decrease in the corresponding number of children who were brought into state care).

<sup>139</sup> Ontario, Ministry of Community and Social Services, *The Children's Act: A Consultation Paper*, October 1982 at 49 (In considering the risks to the child, the report focuses on advising or reminding the reader of the risks to the child that come with the loss of being separated from his or her family of origin.).

continuity of care and for stable family relationships,”<sup>140</sup> the concept of “family relationships” would be narrowly defined. The balance of the legislation was read to strongly favour the goal of continuity for children within their families of origin.

One practical result of continuing to pursue the laudable but sometimes elusive goal of family preservation was a lack of stability for some children. The concepts of “loss” and “separation” that had been called upon to evoke the danger of separating a child from his or her family<sup>141</sup> were still not being applied as independent factors causing risk and harm to children. With family preservation as the goal and the minimization of government care as a means to achieve that goal, the primary solution was to continue trying to keep the family together even if that meant multiple placement changes with the child moving in and out of state care. For example, in considering what would be the “least restrictive” use of alternative care, the authors of the 1982 *Consultation Paper (A Children’s Act)* suggested that “shorter stays [in care] of definite duration are preferred to longer and indefinite stays, and intermittent stays are preferred to those that are continuous.”<sup>142</sup> Such an approach is problematic from an attachment perspective because children were exposed to placement instability in an effort to preserve their place in their family of origin.

One should not construe the debate then or now as “attachment vs. family preservation.” There were and are attachment-focused arguments from the field of psychology that favour family preservation. Even at the time of the family-focused 1984 legislative amendments, psychological theories of attachment and psychological

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<sup>140</sup> *Child and Family Services Act* S.O. 1984, c. 55, s. 1 (Declaration of Principles).

<sup>141</sup> Ontario, Ministry of Community and Social Services, *The Children’s Act: A Consultation Paper*, October 1982 at 49.

<sup>142</sup> *Ibid* at 17 (“Length of Stay”); see also *ibid* at 49.

parenting were offered in support of the principle that a child should, wherever possible, be permitted to remain in the care of his or her family. Under the now commonly used term “permanency planning,” this support for the legal principle of family preservation came with a caveat. From the mental health perspective, permanency planning is a two-step decision-making process that favours, wherever possible, continuity of relationships. First, authorities apply resources toward preventative and remedial supports to keep children with their families wherever doing so is feasible. However, if such supports fail to mitigate risks to the safety and well being of a child within his or her family home, the child should be removed from the home as soon as possible and given a permanent placement elsewhere.<sup>143</sup>

However, that two-step attachment-focused approach to the family preservation principle was not reflected in the legislative changes of the 1980s. Changes to legislation and practice in the 1980s maintained the first part of the analysis – that children should, wherever possible, be kept in the care of their families – but largely disregarded the second part – a need for swift removal and permanent placement (subject to judicial control) in those cases where removal proved necessary.

In the 1960s, family preservation had been suggested as a child welfare priority built on the works of Bowlby, Ainsworth and others in the field of children’s mental health.<sup>144</sup> Meanwhile, the field of children’s mental health saw advances in the understanding of a child’s need for attachment and had come to recognize that it is the

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<sup>143</sup> Paul D. Steinhauer, “Permanency Planning: Prescription for Continuity or Chaos?” Presented at the Panel on “The Politics of Permanency Planning for Children”, 57<sup>th</sup> Annual Meeting of the American Orthopsychiatric Association, April 10, 1980, Toronto at 5-6 (published in *The Law Society of Upper Canada, Families Children and the Law*, June 1985); see also Nicholas Bala, “Reforming Ontario’s Child and Family Services Act: Is the pendulum swinging back too far?” (1999) 17 C.F.L.Q. 121 at 4-5 (citing the works of “influential American scholars Goldstein, Freud and Solnit, who advocated preserving ‘continuity of relationships’ in the practice of child welfare”).

<sup>144</sup> *Supra* note 108.

healthy formation of an attachment to a caregiver, rather than the child's biological relationship to a caregiver, that is significant to the child's optimum development. Even as early as the 1960s, children's mental health professionals had come to recognize that maladaptive outcomes were not the simple result of children being deprived of the care of their mothers or other members of their families of origin.<sup>145</sup> Rather it was viewed as the child being denied the opportunity to form secure, stable attachments to adult caregivers.

As advocates for family preservation, the authors of the 1980 *Consultation Paper (Children's Services, Past, Present and Future)* predicted another problem inherent in their own solution – there would be calls for change when the risks of the family preservation model lead to, or were perceived as having led to, tragic results for individual children.<sup>146</sup> In response to their own predictions of a “small or large tragedy,” these advocates for change offered only bare assurances that family preservation is “worthwhile because of the beneficial effect for many families.”<sup>147</sup> The authors did not provide a plan for maintaining public and political support for this “more humane”<sup>148</sup> approach following the tragic outcomes they predicted could result from what they describe as a “worthwhile risk.”<sup>149</sup>

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<sup>145</sup> See John Bowlby & Mary Ainsworth, *Child Care and the Growth of Love*, 2<sup>nd</sup> Ed., (Harmondsworth: Penguin Books, 1965) at 191-192.

<sup>146</sup> Ontario, Ministry of Community and Social Services, 1980 *Consultation Paper (Children's Services, Past, Present and Future)* at 36 (“The principles and philosophy that have been adopted and the specific approaches that follow from them are more difficult to standardize than the traditional bias towards alternative care. However, the acceptance of the risk involved is worthwhile because of the beneficial effect for many families. From time to time, especially on the occasion when a small or large tragedy reveals inadequacy of care for a child, it will be inevitable that there will be media or other public demands to return to an approach that removes the child from the family at the first indication of a problem. While it would appear that no arrangements are perfect, the emphasis upon the importance of permanent and personal relationships is considered to be more humane and ultimately less difficult to perfect.”)

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*

As predicted, tragedies did occur.<sup>150</sup> As also predicted, the publicity surrounding the deaths of children resulted in calls for change to the focus of child protection in Ontario. In 1998 the opening pages of *Protecting Vulnerable Children: Report of the Panel of Experts on Child Protection (1998 Panel Report)* states:

Following the deaths of Ontario children while receiving child welfare services the Minister of Community and Social Services created a panel of eight experts to examine the *Child and Family Services Act*. The Panel was asked to indicate whether or not the province's child welfare legislation should be amended.<sup>151</sup>

The Panel's answer to that question was "yes."<sup>152</sup> Faced with the deaths of children while in parental care and receiving child protection services from the province, the Panel of Experts concluded that it was no longer enough to say that a family-preservation focus was good for children in general.

The Panel concluded that the objectives of the 1984 *Child and Family Services Act* had been interpreted "in such a way as to overemphasize the rights and interests of parents rather than the needs of the child."<sup>153</sup> In 1999, the Ontario legislature amended the *Act* to, among other things, expand the grounds upon which a child could be found to be in need of protection and clarify the obligations of professionals and members of the public to report child abuse that comes to their attention. These changes began the province's movement away from the family-preservation approach back toward a stronger reliance upon removal of the child from the family home as a means of protecting a child's safety.

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<sup>150</sup> Ontario, Ministry of Children's Services, *Child Welfare Program Evaluation Report*, November 2003 at 11 ("Inquests into deaths of children known to CASs indicate that previous wording in the legislation had been used to keep families together at the expense of the children.")

<sup>151</sup> Ontario, Ministry of Community and Social Services, Judge Mary Jane Hatton et al, *Protecting Vulnerable Children: Report of the Panel of Experts on Child Protection*, March 9, 1998 at 1.

<sup>152</sup> *Ibid* at 7.

<sup>153</sup> *Ibid* at 13.

Even before changes were made to the legislation, interventions had increased and more children were coming into care due to dramatic reports of injury to, or death of, children receiving child protection services.<sup>154</sup> These cases of injury and death had already proven more compelling than the more subtle, but still lasting, damage believed to be caused to the greater number of children removed from the care of their imperfect families. With an expansion of the legislation to include risk of harm to children, even more children would be brought to the attention of the child protection service that had already increased its focus on the physical safety of children.<sup>155</sup>

Although these legislative changes marked a significant shift in Ontario's approach to child welfare, there is little public record of the contributing professional input or debate leading up to the 1999 amendments to the *Child and Family Services Act*. Without the benefit of the extensive consultation papers that had accompanied previous legislative changes, it is more difficult to assess the Ministry's specific intent in making any of the particular changes.

The 1998 *Panel Report* is the primary source of recommendations that gave rise to the 1999/2000 changes to the legislation. The report was scant in its analysis in comparison to reports made to previous governments that had sought to effect change in regard to this complex issue. The 1998 *Panel Report* does have, however, an extensive bibliography that includes publications by known attachment theorists and so the influence of their work may be presumed.

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<sup>154</sup> See Measuring 2005 Transformation Goals to 2010 Child Welfare Practices: Interim Progress Report, Ontario Association of Children's Aid Societies June 14, 2011 at 17 ("The result [of the Child Mortality Task Force and the Panel of Experts and resulting recommendations for legislative change] was a movement towards a child safety focus model for child welfare [in Ontario]").

<sup>155</sup> *Ibid.*

The 1999/2000 legislative amendments were primarily a reaction to the need for immediate physical safety for children who suffered or would be at risk of suffering harm. Aimed at offering more protection for children at risk, those amendments expanded the grounds upon which children could be found to be in need of protection and clarified the duty of professionals and the public to report when they observed children to be at risk. Such a focus on the removal of children into government care would have, standing alone, run counter to attachment principles since the necessary result is an increase in disruptions in caregiving relationships.

However, that increased focus on the safety of children did not stand alone. Included among the 1999/2000 amendments to the *Child and Family Services Act* was a further limit on the time that younger children could spend in impermanent care. Whereas the 1984 version of the *Act* had allowed for twenty four months of short-term care before an order for permanency was required, the amendments enacted in 1999 and brought into force in 2000 differentiated between older and younger children, providing that children under the age of six could only be subject to a final court order keeping them in impermanent government care (Society wardship) for up to twelve months.<sup>156</sup> As well, the 1999 amendments attempted to further address the need for permanency for all children regardless of age by making the calculations of time spent in care cumulative and inclusive of all time that children have spent in care – whether voluntarily by consent

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<sup>156</sup> Nicholas Bala, “Reforming Ontario’s Child and Family Services Act: Is the pendulum swinging back too far?” (1999) 17 C.F.L.Q. 121 at 15 (noting that the legislature took a more interventionist approach than that taken by the Panel of Experts who had recommended a 12 month time limit for children up to the age of two years, an 18 month time limit for children between the ages of 2 and 4 years and a 24 month time limit for children over the age of 5 years).

of the parents, by a temporary court order pending court proceedings or by a final court order for impermanent placement.<sup>157</sup>

Due to a closing of the legislative session, it took two tries – Bill 73 in 1998<sup>158</sup> and Bill 6 in 1999<sup>159</sup> – for these child welfare amendments to make it through to third reading. The first time the amendments to the *Act* were offered, there was some discussion in the legislature regarding the bill. During Second Reading on November 5, 1998, then Minister of Community and Social Services, Janet Ecker, listed as a fourth priority of the proposed legislation the need for improved permanency planning for children in care stating: “The proposed amendments would reduce the length of time that a child under six years of age could be in a society’s temporary care. . . . This will encourage an earlier achievement of the stability and the permanency so necessary for young children.”<sup>160</sup>

Sharing time with the Minister, Mr. Jack Carroll (Chatham-Kent) alluded to the clear influence of Attachment Theory and related social sciences in implementing shorter timelines for children in care when he stated “. . . because all the experts tell us that the sooner the child can get out of the revolving door syndrome and be put into permanent care, the better it is for the child.”<sup>161</sup> These time limits on impermanent care – 12 months for children under six years of age and 24 months for all other children – have continued in place through subsequent legislative changes.<sup>162</sup>

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<sup>157</sup> *Ibid.*

<sup>158</sup> Bill 73, *An Act to amend the Child and Family Services Act in order to better promote the best interests, protection and well being of children*, 2d Session, 36th Leg, Ontario, 1998.

<sup>159</sup> Bill 6, *An Act to amend the Child and Family Services Act in order to better promote the best interests, protection and well being of children*, 3rd Sess, 36th Leg, Ontario, 1999.

<sup>160</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 36th Parl, 2<sup>nd</sup> Sess, No 56A (5 November 1998) at 3342 (Janet Eckert).

<sup>161</sup> *Ibid* at 3344 (Jack Carroll).

<sup>162</sup> *Child and Family Services Act*, R.S.O. 1990, c. C.11, as amended, s-s. 70(4).

Where the 1999/2000 amendments had emerged as a reaction to negative outcomes resulting from the “family preservation” tack taken in the 1980s, the next round of legislative change in Ontario came more swiftly and was considered part of a sweeping “transformation” of the province’s approach to the practice of child protection.<sup>163</sup> Changes to the legislation came into effect in 2006 with the proclamation of the *Child & Family Services Statute Law Amendment Act*<sup>164</sup> and were the result of a broad review of child welfare practice and outcomes within the province.<sup>165</sup> The review and the recommendations for change expanded beyond legal reforms and extended into other aspects of child welfare such as the day-to-day practice of child protection professionals and the funding model for child protection agencies in the province.<sup>166</sup> Although the full breadth of the transformation agenda is beyond the scope of this work, there are elements that are pertinent due to potential impact on matters relating to attachment.

Among the keys to the child welfare transformation agenda is “permanency” for children.<sup>167</sup> In the *2003 Evaluation Report* that preceded and informed the broad changes of 2006, this need for early permanency was acknowledged with a clear nod toward the importance of the issue of attachment. Examining the issue of permanency in the context of child outcomes, the *2003 Evaluation Report* states:

There is considerable research dating as far back as the 1960s and 1970s on the effects of separating children from their natural or substitute families. These children experience trauma and a strong sense of loss. Those who are separated from their parents and do not bond with substitute caregivers risk long-term

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<sup>163</sup> See *Measuring 2005 Transformation Goals to 2010 Child Welfare Practices: Interim Progress Report*, Ontario Association of Children’s Aid Societies June 14, 2011 at 12 - 16 (Transformation in Transition).

<sup>164</sup> *Ibid.*

<sup>165</sup> *Child Welfare Program Evaluation Report*, Ministry of Children’s Services, November 2003.

<sup>166</sup> See *Ibid.* at 56-57.

<sup>167</sup> See *Measuring 2005 Transformation Goals to 2010 Child Welfare Practices: Interim Progress Report*, Ontario Association of Children’s Aid Societies June 14, 2011 at 14.

psychological effects such as chronic depression and the inability to form meaningful relationships with others.<sup>168</sup>

In the 1980s, permanency planning had been defined by mental health professionals as a two-step process of maintaining children in the care of families to the extent that it is safe to do so and then, barring success with the family, effecting swift placement and “permanency” for the child. In the context of the 2006 transformation agenda, permanency planning was more generally defined as “[providing] a broad range of care options to achieve a permanent placement for a child that will ensure their safety, stability and attachment.”

Within this new and more broad definition, permanency planning includes an ascending order of interventions with the focus being to rely, whenever possible, on the benefits of less formal interventions.<sup>169</sup> The most formal of the interventions and the last on the continuum are foster care and adoption.<sup>170</sup> The least formal of the listed interventions and therefore the most preferred is “admission prevention.” This first step in the continuum of intervention involves the child protection agency providing supports to the family in an effort to address child protection concerns without removing children from the home.<sup>171</sup> This is reminiscent of the first step in the earlier two-step construction of the original definition of permanency planning as offered by mental health professionals.

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<sup>168</sup> *Child Welfare Program Evaluation Report*, Ministry of Children’s Services, November 2003 at 25 (citing Dr. Ner Littner and Dr. Paul Steinhauer as “two prominent researchers”)

<sup>169</sup> *Measuring 2005 Transformation Goals to 2010 Child Welfare Practices: Interim Progress Report*, Ontario Association of Children’s Aid Societies June 14, 2011 at 31 and 80

<sup>170</sup> *Ibid* at 79.

<sup>171</sup> *Ibid*

Second in the continuum following “admission prevention” and therefore currently the next preferred option in Ontario child protection practice is “kinship service”. Kinship service is defined as follows:

When a child is unable to remain in his/her immediate family’s care, outreach to extended family or kin is explored. These families are assessed in accordance with [Ministry of Child and Youth Services] provincial Kinship Service Standards. The Child is not in the formal care of the child welfare agency [though] the child welfare agency continues to work with the family.<sup>172</sup>

Kinship service placements are “out-of-care” placements. Although the child is out of the physical care of the parents, the child is not in the formal care of the child protection agency. Theoretically, the parents recognize their own limitations in providing care for their children and voluntarily place the child with an agency-approved family or community member, the “kin.” Such an arrangement may be intended as temporary or long-term. Among the expected benefits of such an arrangement is the continuity of the child’s relationship to extended family and community. Promotion of attachment is listed among the goals of this less formal intervention.<sup>173</sup> However, in this context “attachment” is not defined and it is offered without the specificity of how this priority of family would be called upon to serve a child’s attachment needs.

Throughout the time that Attachment Theory has been under development as a means of understanding and addressing issues of child development, it has been one among myriad factors influencing legislative change in Ontario. Legislation is a blunt tool being used here to address a complex and delicate set of problems. Formed with

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<sup>172</sup> *Ibid*

<sup>173</sup> *Ibid* (“Permanency planning provide(s) . . . options to achieve a permanent placement for a child that will ensure their safety, stability and attachment.”).

input from different fields, legislation is influenced by different priorities and concerns of the day. In that context, attachment has been called upon in support of family preservation, shorter time limits for younger children in impermanent care and, most recently, permanency planning by way of less formal kinship service placements.

Attachment remains a concept that is seen to feed the principles that drive child welfare practice and policy in the province. The finer points of Attachment Theory and the importance of continuity of care remain mixed with other competing priorities – the continuing effort to respect the unity and autonomy of the family, the pressing need for immediate physical safety for children and the realities of delivering social services to a disenfranchised population in a time of economic restraint – to name a few.

Ultimately, legislation seeks to address the best interests of all children. It provides parameters and principles within which decisions shall be made. However it can never provide all the solutions required to address this delicate problem of infinite variations and possibilities. Ultimately, the best interests of individual children are not determined by legislators but rather are determined within parameters laid out by legislators. Decisions are made on a case-by-case basis by child protection agencies sometimes, but not always, with the oversight of the judicial system.

## Chapter 4: Litigating Attachment Issues and Child Protection in Ontario

### A. The Backdrop of Child Protection Litigation

Family, in some form, is a universal experience. For most, the experience of family includes a childhood spent in the care of parents and an adulthood spent in a relationship with one's own children. Family relationships, good and bad, shape us and remain with us throughout our lives. Orders for Crown wardship terminate parental rights and sever a child's family relationships and so have a significant impact on the lives of all involved. The impact is so significant that such orders have been referred to as the "capital punishment of Family Law."<sup>174</sup>

It is not surprising then that, in child protection matters, judges openly address the gravity of their decisions and the need for care in making such an order. Final decisions for permanent orders of Crown wardship are often prefaced with comments such as:

[A] Crown Wardship order is probably the most profound order that a court can make. Cases are virtually unanimous in postulating that there is no order that any judge can possibly make that so profoundly affects the lives of the people involved. Thus, 'to take someone's children from them is a power that a judge must exercise only with the highest degree of caution, and only on the basis of compelling evidence, and only after a careful examination of possible alternative remedies'.<sup>175</sup>

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<sup>174</sup> See eg. Law Times, "Proposed adoption law raises many questions" Sunday, July 24, 2005, Carole Curtis ("Losing your child forever is the worst thing that could possibly happen to a parent. A Crown wardship case is the capital punishment of family law.") [www.lawtimesnews.com/20050725125/Headline-News/Proposed-adoption-law-raises-many-questions](http://www.lawtimesnews.com/20050725125/Headline-News/Proposed-adoption-law-raises-many-questions)

<sup>175</sup> *Children's Aid Society of Hamilton v. M.(M.A.)* 2003 CarswellOnt 1122, 16 O.F.L.R. 235, 121 A.C.W.S. (3d) 889 at para 12 citing (*Catholic Children's Aid Society of Hamilton-Wentworth v. G. (J.)* (1996), 23 R.F.L. (4th) 79 (Ont. Div. Ct.); See also *Children's Aid Society of Halton (Region) v. N.(R.R.)* 2008 CarswellOnt 1196, 2008 ONCJ 95 ("The Crown wardship order is the most profound order that a court can make. To permanently remove a child from the care of a parent is a power that a judge must exercise only with the highest degree of caution and only on the basis of compelling evidence and only after careful examination of possible alternative remedies."); and see *Lennox and Addington Family and Children's Services v. J.S.*, [1999] O.J. No. 1821 at para 1 ("The most serious remedy in a child protection hearing is to extinguish a parent/child relationship through Crown wardship without access. The law restricts a court's power to make that order if the circumstances are likely to change within a maximum period . . . from admission to foster care."))

It is within this framework of caution and compelling evidence that Attachment Theory is being offered as *a* factor or as *the* factor that will determine a court's decision regarding the future of a child.

Further complicating these difficult decisions regarding children is an ever-changing landscape of social science. Child development is an evolving area of research and discovery. The knowledge base regarding assessment and treatment of children and parents is ever expanding. Parenting is made up of intensely personal choices coloured by normative expectations but also by one's own experiences, culture, religion and individual capacity. Those involved, including ultimately the judge, bring their own experiences and expectations to this process. Even perceptions of accepted parenting norms are subject to shifting social values and decisions often reflect the dominant value system of the time. In litigated matters of child protection, a court is left to sift through all this to determine what constitutes a minimum threshold of acceptable parenting. To make these decisions, judges must also consider when, if ever, the science of child development is so certain as to be determinative of the result.

The central message of Attachment Theory is intuitive for most parents and, indeed, for most people – when children develop relationships of significance, any termination of those significant relationships is a painful loss. But questions remain in individual cases. How is the loss measured? What is the impact of the loss and how can that be assessed or predicted for individual children or for children in general? Can the impact of the loss be minimized and if so, how? In the field of child protection, these questions of loss are critical when contemplating removal of children from their families of origin and also when contemplating removal of children from foster care for a return to

their families. Principles develop but this remains a case-by-case determination. Given the acknowledged gravity of child protection litigation and the perpetually evolving knowledge base, decisions regarding the welfare of children can never be a simple application of set rules.

Balancing parental rights against the various factors that determine the best interests of children rests at the heart of all child protection decision making. The effort to strike that balance influences and has been influenced by the larger context of the expanded role of Canadian courts. It has only been in the last quarter century that Canadian courts have moved from their traditional role of settling disputes between litigants toward a broader role of arbiter of rights and social policy.<sup>176</sup> In the context of child protection, that newer role comes with a dual function – the protection of individual children as well as the protection of parents and families from overreaching by the state. In consideration of the Ontario *Child and Family Services Act*, the Supreme Court has stated that, to fulfill the objective of promoting the best interests, protection and well-being of children as the paramount purpose of the *Act*, the *Act* “carefully seeks to balance the rights of parents, and, to that end, the need to restrict State intervention, with the rights of children to protection and well-being.”<sup>177</sup> With the variability of the facts among individual cases, these two points of balance, the rights and needs of the child and

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<sup>176</sup>See Nicholas Bala et al, ed., *Canadian Child Welfare Law: Children, Families and the State*, 2<sup>nd</sup> ed (Toronto: Thompson Educational Publishing, Inc. 2004) at 5; See also Nicholas Bala & Robert Leckey, “Family Law and the *Charter’s* First 30 Years: An Impact Delayed, Deep, and Declining but Lasting” (2013) 32 C.F.L.Q. 21 at 23 (noting that, by the mid-1990s, the time period when the Supreme Court was deciding *M.(C.)*, the Court was also applying the *Charter* to “reshape” family law “in ways that reflect and reinforce fundamental changes in attitudes towards family life among the Canadian Public,” including increased recognition of parent’s Constitutional rights).

<sup>177</sup> *Catholic Children’s Aid Society of Toronto v. M.(C.)* 2 R.F.L. (4th) 313, [1994] 2 S.C.R. 165 at para 25.

those of the family unit, can prove paradoxical – sometimes aligned and sometimes in opposition to one another.

The child welfare system starts with the premise that the interests of children are best served by being raised in their family of origin. There are times, however, when state intervention is necessary and, in cases of greater risk, such intervention will include removal of the child from the family and placement in temporary care while decisions are made regarding the child's permanent care. Where the child protection agency or a court deems return of the child to the family to be in the child's best interest, the child is removed from that agency-supervised temporary caregiving arrangement. This may be after weeks, months or even years in the care of one foster family. An examination of attachment in the context of child protection is, for the most part, an examination of risks associated with removing or not removing children from caregivers – whether the contemplated removal is from the care of family members or from the care of temporary caregivers who became involved when care by family was found to have posed unacceptable risks.

### **B. Resource Foster Placements (Fostering with a View to Adoption)**

Among the many social changes that impact on child welfare, there is one that is closely related to issues of attachment. As discussed in Chapter 3 (Legislation), during the 1950s and 1960s, the role of child protection agencies shifted from being one focused on the receipt and placement of abandoned children to one of state-authorized

investigation of and intervention in the inner workings of families.<sup>178</sup> This is partly due to social changes that made it possible for unmarried women to raise their own children which is a significant factor leading to a “market” change in adoption.<sup>179</sup> No longer is there an excess of healthy infants requiring placement. In the current context, healthy children like George<sup>180</sup> would no longer be difficult to place due to being “illegitimate” or having had a grandfather with epilepsy.

Quite the contrary, child protection agencies are now able to place children in a “resource” foster placement. Resource foster parents provide temporary care, usually for infants and small children, as a means of hopefully becoming adoptive parents to those children. In some cases, the agencies prejudge their open cases in an effort to determine which cases are the most likely to result in a final order for Crown wardship. It is in these cases that agencies engage in concurrent planning so as to place children with their permanent caregivers as soon as possible. The agency makes the deliberate decision to place the child with a resource foster parent. In other cases, the child is placed with a traditional foster family but, over time, that foster family decides that they are available to the child as a permanent placement should adoption become an option. In either case the result is the same; despite the temporary legal status of the child, resource foster parents intend the child’s placement to be permanent.

The practice of relying on resource foster parents is intended for the benefit of the child – the sooner the child is placed with a permanent caregiver and the fewer moves a child must endure, the better it is for the child. However, this use of resource foster

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<sup>178</sup> Nicholas Bala et al, ed., *Canadian Child Welfare Law: Children, Families and the State*, 2<sup>nd</sup> ed (Toronto: Thompson Educational Publishing, Inc. 2004) at 2-4.

<sup>179</sup> *Ibid* at 4 and 194.

<sup>180</sup> *Supra note* 120-122.

placements also has an impact on child protection litigation. Whether the resource placement is deliberately arranged by the child protection agency or it develops naturally due to the time that the child and the caregiver have spent together as a family, resource foster placements have become an aggravating factor for parents and other biological family members working toward a return of the child. As will be explored herein, the attachment between a child and a resource foster parent has emerged as a significant consideration in determining the best interests of children in care.<sup>181</sup> Because of the resulting negative impact on the family's efforts to secure return of the child, parents, parents' counsel and some courts have perceived such regard for the attachment relationship as a point of unfairness to the family of origin.<sup>182</sup>

Despite such concerns, the use of resource foster parents is an accepted practice known in the field as "concurrent planning." The term reflects an agency's parallel roles of working to return the child to the care of the family while also engaging an alternate plan for the child's permanency through adoption.<sup>183</sup>

### **C. Case Law as One Means of Assessing the Impact of Attachment Theory on Child Protection**

As discussed in Chapter 2 (Attachment) and Chapter 3 (Legislation), the development of Attachment Theory as an influential aspect of developmental psychology coincided with changes in the Ontario child welfare legislation in the early 1960s. Prior

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<sup>181</sup> See *Catholic Children's Aid of Metropolitan Toronto v. M.(C.)* 113 D.L.R. (4th) 321, [1994] 2 S.C.R. 165, 1994 CarswellOnt 3762, R.F.L. (4th) 313, 18 O.R. (3d) 160 at para 15.

<sup>182</sup> See eg. *Children's Aid of Peel (Region) v. K.(D.)* [1991] W.D.F.L. 264, 4 O.F.L.R. 121.

<sup>183</sup> Linda Katz "Concurrent Planning: Benefits and Pitfalls," (1999) 78 Child Welfare 71 at 72 (defining concurrent planning as "work[ing] towards family reunification while, at the same time, developing an alternative permanent plan").

to these changes, there had not been a significant role for the courts in matters of child protection.<sup>184</sup> However, since those changes, the practice of child protection has undergone a sea change.<sup>185</sup> Included in this has been the formalization of state involvement in families and an exponential increase in the amount of court involvement.<sup>186</sup> Among the changes was the movement from the use of lay magistrates to the appointment of family court judges with legal training, the extension of legal aid assistance to parents facing child protection matters, the appointment of counsel for children and decisions relating to the protection of children being considered at the level of the Supreme Court.<sup>187</sup>

However, even with an increase in formal court involvement, there are still many cases that cannot be part of this review. Not all court cases that are decided at trial are reported. As well, more cases are settled than are put to the court for a final decision. In child protection matters, this would include many cases that are settled with an agency's decision to return the child to the family of origin, a decision that will usually go unchallenged.

There are other reasons why reported case law is not fully representative of trends in child protection practice and litigation. For example, there is now an increased focus on the use of "kin" or family and community members as an alternative to foster care. As was discussed in Chapter 3 (Legislation) and will be examined further in Chapter 5

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<sup>184</sup> Nicholas Bala et al, ed., *Canadian Child Welfare Law: Children, Families and the State*, 2<sup>nd</sup> ed (Toronto: Thompson Educational Publishing, Inc. 2004) at 3.

<sup>185</sup> *Ibid* at 3-4 (noting that, with the discovery of the problems of the physical and sexual abuse of children and Canadian society's changing views toward single parenthood, child protection agencies have moved toward active investigation of and intervention in matters of suspected abuse and a waning of their prior responsibility of receiving and placing infants born out of wedlock and older children who were in breach the law or were otherwise presenting as unmanageable).

<sup>186</sup> *Ibid* at 5 ("Related to some of the fundamental changes in the child protection field [since the 1960s] has been a veritable revolution in the role of law and the courts in Canadian society.").

<sup>187</sup> *Ibid* at 5-12.

(Analysis and Conclusion), much of the focus of kin placements is on the less formal “kin services” placements that involve an involuntary removal of the child but that do not result in the child being placed in government care and so therefore do not elicit court involvement.

As well, due to ongoing developments in the field of child development and legislative changes that occur with increasing frequency, even child protection cases with similar facts may be decided very differently at different times and in different contexts. Reliance on child protection precedents requires knowledge of these variations and the outcomes of these cases have to be considered with those variations in mind. So, while this thesis includes a review of relevant case law in Ontario, the results cannot reflect all circumstances involving the involuntary removal of children from the care of their families.

The selection of cases for this review occurred over a series of steps. I had gathered a collection of cases over several years during my legal practice – through case specific research, general research and discussions with colleagues. Some but not all of those were reported decisions. My focus at that time was a child protection agency’s argument in favour of continuity of care and so my collection of cases included, but was not restricted to, cases that referred to Attachment Theory. From my own practice, I was already aware of cases in which Attachment Theory had been called upon to describe and assess the special needs of a child.<sup>188</sup>

Upon embarking on this thesis, I shifted my focus from cases favouring continuity of care to all child protection cases referring to and relying on Attachment Theory and

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<sup>188</sup> *Lennox and Addington Family and Children’s Services v. C.(N) and C.(S.)*(September 26, 2006), Napanee 05/59 (ON SCJ).

related concepts. I found many of the same cases I had already collected – those that mentioned Attachment Theory as part of the discussion of continuity of care. As I expected I would, I also found cases that referred to Attachment Theory as part of the examination of the special needs of children who had suffered or were considered to be at risk of suffering an unhealthy attachment. And finally, less expected but more interesting, I found written decisions describing and considering the use of the Adult Attachment Interview as a predictor for parenting capacity.

Since this cannot be an exhaustive review of attachment-related case law in Ontario, the cases reviewed herein serve a number of purposes in this examination of Attachment Theory within the legal aspects of child protection practice in Ontario. First, there are two significant cases from the Supreme Court of Canada that marked changes in the law and the shift toward a new way of looking at the welfare of children in Canada. These two cases, and cases decided proximately, serve as an historical benchmark from which one can partially assess the marked emergence of child-focused jurisprudence since the 1980s and 1990s.

Other cases have been selected to illustrate various observations: the impact of legislative change on the disposition of individual cases, the expansion of attachment beyond being an articulation of the importance of continuity of care and finally the mixed results of child protection applications that rely on scientific measures of adult attachment profiles specifically as predictive of parenting capacity.

#### **D. Three Categories of Attachment-Related Case Law in Child Protection**

Attachment, whether the formal theory or the related concepts guised in other terms, is being relied upon in an increasing number of child protection cases in Ontario. This reflects the growing influence and acceptance of developments within this field of social science. Those cases in which attachment-related issues were found to be determinative, or at least significant, can be grouped into three major categories.

The largest and longest-standing of these three categories is made up of the “continuity of care” cases involving resource foster parents. Parents or other members of the family of origin make efforts to address identified child protection concerns. However, due to the time the children spend in temporary care forming other attachments, the parents come to face the added argument that the children have grown attached to their foster parents. If the foster parents are willing to adopt the child then the court is presented with an opportunity to avoid a further placement change for the child. In addition to the identified child protection concerns that first lead to the removal of the child from parental care, the parents face the added concern that separation from the foster family may present a new risk of harm to the child. The examination of the best interests of the child that began as an examination of the suitability of the care offered by the family of origin expands to include the significance to the child of attachments that formed while he or she was in temporary care.

The second category of attachment cases has emerged with the further development and acceptance of Attachment Theory and the diagnosis and treatment of children with attachment-related mental health concerns. These are cases in which the

quality or even existence of the child's primary attachment is or becomes the leading protection concern and the focus of the state's intervention in the child's care. The child's diagnosis of an attachment disorder renders the child one with special needs. The caregivers' contribution to causing or failing to mitigate the child's mental health struggles may be at issue; however, also at issue is the child's assessed need for specialized parenting due to the attachment disorder. The focus on the child's need for care includes the factors necessary for the formation of a healthy attachment.

The third category of attachment cases represents both a marked advancement in the courts' acceptance of developments in Attachment Theory as well as some expression of the current limits of that acceptance of this developing field of mental health science. These are cases in which the court is asked to rely upon an assessment of the adult caregiver's inability to develop healthy attachment in the child as a primary child protection concern. The assessment is based on an adult caregiver's perception of their own childhood history of attachment as a means of determining whether that adult caregiver will have the ability to foster a healthy attachment in a child. With this third set of cases, however, the focus is not directly on the child's attachment or the child's ability to attach but rather on an expert assessment of the adult caregiver's attachment profile and the expected impact of that assessed profile on the adult's ability to parent.

**i. Attachments to Temporary Caregivers and the Passage of Time as a Factor in the Litigation: the "Continuity of Care" Cases**

All child protection litigation will include consideration of the parents' ability and progress in addressing identified child protection concerns. Where a child has been

removed from the care of the parents and the parents' progress in addressing identified concerns is determined to be insufficient to warrant a safe return of the child within legislated time limits, a child's attachment to a foster family may not be determinative in the court's decision to order Crown wardship. However, where parents have demonstrated significant and even sufficient progress in their efforts to ameliorate child protection concerns or where a suitable family member has come forward and offered to parent the child, the significance of a child's move from a settled foster placement becomes an issue. The importance of the child's attachment to a temporary caregiver willing to adopt can have a substantial impact on the determination of the child's future. The examination of the child's best interests may then focus substantially on the child's attachment relationship and the risk to the child if that relationship is severed.

The emergence of an individual child's continued development as an acknowledged consideration within litigation illustrates a general shift away from regarding children as the quasi-property of their parents and toward regarding children as individuals whose ongoing development bears its own relevance in child protection proceedings. The result of this shift in the context of a child's attachment to temporary caregivers was aptly summarized by Justice Robertson of the Superior Court of Justice when she said:

Fostering is not a type of bailment or parking. There is no lay-away plan for this child to go on hold until the mother can acquire adequate resources, enabling her to redeem the child. A child is not a good. A child changes and develops. Neither the Society nor the foster parents are the enemy of the mother. Her real adversary is time and [the child's] development.<sup>189</sup>

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<sup>189</sup> *Lennox and Addington Family and Children's Services v J.S.* [1999] O.J. No. 1821 at para 44

The first Supreme Court case relevant to this discussion is *Racine v. Woods*<sup>190</sup> which was not, in fact, a child protection case but rather an adoption case arising from an informal fostering arrangement.<sup>191</sup> Leticia Woods was born to an Ojibway mother<sup>192</sup> who admitted to suffering from a “serious alcohol problem” that impaired her ability to provide safe care for the child.<sup>193</sup> Born in September 1976, Leticia was apprehended by the local children’s aid society within weeks of her birth. During the short time before she was apprehended from her mother’s care, Leticia also spent time in the care of family members. Following her apprehension, Leticia was made a short-term ward with her mother’s consent. In February 1977, when Leticia was five months old, the children’s aid society placed her in the care of the non-aboriginal foster mother who would remain her primary caregiver thereafter.<sup>194</sup>

Leticia’s biological mother had no contact with her during the nineteen months of her formal foster care. Nevertheless, at the expiration of the period of Society wardship, the biological mother sought and was granted Leticia’s return to her care.<sup>195</sup> In May 1978, when Leticia was twenty months old, the foster parents cooperated with the mother and the children’s aid society in returning Leticia to her mother’s care.<sup>196</sup>

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<sup>190</sup> *R.(A.N.) v. W. (L.J.)* 26 R.F.L. (2d) 1, [1983] 2 S.C.R. 173.

<sup>191</sup> Kim Brooks, ed., *Justice Bertha Wilson: One Woman’s Difference* (Vancouver: UBC Press 2009) at 177 (Although the author describes the facts of *Racine* as “fairly typical of the child welfare landscape,” this is not accurate. The element of state intervention fell away well before the child’s second birthday. The mother returned the child to the care of the foster parents on her own initiative and it was another three years before she took any action to secure return of the child to her care.)

<sup>192</sup> See *R.(A.N.) v. W. (L.J.)* 26 R.F.L. (2d) 1, [1983] 2 S.C.R. 173 at para 2 (describing the child’s mother only as “Indian”); but see Kim Brooks, ed., *Justice Bertha Wilson: One Woman’s Difference* (Vancouver: UBC Press 2009) at 174 (“ . . . I examine the Court’s determination that it was Leticia Woods’ best interest to be adopted by her non-Aboriginal foster family instead of being returned to her Ojibway birth mother.”).

<sup>193</sup> *R.(A.N.) v. W. (L.J.)* 26 R.F.L. (2d) 1, [1983] 2 S.C.R. 173 at para 2.

<sup>194</sup> *Ibid.*

<sup>195</sup> *Ibid* at para 2-4.

<sup>196</sup> *Ibid.*

Shortly following Leticia's return to her mother's care, the foster parents visited with the child at the invitation of the mother. At the end of one of those visits, the biological mother returned Leticia to the care of the foster parents. She did so of her own accord and without any intervention from the child protection agency whose involvement had ended with the termination of the period of Society wardship.<sup>197</sup> At the time of her return to the foster parents, Leticia had been in her mother's care for less than a month. The biological mother and the foster parents later differed on whether the mother intended this new informal fostering arrangement to be permanent<sup>198</sup> but it was almost four more years before the mother sought to have contact with Leticia or to have Leticia returned to her care.<sup>199</sup>

In January 1982, the mother, having successfully addressed the alcohol abuse issues that had interfered with her parenting, brought an action against the informal foster parents seeking to have Leticia returned to her care.<sup>200</sup> By that time, Leticia was five years old and she had only ever been in the care of her biological mother for two brief periods totaling approximately eight weeks. She had been in the care of her foster parents, either formally or informally, for five years.<sup>201</sup> The foster parents responded to

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<sup>197</sup> *Ibid* at para 4 (When the Racine's turned to the children's aid society for assistance with adopting the child left in their care, the agency advised the Racines that the agency was no longer responsible for the child. The agency recommended that the Racines hire private counsel to pursue an adoption.)

<sup>198</sup> *Ibid* (The foster parents testify that they understood the placement to be permanent but it was the mother's position that she intended for the foster parents to have the child "just for a while.")

<sup>199</sup> *Ibid* at para 5 (The biological mother appeared unannounced at the home of the foster parents once when Leticia was two years old stating that she was moving away and that she wanted to place the child in the care of an aunt. The foster parents refused and the mother made no further effort to retrieve the child until the court application.)

<sup>200</sup> *Ibid* at para 5-6.

<sup>201</sup> *Ibid* at para 6.

the mother's application with their own application for adoption, claiming that the mother had abandoned the child to their care.<sup>202</sup>

The trial court dismissed the mother's application for return of the child and granted the foster parents' application for adoption.<sup>203</sup> The Manitoba Court of Appeal, relied on its own interpretation of the facts as applied to questions of abandonment and *de facto* adoption and overturned the trial court decision replacing it with an order granting custody to the foster parents. This decision left Leticia in the care of the foster parents but left open the possibility that the biological mother could make further applications for custody or access.<sup>204</sup> The foster parents appealed that decision to the Supreme Court of Canada where Justice Wilson penned the unanimous decision allowing the foster parents to adopt the child. The Court did so over the objections of the mother and over concerns about the child being separated from her aboriginal culture and community by adoption into a non-aboriginal family.<sup>205</sup>

The Supreme Court's decision in *Racine* is replete with the principles and developing language of Attachment Theory albeit without explicit references to the literature in this field of study. Justice Wilson noted that Leticia had become "bonded"<sup>206</sup> and "securely bonded"<sup>207</sup> to her foster parents during the period that the mother allowed her to remain in their care. Considering the importance of the mother's parental tie in analyzing the question of *de facto* adoption, Justice Wilson declared that "it is the

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<sup>202</sup> *Ibid* at para 5 and 10-11 (Under Manitoba law at that time, an application for adoption could be made on the grounds of abandonment or a finding of *de facto* adoption which required a period of three continuous years of care. Facts that lead to the findings of adoption or continuous care were chief among those considered by the trial court.).

<sup>203</sup> *Ibid* at para 9.

<sup>204</sup> *Ibid* at paras 13-20.

<sup>205</sup> *Ibid*.

<sup>206</sup> *R.(A.N.) v. W. (L.J.) 26 R.F.L. (2d) 1, [1983] 2 S.C.R. 173* at para 21.

<sup>207</sup> *Ibid* at para 26.

parental tie as a meaningful and positive force in the life of the child and not in the life of the parent that the court has to be concerned about.”<sup>208</sup>

In the decision, Justice Wilson refers generally to “expert witnesses [who] agree that the [foster parents] are [the child’s] ‘psychological parents.’”<sup>209</sup> One such expert echoed the works of Bowlby and, in particular, the focus on maternal deprivation and the possibility of a child forming attachments to a permanent mother substitute. He stated that that the important priority of racial identity had fallen away in Leticia’s case due to the passage of time “because now it’s the mother-child relationship . . . . It’s two women and a little girl and one of [the women] doesn’t know [the child]. It’s as simple as that . . . .”<sup>210</sup>

As discussed in Chapter 2 (Attachment Theory), research has demonstrated that interrupting a child’s attachment relationship is an emotionally harmful loss that gives rise to a grief response by the child.<sup>211</sup> The outcomes for a child suffering such a loss depend on many factors including the child’s past experiences of loss and the responsiveness of the adult caregiver assuming the role. Any child grieving the loss of a significant attachment relationship requires extraordinary care and, in particular, sensitivity on the part of the replacement caregivers regarding the impact of the loss.<sup>212</sup> The available information regarding Leticia’s mother reveals a lack of insight regarding the natural effects of her own choices and actions.<sup>213</sup> The mother did not acknowledge

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<sup>208</sup> *Ibid* at para 23.

<sup>209</sup> *Ibid* at para 7.

<sup>210</sup> *Ibid* para 28 (The same expert witness who dismissed the matter as being “as simple as that” went on to say with a trace of irony that “all the rest of it is extra and of no consequence, except to the people involved, of course.”).

<sup>211</sup> *Supra* note 64.

<sup>212</sup> *Ibid*.

<sup>213</sup> *R.(A.N.) v. W. (L.J.) 26 R.F.L. (2d) 1, [1983] 2 S.C.R. 173* at para 10 (the court wondered whether the mother’s “concern was for the child as a person or as a political issue”).

the years that she spent without having contact with the child and the impact of her absence on their relationship. As well, the Court noted two incidents that support the observation that the mother was more focused on the aboriginal cultural issues than she was on the needs of the child; the mother attempted to abduct the child during a period of adjournment and, following the failed abduction, appeared for her first supervised access visit with a reporter and a photographer from the Winnipeg Free Press.<sup>214</sup>

Some critics cite this case as an example of further loss for aboriginal culture in the context of historical and ongoing struggles between Canada and its aboriginal peoples<sup>215</sup> and particularly the forced removal of aboriginal children from their communities for placement in residential schools or for adoption by non-aboriginal families.<sup>216</sup> However, an analysis of the *Racine* decision as one regarding race and aboriginal culture is too limited. The gravity of the cultural issues was recognized throughout the decision. The Supreme Court did not ignore those cultural considerations but rather was compelled to override them in favour of another concern – the recognition of children as individuals with changing developmental needs and interests separate from those of their families.

The *Racine* decision was not, as has been suggested, a continuation of the historical cultural dominance over aboriginals. This decision represented the emergence of a new approach in those areas of the law that impact on all children. As Justice Wilson stated in the first line of the Court’s decision: “This appeal . . . emphasizes once

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<sup>214</sup> *Ibid* at para 8.

<sup>215</sup> See eg. Wesley Crichlow, “Western Colonization as Disease: Native Adoption and Cultural Genocide” (2002) 3 Critical Social Work No. 1; See also Kim Brooks, ed., *Justice Bertha Wilson: One Woman’s Difference* (Vancouver: UBC Press 2009) at 175.

<sup>216</sup> See Nicholas Bala et al, ed., *Canadian Child Welfare Law: Children, Families and the State*, 2<sup>nd</sup> ed (Toronto: Thompson Educational Publishing, Inc. 2004) at 199–216.

more, this time in an inter-racial context, that the law no longer treats children as the property of those who gave them birth but focuses on what is in their best interests.”<sup>217</sup>

Viewed from the perspective of Leticia and her relationship to her foster parents, the court’s dilemma in *Racine* could be considered by children’s mental health professionals to be quite straightforward. One skilled in the field of child development would likely consider it remarkable that so much consideration, time and controversy went into deciding to continue Leticia’s placement with her foster parents after so many years of nearly uninterrupted care. The fact that the Court struggled with the decision at all demonstrates the strength of the aboriginal cultural considerations before the Court. Although clouded then and now by its significance as a decision regarding aboriginal culture, the Supreme Court’s decision in *Racine* is more significant as a clear stand in favour of treating children as individuals whose own needs, including their developmental needs, must be considered as paramount in decisions regarding their best interests.

Ten years later, the Supreme Court encountered the continuity of care issue again in the case of *Catholic Children’s Aid Society of Toronto v. M.(C.)*, another unanimous decision of the Supreme Court.<sup>218</sup> In the decision authored by Justice L’Heureux-Dubé, the Supreme Court built upon its own acknowledgement of time and its impact on the life of a child as well as the importance of continuity of care for the development of all children.

Although the circumstances of the child in *M.(C.)* did not include aboriginal cultural considerations, the issues underlying the *M.(C.)* decision had their own added

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<sup>217</sup> *R.(A.N.) v. W. (L.J.)* 26 R.F.L. (2d) 1, [1983] 2 S.C.R. 173 at para 1.

<sup>218</sup> *Catholic Children’s Aid of Metropolitan Toronto v. M.(C.)* 113 D.L.R. (4th) 321, [1994] 2 S.C.R. 165, 1994 CarswellOnt 3762, R.F.L. (4th) 313, 18 O.R. (3d) 160.

complications. Where the mother in *Racine* had placed her child voluntarily with the foster parents, the *M.(C.)* decision came about following state removal of a child from the care of her mother. Where the mother in *Racine* had been found to have abandoned her child, the mother in *M.(C.)* actively sought the return of the child to her care while maintaining an ongoing relationship with the child by exercising access.

As in *Racine*, the mother in *M.(C.)* had, after some years, successfully addressed the concerns that had been found to interfere with her parenting. And, as in *Racine*, during the time that the mother was improving her circumstances, the child remained in the care of foster parents who, by the time of trial, were seeking to adopt.

Whereas *Racine* had been simplified as a contest between a mother who knew the child and one who did not, *M.(C.)* emerged as a contest between parental rights and the authority of the state to intervene in the sanctity of the family – two factors being balanced in the context of the best interests of this individual child. Both Leticia and S.M. had established parent/child relationships with their “temporary” caregivers. In *M.(C.)* the Court would determine the role that such an attachment relationship would play in a contest between a parent and the state (as opposed to a contest between two parents).

The child S.M. was born on September 28, 1986 to a single mother who had immigrated to Canada from Portugal. Before and after S.M.’s birth, S.M.’s mother demonstrated a history of transience and employment instability. Following S.M.’s birth, the mother also demonstrated little ability to provide proper care for her infant daughter due to persistent mental health difficulties.<sup>219</sup> Child protection involvement began almost immediately for S.M. Within her first eighteen months, S.M. was apprehended three

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<sup>219</sup> *Ibid* at para 2-3.

times and spent a total of nine months in foster care. Each time S.M. was returned to her mother's care, the Society continued to work with the mother in efforts to improve her parenting and to supervise the child's placement in her mother's care.<sup>220</sup>

Despite the Society's efforts to assist the mother to address her mental health issues and develop her parenting skills, the mother's circumstances worsened and S.M. was apprehended for the last time when she was two and a half years old. Once again, the mother was unable to care for the child, this time having been hospitalized following a dramatic psychiatric incident that occurred while she had care of the child.<sup>221</sup>

Although the Society continued to work with the mother toward a return of the child to her care, S.M. remained in the care of the Society from that time forward. On December 14, 1989, when S.M. was more than three years old, the Society sought a permanent order severing the mother's parental rights – an order for Crown wardship without access for the purposes of adoption.<sup>222</sup> Following significant involvement with this mother throughout the life of her now three-year old child, including multiple temporary removals, the Society began the process necessary to permanently sever this parent/child relationship so that the child could be adopted.

It took another two years for the matter to be decided at trial.<sup>223</sup> The trial began at the Ontario Court of Justice on January 7, 1991 which was more than one year following the commencement of the application.<sup>224</sup> At the beginning of the trial, S.M. was more than four years old and had been in care for two and a half years. The trial consisted of nine days of testimony heard over the course of a year and Judge Bean decided the matter

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<sup>220</sup> *Ibid* at para 3.

<sup>221</sup> *Ibid* (the mother went into a bank with her crying child screaming that someone was trying to kill her).

<sup>222</sup> *Ibid* at para 4.

<sup>223</sup> *Ibid*.

<sup>224</sup> *Ibid*.

on February 17, 1992. By the time the trial decision was rendered, S.M., who had been apprehended at the age of two and a half years, was five and a half years old. She had been in her foster placement for three years without interruption and she had been in Society care for nearly four years in total.<sup>225</sup>

In ordering the return of the child to the mother's care, Judge Bean focused on the mother's positive progress in addressing the child protection concerns that had caused the child to be removed from her care.<sup>226</sup> Having determined that the first step of the analysis was to assess whether there was still a need for court intervention, Judge Bean further determined that this assessment was solely on an examination of the current status of the original reason for intervention. Therefore, whether there was a continued need for intervention regarding S.M. had to be answered by an examination of whether or not her mother had recovered sufficiently from the psychiatric issues that had impeded her ability to parent adequately.<sup>227</sup> Bound then by this threshold test that was exclusive of the concept of the best interests of the child, Judge Bean determined that the mother had recovered sufficiently to safely care for the child. Although aware of S.M.'s settled circumstances in the care of her foster family, Judge Bean then ended the analysis without considering the circumstances of the child in her foster placement and ordered the child returned to her mother's care.<sup>228</sup>

The order for return of the child to the care of her mother was stayed pending what would turn out to be two years and three levels of appeal. First, the Society

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<sup>225</sup> *Ibid* at para 3-4.

<sup>226</sup> *Ibid* at para 4-6.

<sup>227</sup> *Ibid*.

<sup>228</sup> *Ibid* (In a statement that would now be all but heretical, the trial judge stated "I am not concerned with the 'best interests' or 'well-being' of the child, nor am I concerned with injury or danger against which the child can be protected without the necessity of a court order.").

appealed to what was then the General Division (now the Superior Court of Justice). The hearing of the appeal began in May 1992, only three months after the release of the trial decision; however, that decision was not rendered until December 14, 1992 by which time S.M. was six years old.<sup>229</sup> Justice Macdonald disagreed with Judge Bean's approach and found that "best interests" was to be a consideration throughout the court's analysis.<sup>230</sup> However, Justice Macdonald also found that an order returning S.M. to the care of her mother was in S.M.'s best interests and, as such, dismissed the Society's appeal.<sup>231</sup>

In upholding the order for S.M.'s return to her mother, Justice Macdonald acknowledged but then minimized the negative impact of severing S.M.'s long-standing and presumptively attached relationship to her foster parents noting that it was something that the child was always aware might happen.<sup>232</sup> Finding the mother "fit to parent her child,"<sup>233</sup> Justice MacDonald went on to conclude that "the understandable 'bonding' which has occurred between [S.M.] and her foster family would not be an insurmountable obstacle to the child's reintegration with her natural mother [and that] no irreparable harm would result if the foster placement [was] disturbed at [that] point."<sup>234</sup>

Continuing the parent-focused analysis, Justice Macdonald went on to highlight the issue of systemic delay and set a very high bar of demonstrated risk of harm to a child that would be necessary to overcome parental rights. She stated that "it is improper that the lethargy of our court system give rise to a [*status quo*] argument and *prejudice the*

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<sup>229</sup> *Ibid* at para 4.

<sup>230</sup> *Ibid* at para 9.

<sup>231</sup> *Ibid.*

<sup>232</sup> *Ibid.*

<sup>233</sup> *Ibid* at para 8.

<sup>234</sup> *Ibid* at para 9; See also *Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)* (1992), 99 D.L.R. (4th) 77, [1993] W.D.F.L. 115 1992, CarswellOnt 1737 at para 70.

*rights of the natural mother, unless disturbing the [status quo] would result in irreparable harm to the child.*”<sup>235</sup>

Although it was not addressed at this first appeal, the issue of this six-year old child refusing to attend access with her mother had, by that time, started to become a significant problem. The Supreme Court would later refer to the evidence of a Society worker who was involved in the access arrangements between S.M. and her mother in the months following the General Division appeal decision. Details of this worker’s involvement from February to April 1993 were provided to the Supreme Court as part of a body of new evidence that painted a picture of a complete breakdown in the child’s relationship to her biological mother.<sup>236</sup> The Supreme Court would later conclude that, at that time, “[t]he possibility of access visits occurring had a severe effect on the emotional, psychological, and physical well-being of the child, who, in fact, injured herself and made herself ill in order to prevent the visits from occurring.”<sup>237</sup> This information was not yet available at the time of the appeal to the General Division and in fact Justice Macdonald specifically stated that, at the time of that appeal, “the evidence before [her] was that the mother has continued to see her child without interruption on a weekly basis.”<sup>238</sup> Evidence of the breakdown of the access relationship, if available and presented at the time, may have influenced Justice Macdonald in her assessment of “irreparable harm” to the child.

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<sup>235</sup> *Catholic Children’s Aid of Metropolitan Toronto v. M.(C.)* 113 D.L.R. (4th) 321, [1994] 2 S.C.R. 165, 1994 CarswellOnt 3762, R.F.L. (4th) 313, 18 O.R. (3d) 160 at para 9 (emphasis added).

<sup>236</sup> *Ibid* at para 22.

<sup>237</sup> *Ibid.*

<sup>238</sup> *Catholic Children’s Aid Society of Metropolitan Toronto v. M. (C.)* (1992), 99 D.L.R. (4th) 77, [1993] W.D.F.L. 115 1992, CarswellOnt 1737 at para 35.

From the General Division, the matter moved to the Ontario Court of Appeal with a final decision being rendered five months later on May 4, 1993. By this time the child was six and half years old. In a unanimous decision, and with the benefit of fresh evidence regarding the breakdown of the access relationship,<sup>239</sup> the Court of Appeal overturned the decision to return S.M. to her mother's care.<sup>240</sup> Noting the need for a swift decision in the matter, the Court provided only a four paragraph *per curium* endorsement.<sup>241</sup> Justices Krever, Catzman and Weiler had concluded that Justice Macdonald had "failed to consider adequately whether a court order was necessary to protect S. from the emotional harm she would suffer if she were removed from the care of her foster parents, with whom she had lived most of her life, and whom she regard[ed] as her psychological parents."<sup>242</sup>

Taking it one step further and following consideration of fresh evidence that was not detailed at that time, the Court of Appeal found that, had Justice Macdonald considered the harm to the child if removed from the care of her psychological parents, "she should have concluded that the best interests of the child require that she remain with her foster family."<sup>243</sup> Rejecting the parent-focused analysis of the two earlier decisions, the Court of Appeal held that a court order to protect the child can be required for purposes other than protecting a child from his or her parent. The Court of Appeal decision (as later cited by the Supreme Court) stated that "[a] court order may also be

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<sup>239</sup> *Catholic Children's Aid of Metropolitan Toronto v. M.(C.)* 113 D.L.R. (4th) 321, [1994] 2 S.C.R. 165, 1994 CarswellOnt 3762, R.F.L. (4th) 313, 18 O.R. (3d) 160 at para 15 (referring to the Society's motion for the admission of fresh evidence made in January 1993 following the hearing of the matter at the General Division and prior to the matter being heard at the Court of Appeal).

<sup>240</sup> *Ibid* at para 15.

<sup>241</sup> *Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)* (1993), 47 R.F.L. (3d) 109, 13 O.R. (3d) 227, 101 D.L.R. (4th) , 766 CarswellOnt 332.

<sup>242</sup> *Catholic Children's Aid of Metropolitan Toronto v. M.(C.)* 113 D.L.R. (4th) 321, [1994] 2 S.C.R. 165, 1994 CarswellOnt 3762, R.F.L. (4th) 313, 18 O.R. (3d) 160 at para 15.

<sup>243</sup> *Ibid.*

necessary to protect the child from emotional harm, which would result in the future, if the emotional tie to the care givers, whom the child regards as her psychological parents, is severed.”<sup>244</sup>

The mother appealed and the matter was heard at the Supreme Court on December 7, 1993. By that time the child was seven years old. On May 5, 1994, the Supreme Court upheld the Court of Appeal decision ruling that S.M.’s best interests were served by allowing her to remain in the care of and be adopted by her foster family. By the time this final decision was rendered, S.M. was seven and a half years old and she had been in the care of her foster parents since her apprehension more than five years earlier.<sup>245</sup>

In her decision for the Supreme Court, Justice L’Heureux-Dubé accepted the conclusion of the Ontario Court of Appeal that “[s]uch a factor [as the emotional harm to a child from being severed from an attached caregiver] is a *well recognized consideration* in determining the best interests of the child.”<sup>246</sup> The case of M.(C.) originated in Ontario; however, none of the cases that were cited by the Supreme Court for that proposition were cases from Ontario. As discussed in Chapter 3 (Legislation), during that period, Ontario had taken an approach to child protection that minimized state intrusion in the lives of children and families.<sup>247</sup> The parent-focused decisions in M.(C.) that lead up to the matter being heard by the Court of Appeal were not incongruent with Ontario court decisions of that time.

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<sup>244</sup> *Ibid.*

<sup>245</sup> *Ibid* at para 1 and 44 (The very specific calculations of the age of the child is part of the overall tenor of the decision regarding the significance of time to a child. One oft quoted line from M.(C.) as the court describes the need for speedy resolution of matters regarding children is “A few months in the life of a child, as compared to that of adults, may acquire great significance. Years go by crystallizing situations that become irreversible.”).

<sup>246</sup> *Ibid* at para 15 (emphasis added).

<sup>247</sup> *Supra* at note 132-139.

In 1991, after the Supreme Court's decision in *Racine* but before the decision in *M.(C.)*, the Ontario Court of Justice decided *Children's Aid of Peel (Region) v. K.(D.)*.<sup>248</sup> The child in this case had been apprehended at birth following the permanent removal of three other children from the care of the mother due to very serious abuse.<sup>249</sup> The father of this fourth child was the mother's new partner. The parents took the position that the circumstances that had led to the removal of the mother's three other children had changed and that this subsequent child would be safe in the mother's care.<sup>250</sup>

Having been apprehended at birth, the child, E., was in temporary care for twenty-three months pending the hearing of the matter. The last nineteen months of that time, the child was in the care of resource foster parents.<sup>251</sup> In analyzing the risks to E. if returned to the care of the mother, Judge Nasmith (like Judge Bean and Justice Macdonald in *M.(C.)*) focused on the risks that gave rise to the apprehension in light of the mother's circumstances at the time of the trial.<sup>252</sup> In considering risks posed by the mother, the court found that the mother – now five years older, married and a born-again Christian – had “experienced a remarkable transformation and [found] herself in very different circumstances.”<sup>253</sup> Judge Nasmith described the mother as having moved “light years away” from the circumstances that led to the removal of her three older children.<sup>254</sup>

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<sup>248</sup> *Children's Aid of Peel (Region) v. K.(D.)* [1991] W.D.F.L. 264, 4 O.F.L.R. 121.

<sup>249</sup> *Ibid.*

<sup>250</sup> *Ibid* at para 35-36 (The judge accepted that the father was unrelated to any of the mother's prior parenting or child protection involvement and did not pose a risk to the child.).

<sup>251</sup> *Ibid* at para 1-2 and 33.

<sup>252</sup> *Ibid* at para 22 and 25 (referring to the prior risks as the “Hamilton” risks because the prior case took place in Hamilton and referring to the risks at the time of this trial as “personality” risks because the mother had been assessed as not suffering from any mental illness however she was a “damaged individual who exhibits borderline personality traits”).

<sup>253</sup> *Ibid* at para 45.

<sup>254</sup> *Ibid.*

The judge did not assess the effect of removal of the child from the care of the foster parents as one of the risks to the child's well being. He revealed some bare knowledge of the possibility of attachment-related issues arising from change in the child's placement but ultimately he was dismissive of the issue stating:

[T]here is a risk that arises from [the child's] nineteen-month stay in her last foster home pending trial. [The child] and her birth parents will have some stresses and adjustments from her return home. She is no doubt attached to her foster parents. Fortunately, [she] adjusted very quickly to her change in foster homes and she has no special needs in this regard.<sup>255</sup>

In deciding not to consider the change in placement or consider the placement as one of the factors for determining risk to the child, Judge Nasmith went on to state:

It is just not sustainable to take a child at birth and to place the child in temporary foster care as a precautionary measure pending trial and then, when the trial arrives, to head off or replace the preliminary issue with a placement contest between the temporary foster home and the birth home by arguing attachment, continuity, etc. in a foster home.<sup>256</sup>

The court further stated:

The fact that it has taken twenty-three months to get this case through trial and that [the child] has been in the most recent foster home for about nineteen months, cannot beg the question. The remedy lies in getting these primary issues on for trial faster; not in circumventing the crucial prerequisite of [the least restrictive alternative].<sup>257</sup>

In examining the dilemma created by the child growing settled in a foster placement, Judge Nasmith went so far as to criticize the practice of concurrent planning and the utilization of resource foster parents,<sup>258</sup> common in child protection and

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<sup>255</sup> *Ibid* at para 33.

<sup>256</sup> *Ibid* at para 54.

<sup>257</sup> *Ibid* at para 51.

<sup>258</sup> *Children's Aid of Peel (Region) v. K.(D.)* [1991] W.D.F.L. 264, 4 O.F.L.R. 121 at para 105 (In making this admonition, the court appeared to be directly focused on the difficulty that his decision would cause for

encouraged as serving children's need for continuity of care. In his concluding remarks in the *K.(D.)* decision, Judge Nasmith stated:

Sometimes the option of an adoption by [long-term] foster parents is an excellent solution. It is important, however, that such plans not get ahead of themselves. I would recommend against setting up foster parents to be adoption candidates at the stage of a temporary adjournment order.<sup>259</sup>

Following Judge Nasmith's admonition to its natural conclusion, it is preferable that children remain in temporary foster placements from which they will be assured at least one move – a return to family or placement for adoption – so as to better protect the possibility that they can return to their family of origin. In recommending against the use of resource foster parents, the court did not address what, if anything, can or should be done about foster parents who begin as temporary placements but who, over long periods of delay, come to offer their families as the foster child's option for permanence.

In taking the position against resource foster placements in *K.(D.)*, Judge Nasmith raised a critical and as yet unresolved issue in the intersection of Attachment Theory and child protection litigation and practice. What are the implications if a court can and will make an order for Crown wardship of a child solely due to concerns regarding removal of the child from a foster placement? If the use of resource foster placements has the effect of predetermining the outcome of the litigation in favour of a child protection agency, does that create an incentive for the agency, as a litigant, to structure a child's circumstances so as to achieve such a result regardless of the balance of the facts and circumstances?

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the foster parents and possibly the difficulty that this added factor caused for the court in making the decision.).

<sup>259</sup> *Ibid* at para 105.

The case of *M.(C.)* included extreme facts - a seven year old child in the same foster placement for more than five years who was clearly expressing that she wanted to be adopted into her foster family and that she would not attend for access with her mother. On those facts, the Supreme Court was unanimous in setting a clear outer limit for circumstances that lead to “a disposition which became almost inevitable as the years went by.”<sup>260</sup> The Court explained that “[o]ne has to face the reality that new bonds will necessarily form between the child and her foster family, bonds that may be detrimental to the child to sever *at a given point . . .*”<sup>261</sup>

Read together, these two cases, *K.(D.)* and *M.(C.)*, highlight a remarkable time of change in the field of child welfare. The approach to resource foster care and concurrent planning that was so soundly rejected by the court in *K.(D.)* as “just not sustainable” is precisely the approach endorsed three years later by the Supreme Court in *M.(C.)*. Where the court in *K.(D.)* had determined that any consideration of the child’s foster placement was unavailable to the court as a consideration, the Supreme Court in *M.(C.)* took the opposite approach – not only including such a consideration but giving it precedence. Fixing this transition to decisions focused on the needs of the child rather than on the rights of the family of origin, Justice L’Heureux-Dubé stated in *M.(C.)*: “Within the realm of best interests, perhaps the most important factor in the present case, as probably in many others, is regard to the psychological bonding of a child to her or his foster family.”<sup>262</sup>

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<sup>260</sup> *Catholic Children’s Aid of Metropolitan Toronto v. M.(C.)* 113 D.L.R. (4th) 321, [1994] 2 S.C.R. 165, 1994 CarswellOnt 3762, R.F.L. (4th) 313, 18 O.R. (3d) 160 at para 48.

<sup>261</sup> *Ibid.*

<sup>262</sup> *Catholic Children’s Aid of Metropolitan Toronto v. M.(C.)* 113 D.L.R. (4th) 321, [1994] 2 S.C.R. 165, 1994 CarswellOnt 3762, R.F.L. (4th) 313, 18 O.R. (3d) 160 at para 39 (emphasis added)(Further stating that such considerations are neither new nor restricted to child welfare cases, the Court went on to recall its own decision in *Racine.*)

The Supreme Court's decision in *M.(C.)* became and still is an influential precedent in all matters of child protection litigation in Ontario. Case-by-case determinations of the "given point" referred to in *M.(C.)* are influenced by child-focused principles offered in *M.(C.)* as well as by subsequent changes in child welfare legislation that are congruent with those principles. Among changes that came after and may have resulted from the decision in *M.(C.)* were changes to the *Child and Family Services Act* in 1999/2000 that expanded the application of "emotional harm" as a means of finding that a child was in need of protection.

There was another change to the legislation in 1999/2000 that is related to this discussion – the shortening of the allowable time that children under the age of six years can remain in care subject to impermanent orders. The Ontario case of *Lennox and Addington Family and Children's Services v. J.S.*<sup>263</sup> was decided in February 1999, well after the decision in *M.C.* and just prior to the changes to the *Child and Family Services Act* that shortened the allowable timelines for children under the age of six years from twenty four months to twelve. The case was regarding the two-year old child, T.S., who had been in foster care for twenty-three months. Pending trial, T.S. had been placed with foster parents who hoped to adopt him.

Since this case took place prior to the 1999/2000 changes to *Child and Family Services Act*, the court was limited to making an order that would have the child remaining in care pursuant to an impermanent (Society wardship) order for no more than twenty-four (rather than the current twelve) months. Although the mother had made significant strides in addressing the issues that had impeded her parenting, Justice Robertson was still not prepared to return the child to the mother's care. However,

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<sup>263</sup> *Lennox and Addington Family and Children's Services v. J.S.*, [1999] O.J. No. 1821.

Justice Robertson was also not prepared to terminate the parent/child relationship, deeming such an order to be premature given the mother's progress to that point.<sup>264</sup>

In the final result, Justice Robertson ordered a one-month Society wardship, the maximum short-term final order allowable under the law at that time. In her decision, she noted that, given "[t]he reality of court delay," the one-month order would in fact provide the mother with at least another six months to further address concerns prior to the matter being returned to a final trial on the issue of permanent removal.<sup>265</sup>

Pursuant to the legislative amendments that followed shortly thereafter, Justice Robertson would not have had such an option for a child under the age of six years. Having found that the child could not be safely returned to the care of his mother, she would have had no option but to order a permanent removal by Crown wardship.

With the benefit of hindsight and through the lens of the ensuing changes in child protection practice, Justice Robertson's decision in *J.S.* appears particularly sympathetic to the parent. Justice Robertson was remarkably transparent in her effort to insert delay into the process of achieving permanency for this child with a view toward giving the mother every opportunity to redeem herself. Notwithstanding her sympathy for the mother, Justice Robertson also demonstrated sensitivity to the nature of the resource foster care dilemma from the child's perspective stating:

A child changes and develops. Neither the [child protection agency] nor the foster parents are the enemy of the mother. Her real adversary is time and [the child's own] development. His needs will not wait while [his mother] reorders her life. Even with the opportunity given to her in this order, she may be unable

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<sup>264</sup> *Ibid* at para 49 ("Neither the order sought by the society [for Crown wardship without access for the purposes of adoption] or [by] the mother [for return of the child] is 'least restrictive' for T. Either costs him a parent and extended family relationships.").

<sup>265</sup> *Ibid* at para 4-5.

to recover from her failure to initiate her admirable changes during the first year of [the child's] foster care.<sup>266</sup>

Despite the fact that the child had been in foster care for two years and the mother came late to improving her circumstances, the “given point” at which a court would find that a child’s development had overtaken sympathy for a parent had, for this court, not been reached. Nevertheless, Justice Robertson contemplated the possibility that, with the added time given to the mother to address her issues, the child’s attachment to his resource foster parents would continue to grow in significance – both for the child and for the court – and that a shift in that balance was forthcoming. She stated that “[w]hen the status review [application] is heard, [the child] will have been with his foster family for close to three years and the impact of removing him from his ‘family’ might tip the scale further against [the mother].”<sup>267</sup>

While showing great sensitivity to the plight of the child and to the attachment issue in particular, Justice Robertson still went to lengths to provide the mother as much time as possible under the legislation. She went so far as to recognize and insert systemic court delays into the matter. Justice Robertson did so knowing that, as a result, the child would remain in care at least two and a half years after which the disposition of the matter would still be uncertain. Such a case could not be resolved this way under the current legislation which highlights the importance of the legislation in resisting delay despite sympathetic facts.

One court ventured very specifically into the question of where one finds the “given point” at which the child’s attachment to his foster care providers is so significant

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<sup>266</sup> *Ibid* at para 44.

<sup>267</sup> *Ibid*.

as to overcome the benefits of his relationship to his or her family of origin. In the 2003 case of *C.A.S. of Algoma v. H.K.(A.)*, Justice Keast assessed the “[a]ppellate and trial case law” as “mak[ing] it clear that the concept of the psychological parent is more important than to place a child with a blood relative.”<sup>268</sup> Justice Keast posed the question “why take any risk to disrupt that attachment and put the child through the short-term trauma and risks associated with attempts to re-attach to another caregiver?”<sup>269</sup> With that, he appears to have adopted a presumption in favour of the child remaining with attached caregivers who are prepared to adopt. In the matter of *H.(K.A.)*, this presumption in favour of attached caregivers was not one that the family of origin was able to overcome.

In deciding against placing the child in the care of his grandmother, Justice Keast used extreme precision in applying a social science that even he acknowledged as being imprecise since “[n]o two children are necessarily going to respond alike in the same set of circumstances.”<sup>270</sup> He relied on unpublished works by Dr. Robert Seim, an attachment professional who had not been called upon to assess the child, assess any of the parties or testify at the trial.<sup>271</sup> He quotes Dr. Seim’s writings at length, including a passage in which Dr. Seim is reported to have stated:

There is research support to suggest that the child that forms strong attachments in the sensitive developmental period between six months and three years of life has a much better chance of developing healthy social-emotional skills in the long-term than a child deprived of the opportunity to form attachments during this period. Thus, attachment to any person during this sensitive period is the major

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<sup>268</sup> *Children’s Aid of Algoma v. H.(K.A.)* 2003 CarswellOnt 3130, [2003] W.D.F.L. 402, 124 A.C.W.S. (3d) 1097, 17 O.F.L.R. 60 at para 233.

<sup>269</sup> *Ibid.*

<sup>270</sup> *Ibid* at para 241.

<sup>271</sup> *Ibid* at para 228-230 (the unpublished work is not identified as “a document referred to as appendix ‘A’, which sets out thoughts on the developmental process of attachment, of Dr. Robert D. Siem [sic], of the Department of Psychology of the University of Waterloo in Ontario” and further describes the document as referring to “general concepts of attachment that Dr. Siem [sic] routinely attaches to the various parenting capacity assessments that he has performed in relation to individual children.”)

requirement for healthy long-term development, not the long-term relationship of the attachment persons to the child.

Then, despite having acknowledged the relative imprecision of attachment time frames generally, Justice Keast used Dr. Seim's information to calculate the sensitive period of attachment for this particular child as being the thirty months spanning from February 13, 2001 to August 13, 2003. Justice Keast further determined that, at the anticipated completion of the trial on March 21, 2003, the child would have spent 86% of his thirty-month sensitive period in the care of foster parents who were seeking to adopt him.<sup>272</sup>

Still drawing on the works of the expert who had not been involved in the case and whose evidence had not been applied to this case or tested by cross examination, Justice Keast concluded that it becomes more difficult for a child to re-attach to a new caregiver after three years of age and that reattachment is more likely to be successful if it begins earlier in the sensitive period of six months to three years of age.<sup>273</sup> Justice Keast extrapolated from that information his conclusion that re-attachment became more difficult the later the child was into the sensitive period<sup>274</sup> and further that “[g]iven the serious and significant consequences of failure to re-attach, the tolerance for risk is low.”<sup>275</sup>

Justice Keast appeared to be adopting a presumption in favour of the attachment relationship when he stated:

Dr. Siem [sic] made it clear in his materials that you do not go through the re-attachment process unless there is a compelling reason to do so. *In my view a*

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<sup>272</sup> *Ibid* at para 230 and 235-236.

<sup>273</sup> *Ibid* at para 238 and 241.

<sup>274</sup> *Ibid* at para 241.

<sup>275</sup> *Ibid* at para 244 (emphasis omitted).

***blood relationship is a compelling reason so long as such re-attachment can be achieved with low or minimal risk,*** or to use the language of Dr. Siem [sic], ‘with relative ease’<sup>276</sup>.

This court relied on untested expert evidence to build a presumption in favour a child’s attached relationship to a temporary caregiver. Such cases had certainly come a long way in the twelve years since *K.(D.)* when even consideration of the foster relationship had been deemed “just not sustainable.”<sup>277</sup>

In 2011, the Ontario Superior Court of Justice had another opportunity to consider the tension between the need for aboriginal cultural preservation and the focus on the attachment relationship between a child and long-term caregivers. The case of *Children’s Aid Society of London and Middlesex v. M.(C.)*<sup>278</sup> was a case about a five year old child, S.F., who had been apprehended with her older siblings at the age of seven months. The concerns at the time of S.F.’s apprehension included the mother’s drug use, engagement in drug culture, transience, unsafe home environment and use of multiple and inappropriate caregivers.<sup>279</sup> From the time of S.F.’s apprehension at seven months of age until the trial when she was five years old, S.F. remained in the care of foster parents who, by the time of trial, were prepared to adopt her.<sup>280</sup>

The facts of this recent case differed from those in the Supreme Court’s 1984 decision in *Racine* because, like the Supreme Court’s decision in *M.(C.)*, this was a child protection application precipitated by the involuntary removal of the child from her mother’s care. However, unlike the matter of *M.(C.)*, the decision in *London and*

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<sup>276</sup> *Ibid* at para 245 (emphasis original).

<sup>277</sup> *Children’s Aid of Peel (Region) v. K.(D.)* [1991] W.D.F.L. 264, 4 O.F.L.R. 121 at 54.

<sup>278</sup> *Children’s Aid Society of London and Middlesex v. M.(C.)* 2011 CarswellOnt 9331, 2011 ONSC 4399, 206 A.C.W.S. (3d) 751, [2012] W.D.F.L. 759, [2012] W.D.F.L. 768, [2012] W.D.F.L. 769.

<sup>279</sup> *Ibid* at para 6.

<sup>280</sup> *Ibid* at para 7.

*Middlesex* was not a question of whether to order permanent removal by way of Crown wardship. Rather the question for the court in *London and Middlesex* was whether to order access between the child and the mother following the order for Crown wardship.<sup>281</sup>

Under the legislation of the time, an order for access would necessarily prevent a child from being adopted. The mother, whose circumstances had substantially improved during the time that the child remained in care,<sup>282</sup> did not seek an order for return of the child but did seek an order for access so that she could continue to have a relationship with the child. Chief among her reasons for wanting the order for access was the opportunity to maintain the child's connection to her family and her aboriginal cultural heritage.<sup>283</sup> At the time of the trial, the child had been having twice-weekly visits with her mother and siblings for a total of eight hours per week.<sup>284</sup> The Society's evidence, supported by that of the court appointed assessor, was that the child was reluctant to engage in that access.<sup>285</sup> The mother's evidence was that the family's relationship with the child had improved and the child was comfortable and engaged with her and with the siblings during access visits.<sup>286</sup>

The mother in *London and Middlesex*, like the mother in *Racine*, demonstrated little understanding of the fact that the child would have built relationships of

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<sup>281</sup> *Ibid* at para 8-10.

<sup>282</sup> *Ibid* at para 3, 6, 11 and 17 (The child S.F. was born on March 24, 2006 and apprehended with her siblings on October 20, 2006. In the two years following the apprehension, the mother had only sporadic contact with the child, she continued to engage in drug use and she had two more children. Access became more regular in 2009 and unsupervised by 2010. By the time of the trial, the mother had abstained from drug use for two years, was no longer engaged in criminal activity, was having regular access to the child and had care and custody of the child's two older brothers and two younger sisters.).

<sup>283</sup> *Ibid* at para 25 and 86 (The mother stated that, if access were ordered, she would not seek return of the child in future. However, in making the final decision, the judge was "not convinced that [the mother would] not at some point in time seek to undermine or divert the child's commitment to the [foster] family in the future.").

<sup>284</sup> *Ibid* at para 23.

<sup>285</sup> *Ibid* at para 13-15, 19 and 46-51.

<sup>286</sup> *Ibid* at para 20 and 24.

significance with other caregivers during the time it took for the mother to address the identified protection concerns. Further, this mother demonstrated little understanding of the potential negative impact on the child if she interfered with those new relationships. S.F.'s mother had been absent for the first two years that S.F. was in foster care and had been inconsistent with access for another year thereafter. Yet she blamed the child protection agency for allowing a strong attachment to form between the child and the foster mother. In particular she objected that the Society did not intervene in the decision to allow S.F. to follow other children in the home by calling the foster mother "Mummy."<sup>287</sup>

Justice Templeton had ordered an attachment assessment to assess the attachment relationship between S.F. and her biological mother and further to assess this four year old child's general functioning.<sup>288</sup> The assessor observed S.F. in the care of the mother and described her as "somber," "quiet" and "reserved"<sup>289</sup> and described her face as "blank, almost expressionless." By comparison, the assessor found that when S.F. was observed in the care of the foster family she was "bubbly and excited and appeared to be a completely different child."<sup>290</sup> She behaved as a member of the family when with the foster family<sup>291</sup> and when she was observed with her biological mother and siblings "[s]he chose to be a 'visitor'."<sup>292</sup>

In one particularly heartrending episode described by the assessor, the child and the foster mother arrived at the assessor's office and the child remained animated and

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<sup>287</sup> *Ibid* at para 52.

<sup>288</sup> *Children's Aid Society of London and Middlesex v. M.(C.)* 2011 CarswellOnt 9331, 2011 ONSC 4399, 206 A.C.W.S. (3d) 751, [2012] W.D.F.L. 759, [2012] W.D.F.L. 768, [2012] W.D.F.L. 769 at para 45.

<sup>289</sup> *Ibid* at para 46.

<sup>290</sup> *Ibid* at para 47.

<sup>291</sup> *Ibid* at para 40.

<sup>292</sup> *Ibid* at para 49.

playful until she learned that the biological mother would be joining them. Upon being greeted by the mother “the child started sobbing and clung to her foster mother [and] ended up going under the table and curling into a fetal position.” The child then remained inconsolable throughout the visit.<sup>293</sup> The assessor concluded: “The child needs to hear that she is going to live with [the foster mother] and that [the foster mother] is her mother. She has been required to call both women ‘Mummy’ and has been anxious for a long time. Reduction of this anxiety is essential.”<sup>294</sup>

Twenty years after *M.(C.)*, the court in *London and Middlesex* moved the continuity of care and attachment analysis still farther forward. Rather than address only the risk of harm that arose if the child’s attachment relationship was severed, Justice Templeton also addressed the risk of harm to a child that arises during any period of placement uncertainty for the child. Justice Templeton found that attachment interruption for S.F. would not only result from being removed from the care of an attached caregiver. Justice Templeton acknowledged that ongoing interruption of S.F.’s healthy attachment formation had resulted from the uncertainty of the circumstances that had defined her whole life. This decision represents another positive step forward in the recognition of attachment issues in child protection litigation as well as yet another advance in focusing decision-making on critical developmental issues above all other considerations. This broader understanding of attachment disruption to include more subtle influences, such as a child’s sense of uncertainty within the attachment relationships, is also a compelling contribution to arguments in favour of reducing or eliminating delay in the disposition of all matters regarding children.

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<sup>293</sup> *Ibid* at 50.

<sup>294</sup> *Ibid*.

The court in *London and Middlesex* was not being asked to consider whether the child should or should not remain with the foster parents who had been her caregivers for four and half of her five years. In light of the Supreme Court’s decisions in *Racine* and *M.(C.)*, such an effort would have surely met with failure. Given the facts of the mother’s long absence, her inconsistent history of access, the results of the court-ordered assessment and the strength of the precedents favouring the Society’s position, a final order of Crown wardship was likely perceived to be, as described in *M.(C.)*, “a disposition which became almost inevitable as the years went by.”<sup>295</sup>

The fact that this mother actually or effectively abandoned her young child for a period of years makes it possible to attribute fault to the mother. Attributing such fault reduces the countervailing measure of sympathy for the parents when a court is considering the significance of the attachment formed during the period of delay leading up to trial. As with *Racine*, the facts of *London and Middlesex* are so clearly in favour of the Society’s position that it is likely only due to the added sensitive issue of the child’s relationship to aboriginal culture that this case continued to trial at all. This observation is apparent as well from the decision where Justice Templeton sets out the position of the child’s First Nation community that “if S.F. were Caucasian and from a Caucasian family, the decision not to disrupt a secure attachment with the foster mother would be more straightforward.”<sup>296</sup>

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<sup>295</sup> *Catholic Children’s Aid of Metropolitan Toronto v. M.(C.)* 113 D.L.R. (4th) 321, [1994] 2 S.C.R. 165, 1994 CarswellOnt 3762, R.F.L. (4th) 313, 18 O.R. (3d) 160 at para 48.

<sup>296</sup> *Children’s Aid Society of London and Middlesex v. M.(C.)* 2011 CarswellOnt 9331, 2011 ONSC 4399, 206 A.C.W.S. (3d) 751, [2012] W.D.F.L. 759, [2012] W.D.F.L. 768, [2012] W.D.F.L. 769 at para 63 (The assessor and the First Nation took the position that “[w]ith native people, however, there is a unique sense when it comes to family. There is a spiritual connection to guide them.”); See also *Children’s Aid Society of Hamilton v. C.(T.)* 2015 [2005] W.D.F.L. 2210 at para 67 (A First Nations band actively pursued long-term foster care as a plan for a child rather than adoption out of concern that adoption by a non-aboriginal family could result in distancing the child from aboriginal heritage and culture.).

The question of the child's permanent placement having been determined, the issue for the court was not the potential impact of a severance of an attached primary relationship. Rather, the mother's application was for access and the issue before the court was impact on the child of the continuing threat to the attachment in the form of ongoing access, Society involvement, professional assessment and even litigation. Although the mother and the Band had made a lesser plea than that made in *M.(C.)*, the understanding of a child's attachment and a child's need for continuity of care within a family has continued to evolve since *M.(C.)*. The court in *London and Middlesex* accepted that S.F. needed more than just to remain in the care of her foster family. The court held that:

adoption by the only parents S.F. has really ever known offers her a security and permanency of family she has not yet enjoyed [and] this child's best interests require certainty that she will not be removed from this home or this family or [be] subjected to any attempt now or in the future to sway her away.<sup>297</sup>

The acknowledged importance of aboriginal culture was not enough to sway the court from even this finer point of attachment – to develop in a healthy way, not only must a child *be* stable in his or her relationships but he or she must also *feel* stable in those relationships.

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<sup>297</sup> *Children's Aid Society of London and Middlesex v. M.(C.)* 2011 CarswellOnt 9331, 2011 ONSC 4399, 206 A.C.W.S. (3d) 751, [2012] W.D.F.L. 759, [2012] W.D.F.L. 768, [2012] W.D.F.L. 769 at para 90.

## ii. Disordered Attachment as a Child's Special Need

With continued development of the field of attachment comes a more clear and detailed understanding of the impact of attachment formation on children. This next category of cases are those in which there may be child protection concerns about the parents and their capacity to provide adequate care but the primary concern for the court is the child's failed or dysfunctional attachment and the resulting risk to his or her mental health and general well being. These decisions demonstrate an understanding that, if attachment does not occur or does not develop in a sufficiently healthy way, that is a developmental concern in and of itself. That failed attachment therefore becomes its own risk factor for the child.

In the 2006 case of *Lennox and Addington Family and Children's Services v. C.(N.)*<sup>298</sup> the child, N.M.C. was apprehended from the care of her mother due to a number of chronic issues including the mother's difficulties with mental health, her engagement in relationships marked by domestic violence and the persistently uninhabitable state of the family home.<sup>299</sup> Also contributing to the decision to apprehend the child was the child's own difficult behaviour. She was found on the evidence to be a "difficult child, prone to behaviour problems and temper tantrums."<sup>300</sup> While in the care of family members just prior to her apprehension, N.M.C., then six years old, was described as "fearful." She "would not be alone in any room and at night would end up in someone's

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<sup>298</sup> *Lennox and Addington Family and Children's Services v. C.(N) and C.(S.)*(September 26, 2006), Napanee 05/59 (ON SCJ).

<sup>299</sup> *Ibid* at para 10-13.

<sup>300</sup> *Ibid* at para 11.

bed.” Further she was described as “aggressive with adults and with [the other child in the home] causing concern for the safety of that other child.”<sup>301</sup>

Once the agency brought N.M.C. into care, it came to light that there were also serious concerns about the child’s overtly sexual behaviour. She would masturbate excessively and was attempting to engage in sexual behaviour with other children.<sup>302</sup> Once in foster care, the child made statements indicating possible sexual interference by named male members of her family. Although the child’s sexualized behaviour seemed to corroborate those statements, the allegations were never verified and no criminal charges were laid.<sup>303</sup>

Noting the impairments to mother’s parenting caused by her own constellation of personal issues and the significant challenges posed by the child’s behaviours, Justice Brennan concluded that “taking the evidence as a whole [the mother was] unable to cope with [N.M.C.]’s needs”<sup>304</sup> and he ordered that the child be made a ward of the Crown.<sup>305</sup>

Where the case became particularly interesting from an attachment perspective was in the consideration of the issue of access. Justice Brennan had noted the importance of the parent/child relationship to the mother and, having made the determination that an order for Crown wardship was necessary, went on to address his “instinctive reluctance to deprive this mother of access to her child.”<sup>306</sup> The Society’s plan was for the child to remain in long-term foster care with the current foster parents; adoption was not being considered because of the child’s extreme special needs. This plan was accepted by the

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<sup>301</sup> *Ibid* at para 13.

<sup>302</sup> *Ibid* at para 15.

<sup>303</sup> *Ibid.*

<sup>304</sup> *Ibid* at para 11.

<sup>305</sup> *Ibid* at para 2.

<sup>306</sup> *Ibid* at para 23.

court<sup>307</sup> and so there wasn't the usual concern that an access order would be a barrier to a planned adoption of the child. Justice Brennan described the Society's request that there be an order for no access between mother and child as "[t]he singularly difficult feature of [the] case."<sup>308</sup>

To address the issue of access, Justice Brennan relied substantially on the evidence of the Society's expert, Dr. Robert Seim, a psychologist described as having "led the field in developing the scientific understanding of 'attachment relationships' between parent and child."<sup>309</sup> Dr. Seim had concluded that the child's attachment to her mother was "weak" as well as "maladaptive and dysfunctional."<sup>310</sup> He further concluded that the child had been primarily in the care of her mother prior to her apprehension and had no other attachment relationships. Dr. Seim attributed the child's behaviour, including the child's "aberrant behavioural patterns in sexual behaviour, cruelty to animals, and rage responses," to her lacking any secure attachment relationship.<sup>311</sup> He noted that N.M.C. did not have a strong attachment to her foster family but that she appeared to him "to be developing early signs of positive attachment including directed smiling and seeking foster mother when under threat."<sup>312</sup>

Within the portion of the expert report that was reproduced in Justice Brennan's decision, Dr. Seim concluded that if access visits with the mother were to continue, the relationship between the child and her mother would "interfere with [the child] forming a positive strong attachment relationship [to her foster parent]."<sup>313</sup> Recommending against

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<sup>307</sup> *Ibid* at para 25.

<sup>308</sup> *Ibid* at 19.

<sup>309</sup> *Ibid*.

<sup>310</sup> *Ibid* at para 21.

<sup>311</sup> *Ibid*.

<sup>312</sup> *Ibid*.

<sup>313</sup> *Ibid*.

any further access between the child and her family of origin, Dr. Seim went on to state that “every effort must be made to provide all the necessary conditions for attachment formation in the [foster home] and protect [the child] from any risk factors that would interfere with this process.”<sup>314</sup> He identified the child’s continued relationship with the mother as being such a risk.<sup>315</sup>

Justice Brennan overcame his reluctance to deny the mother an order for access to N.M.C. and instead accepted Dr. Seim’s conclusion that access would interfere with the child’s ability to form the necessary positive attachment with her foster parent.<sup>316</sup> Due to the concerns regarding the child’s attachment formation, the court declined to order access for the mother citing Dr. Seim’s opinion on the particular conditions needed for this child to form an attachment to her foster parent as “forceful evidence of the child’s best interests.”<sup>317</sup>

In the 2005 decision of *Children’s Aid Society of Ottawa Carleton v. C.(C.)*,<sup>318</sup> the Superior Court considered the circumstances of an eight-year old Ottawa boy. The boy, M.C., was being raised by a single mother who, despite having extensive education in the field of social work, found herself unable to manage the child’s behaviours which had been escalating since he was a toddler.<sup>319</sup> The mother had accessed extensive supportive services before she first placed the child in the care of the Society when he was six years old.<sup>320</sup> From there forward, the Society put extensive services in place for the mother and

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<sup>314</sup> *Ibid.*

<sup>315</sup> *Ibid.*

<sup>316</sup> *Ibid* at para 21-23.

<sup>317</sup> *Ibid* at para 23.

<sup>318</sup> *Children’s Aid Society of Ottawa Carleton v. C.(C.)* 2005 CarswellOnt 8427.

<sup>319</sup> *Ibid* at para 1-14.

<sup>320</sup> *Ibid* at para 6.

the child and there were a number of failed efforts to reintegrate the child into the care of the mother.<sup>321</sup>

M.C. was apprehended for the last time approximately 18 months before the matter was heard at trial.<sup>322</sup> The Society sought an order for Crown wardship without access for the purposes of adoption.<sup>323</sup> The mother acknowledged that she was not capable of having M.C. return home to her at that time. In addition to the significant behaviours of the child that had led to his placement in care, the mother was undergoing therapy for a number of mental health concerns of her own including A.D.H.D. and depression.<sup>324</sup> However, the mother argued that she had been making progress in her own therapy and she sought an extension of the period of Society wardship asserting that such an order was in accordance with M.C.'s wish to return to her care, his wish to continue access and his wish that he not be adopted.<sup>325</sup>

Finding that M.C.'s reintegration into his mother's care was "not an option in the foreseeable future" Justice Sheffield declined to order any further period of Society wardship and instead made the permanent order for Crown wardship. Considering the test for access to a Crown ward under the *Child and Family Services Act*<sup>326</sup> and the question of whether access between the mother and child would be both "meaningful" and "beneficial" to the child, Justice Sheffield concluded "after many hours of anxious consideration, that there is no benefit to the child in permitting continued access to his mother and family." The court further concluded that there was "evidence of risk of

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<sup>321</sup> *Ibid* at para 11.

<sup>322</sup> *Ibid*.

<sup>323</sup> *Ibid* at para 1.

<sup>324</sup> *Ibid* at para 49.

<sup>325</sup> *Ibid* at para 2 and 55-67.

<sup>326</sup> *Child and Family Services Act* R.S.O. 1990, c. C.11, as amended, s. 59(2).

further harm to this child’s emotional and mental development [that was] too great to permit any form of access to this mother.”<sup>327</sup>

The evidence of “risk of further harm to the child” referred to and relied upon by Justice Sheffield was that of an agreed-upon expert, the child psychiatrist Dr. Diane Benoit.<sup>328</sup> Dr. Benoit had first offered her assessment that the child’s attachment to his mother was “an insecure/disorganized attachment” and that the relationship between mother and child was a “source of distress, anxiety and disorganization for [the child and] a source of fear, distress, and perceived chaos and lack of control for [the mother].” She concluded emphatically that continuing to attempt reintegration would be “psychological torture” for the child and possibly for the mother as well.<sup>329</sup> Dr. Benoit further concluded that, despite the wishes of both the mother and the child to continue in that relationship, continuing to allow access would be “grossly irresponsible.”<sup>330</sup>

Dr. Benoit concluded that the child M.C.’s best interests were served by adoption into a home where he “will receive assurances of love, nurturing and acceptance, no matter how difficult he may choose to be.”<sup>331</sup> Unlike in the case of N.M.C. where the assessor demonstrated how continued access would interfere with the child’s treatment, Dr. Benoit (at least as her recommendations are reported in the decision) did not make any such causal link. Instead, she made the remarkable conclusion that the child M.C., despite his age and long history of difficult behavioural issues<sup>332</sup> was ‘highly

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<sup>327</sup> *Children’s Aid Society of Ottawa Carleton v. C.(C.)* 2005 CarswellOnt 8427 at para 82.

<sup>328</sup> *Ibid* at para 30.

<sup>329</sup> *Ibid* at para 35.

<sup>330</sup> *Ibid* at para 39.

<sup>331</sup> *Ibid* at para 40.

<sup>332</sup> *Ibid* at para 20, 24 and 44 (noting among other things that the child required high levels of medication to manage his behaviours, had been through three foster homes in the year and a half between his apprehension and trial, had been diagnosed with ADHD, ODD and OCD, had been destructive and

adoptable.”<sup>333</sup> She predicted that, despite being a high-needs child his whole life, the child would, once adopted “quickly settle in and become a pleasant, charming, highly loveable addition to an adoptive household.”<sup>334</sup>

As noted in Chapter 2 (Attachment), most children are able to form secure, healthy attachments in early childhood and the failure of healthy attachment formation in early childhood is predictive of poor mental health. As such, Attachment Theory is most useful as an admonition in favour of fostering positive attachment in young children by minimizing all the circumstances that threaten the formation of those healthy attachments. However, as also noted, attachment forms as part of the individual during the first three to four years of the child’s life when experiences have the most impact on brain development and personality formation. As a result, attachment disorders are among the most difficult to treat and any treatment requires the placement of the child with an attuned caregiver for the formation of a lasting attachment relationship. Dr. Benoit overstepped the bounds of her expertise (and, arguably, over the bounds of common sense) when she suggested that this child would be easily adopted despite his special needs and history of serious behavioural issues. Even if Dr. Benoit was correct in regard to the adoptability of the child, she may have overstepped the bounds of her own science when she asserted with confidence that, once M.C. was adopted, the serious behavioural issues that had marked his life to that point would simply disappear.

There are other examples of cases in which attachment has been relied on as a means of explaining the special needs of children in the child protection litigation.<sup>335</sup>

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physically aggressive and cruel to animals and further noting that the child was clear in his stated wish that he did not wish to be permanently separated from his mother or adopted).

<sup>333</sup> *Ibid* at para 40.

<sup>334</sup> *Ibid*.

The litigation of such cases represents one example of the continued expansion of Attachment Theory within child welfare practice. However, there remains room for caution when relying on psychological tests and expert witnesses as determinative of these complex matters. As attachment gains ground as a means of assessing the current difficulties and future needs of individual children, the reliability of psychological measures will undergo further scrutiny. The application of some caution in applying those developing assessment tools for the benefit of children is a recognition of the complexity of the problems and solutions at hand.

### **iii. Assessing an Adult’s Attachment Profile to Predict Parenting Capacity: Finding the Limits of Attachment Theory?**

As discussed in Chapter 2 (Attachment), a number of tests have been developed to measure and assess the nature and quality of a child’s attachment to a caregiver. With those results, risks to the child’s development can be measured and expected outcomes for the child predicted. Among the newer measures in the attachment field is the Adult Attachment Interview – an assessment of an adult caregiver’s attachment profile developed from their own childhood experiences. From that attachment profile, mental health professionals make predictive conclusions regarding the adult’s ability to foster healthy attachment in a child and therefore the adult’s capacity to parent.<sup>336</sup>

Dr. Diane Benoit is a psychiatrist at the Hospital for Sick Children in Toronto and a professor at the University of Toronto who has been repeatedly qualified as a court

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<sup>335</sup> *Children’s Aid Society of Ottawa v. S.(L.)*, 1 R.F.L. (7<sup>th</sup>) 108.

<sup>336</sup> Mary Main, Erik Hesse & Siegfried Hesse, “Attachment Theory and Research: Overview with Suggested Applications to Child Custody” (2011) 49 Fam Ct Rev 426 at 427-428; see also *Children’s Aid Society of Simcoe (County) v. S.(M.)* [2006] W.D.F.L. 1817, 146 A.C.W.S. (3d) 284 affirmed by *Children’s Aid Society of Simcoe (County) v. S. (M.)* 2007 [2008] W.D.F.L. 1104, 157 A.C.W.S. (3d) 986 at para 67.

expert in areas relating to child psychiatry and parenting capacity. She is described as a “leading [expert] in Canada on Attachment [T]heory” and is one of the attachment researchers behind the development of the Adult Attachment Interview.<sup>337</sup> Dr. Benoit has described the Adult Attachment Interview as a “validated and reliable test to assess an adult’s state of mind with respect to attachment.”<sup>338</sup> Further and more significantly she describes this psychological measure as “the single most powerful predictor for a variety of aspects pertaining to parenting, predicting with 75 to 90% accuracy whether the parent can promote secure attachment in the child.”<sup>339</sup>

There are other well-established psychological tests of adults that have been utilized in efforts to assist and give context to assessments of parenting capacity.<sup>340</sup> Those tests assess cognitive function and test for personality disorders, thought disorders and mood disorders.<sup>341</sup> Dr. Benoit minimizes the utility of those more traditional measures<sup>342</sup> and asserts that her adult attachment measures are “the only researched tools that can assist in making a prediction about whether a parent will be able to raise a child to become an emotionally healthy adult.”<sup>343</sup>

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<sup>337</sup> *Children’s Aid Society of Simcoe (County) v. S.(M.)* [2006] W.D.F.L. 1817, 146 A.C.W.S. (3d) 284 affirmed by *Children’s Aid Society of Simcoe (County) v. S. (M.)* 2007 [2008] W.D.F.L. 1104, 157 A.C.W.S. (3d) 986 at para 103 (stating as well that “[h]er credentials are impeccable”); See also *Children’s Aid Society of Ottawa v. B.(M.)* 206 CarswellOnt 3006, [2006] W.D.F.L. 2774, 2775 (*Ottawa CAS 2006*) at para 78.

<sup>338</sup> *Children’s Aid Society of Simcoe (County) v. S.(M.)* [2006] W.D.F.L. 1817, 146 A.C.W.S. (3d) 284 affirmed by *Children’s Aid Society of Simcoe (County) v. S. (M.)* 2007 [2008] W.D.F.L. 1104, 157 A.C.W.S. (3d) 986.

<sup>339</sup> *Ibid.*

<sup>340</sup> See eg. *ibid* at para 46-62 (These tests measure cognitive functioning and psychopathology such as personality disorders, mood disorders and thought disorders and the results are combined with other information – observations, interviews, file reviews – all of which combine to assist the assessor to make conclusions regarding parenting capacity and recommendations regarding future parenting.).

<sup>341</sup> *Ibid.*

<sup>342</sup> *Ibid* at para 47 (Dr. Benoit states that the more standard tests are useful for identifying “abnormal functioning” but are not as useful when results fall within normal limits and that “there is no evidence to suggest that they are predictive of future parenting.”)

<sup>343</sup> *Ibid.*

The first reported Ontario court decision considering attachment testing as a measure of parenting capacity was the 2006 case of *Children's Aid Society of Simcoe (County) v. S.(M.)*.<sup>344</sup> This was a case regarding a five-year old boy, J, who, along with his older sister, had been removed from the care of his mother at the age of two years. The children spent twenty months in foster care after which they were placed in the care of their father and stepmother subject to the supervision of the local child protection agency.<sup>345</sup>

The stepmother assumed most of the responsibility for parenting the two young children. The father was described as being submissive to the stepmother and he deferred to her, particularly on matters of parenting.<sup>346</sup> There was conflict between the stepmother and the older child and, after a year, when that child was seven years old, she asked to be allowed to return to the care of the Society. She was placed with her former foster family and, on the consent of all concerned, made a ward of the Crown without access for the purposes of adoption.<sup>347</sup>

The Society's plan was for the two children to be adopted together.<sup>348</sup> It is remarkable, however, that the five-year old boy who was the remaining subject of the Society's application for Crown wardship, continued in the care of his father and stepmother pending trial.<sup>349</sup> An application for Crown wardship without access for the

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<sup>344</sup> *Ibid.*

<sup>345</sup> *Ibid* at para 1- 5 (When the children were first placed in the care of their father following a twenty-month period in care, the "stepmother" was known to the children as their father's roommate, a former friend of their mother's and a former babysitter. The romantic relationship began subsequent to the children's placement.).

<sup>346</sup> *Ibid* at para 32.

<sup>347</sup> *Ibid* at para 1- 11.

<sup>348</sup> *Ibid* at para 10- 11.

<sup>349</sup> *Ibid* at para 12 (noting that the father and the stepmother had been evicted from their apartment during the during the trial period and as a result the boy was living with his maternal grandparents pending the decision).

purposes of the adoption is the most intrusive form of state intervention into the life of a family and so should only be successful in the most clear and serious of cases. The Society had made its most consequential application for J's protection from the alleged deficiencies of his parents' care and yet the Society did not also remove the child from the care of the family and seek a temporary order for his care.

Despite not having concerns sufficient to warrant an immediate removal of the child, the Society prevailed in its application for permanent removal. This result is especially surprising given Justice Wildman's description of the child in the care of the father and stepmother. The description lacks any of the usual symptoms of neglect or abuse that are expected with a claim for Crown wardship.

There is no issue of intentional abuse of [the child] J. It is clear that [the father] MJ and [the stepmother] EK love him dearly. Generally, they were able to meet his basic physical needs. He was always well dressed and fed and had regular doctor and dental appointments. J is not having any extreme behaviour problems that have necessitated clinical intervention. His daycare workers confirmed that, generally, he is a happy and reasonably well-behaved little boy.<sup>350</sup>

Missing were any allegations of physical or sexual abuse. Missing as well were any of the tell tale signs of neglect such as poor hygiene, poor diet and lack of dental care or medical attention. The child was attending daycare and regular medical and dental appointments and so there was no concern that the child suffered heightened vulnerability due to his lack of visibility within the community. Concerns about the boy's mental and emotional health were not at issue since he had no behaviours that gave rise to a need for treatment.

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<sup>350</sup> *Ibid* at para 13 and 307 (“All who have testified describe him as a cute little boy, generally happy and reasonable well behaved. [N]o doctors have identified any serious behavioural or developmental issues at this time. He seems to be meeting appropriate milestones. He is very active and, like his father, likes physical things.”).

Making the order to permanently remove J from the care of his father and stepmother, Justice Wildman expressed concern was about J's future emotional health<sup>351</sup> stating "[t]his case is about J's emotional needs and the ability of [the father or stepmother] to meet those needs and raise him to be an emotionally healthy adult."<sup>352</sup>

This father and stepmother were not without a variety of significant parenting challenges.<sup>353</sup> Nevertheless, it is apparent from Justice Wildman's analysis that the driving consideration in this decision to effect J's permanent removal was Dr. Benoit's attachment assessment of the parents, her resulting conclusions regarding their parenting capacity and her predictions regarding J's future emotional health. Dr. Benoit concluded that a child allowed to remain in the care of these parents was at risk of future emotional harm due to the parents' inability to foster healthy attachment. She testified that she had proven this "objective[ly]"<sup>354</sup> using the "thoroughly researched"<sup>355</sup> science of Attachment Theory. The court made the order for Crown wardship without access despite a competing assessment and expert opinion offered in favour of the parents.<sup>356</sup>

Justice Wildman's reliance on attachment as a tool for predicting parenting capacity represented a significant advance in the acceptance of the developing science of

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<sup>351</sup> *Ibid* at para 44 ("[T]he risk alleged to J is future psychological damage (rather than something more clear cut, such as current physical or sexual abuse or even current emotional harm) . . .").

<sup>352</sup> *Ibid* at para 14.

<sup>353</sup> *Ibid* (The lengthy decision includes descriptions of the parents' various issues which, given how well the child was in fact doing, would not otherwise combine to result in a severance of the parent/child relationship. The issues included financial challenges, instability of housing, the stepmother's chronic medical issues, the stepmother's tendency toward interpersonal conflict with others, the father's plan that stepmother would be the primary caregiver, father allowing the stepmother to proceed unchecked in matters of parenting, the stepmother's physical discipline of the older child, concerns about the stepmother's parenting history and both the father and stepmother's tendency to blame others for their problems and misfortunes.).

<sup>354</sup> *Ibid* at 99.

<sup>355</sup> *Ibid*.

<sup>356</sup> *Ibid* at para 46 *et. seq.* (An experienced clinical psychologist whose review of the matters was more limited than Dr. Benoit's and who disagreed with some of Dr. Benoit's observations, graded the parents overall with a passing grade of "C" and expressed concern at the implications of applying Dr. Benoit's high standards of parenting to the population generally.).

Attachment Theory, both in child protection practice and in Ontario courts. Without this expert evidence, it would have been very difficult for the Society to justify such an intrusive order and prevail in its position for permanent removal. On the other evidence before the court, the child would likely have remained in the care of the parents with a lengthy list of terms and conditions. Dr. Benoit had used Attachment Theory to assess these parents as suffering from an untreatable psychological affliction that rendered them unable to parent. Attachment Theory had come a long way.

However, another decision soon made it clear that Dr. Benoit's "thoroughly researched and objective science" with predictive accuracy of 75 to 90% may be a useful tool but, at least in the legal realm, it is not being accepted as absolute.

Two years following the decision in *S.(M.)*, Dr. Benoit was engaged to complete an assessment in a case with very different facts. In the 2008 decision of *Children's Aid Society of Halton (Region) v. N.(R.R.)*,<sup>357</sup> Justice Zisman of the Ontario Court of Justice was faced with a Crown wardship application regarding a child who was more than two years old and who had been in foster care since being apprehended at birth. Dr. Benoit completed a court-ordered parenting capacity assessment that included testing the child's young mother for her ability to parent using the same predictive attachment measures that had been relied upon two years earlier in *S.(M.)*. Based on the results of those tests, Dr. Benoit concluded that the mother in *N.(R.R.)*, like the parents in *S.(M.)*, is among a small percentage of people who simply do not have the capacity to parent.<sup>358</sup>

Dr. Benoit concluded that this mother's test results were "associated with a high risk of emotional, behavioural and psychiatric problems in the child [she would raise] and

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<sup>357</sup> *Children's Aid Society of Halton (Region) v. N.(R.R.)* 2008 CarswellOnt 1196, 2008 ONCJ 95.

<sup>358</sup> *Ibid* at 34

would result in an insecure attachment between the mother and child.”<sup>359</sup> Dr. Benoit further explained that the mother’s results showed “the presence of unresolved mourning and trauma” which, in a primary caregiver, is “repeatedly associated with . . . disorganized attachment [in the child] which, in turn, has been identified with one of the strongest childhood predictors for the most severe types of emotional and behavioural problems.”<sup>360</sup>

As she had in *S.(M.)* two years earlier, Dr. Benoit offered some of the assurances regarding the reliability of these tests stating that they “are probably the most powerful predictive tests of parenting that exist at the current time and that they are so good at predicting parenting that they can even be done on a pregnant woman.”<sup>361</sup> And, as she had in *S.(M.)*, Dr. Benoit acknowledged that there could be no prediction with absolute certainty.<sup>362</sup> However, this time, apparently challenged by vigorous cross examination, Dr. Benoit was drawn out to testify to her own certainty about the mother’s proven and untreatable lack of parenting capacity stating that it was “crystal clear” and further stating that there were not any hypothetical changes in the mother’s circumstance that would change her opinion.<sup>363</sup>

Buried within Justice Wildman’s lengthy decision in *S.(M.)* is a caution against assessing parenting ability primarily on scientific measurement unless there are “other clues to determine whether or not the predictions from the test results are accurate.”<sup>364</sup> In

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<sup>359</sup> *Ibid* at para 31.

<sup>360</sup> *Ibid.*

<sup>361</sup> *Ibid.*

<sup>362</sup> *Ibid* at para 42.

<sup>363</sup> *Ibid* at para 36.

<sup>364</sup> *Children’s Aid Society of Simcoe (County) v. S.(M.)* [2006] W.D.F.L. 1817, 146 A.C.W.S. (3d) 284 affirmed by *Children’s Aid Society of Simcoe (County) v. S. (M.)* 2007 [2008] W.D.F.L. 1104, 157 A.C.W.S. (3d) 986 at para 108 to 113 (Justice Wildman went on to examine the balance of the evidence for a further 277 paragraphs which perhaps marks some acknowledgment that her decision, unless closely

considering *N.(R.R.)*, Justice Zisman accepted Justice Wildman’s admonition and looked to the evidence before her for the “clues” that would corroborate the conclusions made by Dr. Benoit.<sup>365</sup> However, this judge found that, despite Dr. Benoit’s conclusive findings, those other clues were not there.

Justice Zisman described a young woman who had, in spite of a difficult history and a lack of services from the Society, made significant changes in her life. She had separated from her former partner with whom she had had a conflictual relationship and she was in a new relationship that was stable and positive. She had remained drug and alcohol free for the more than two years since the birth of the child and was living independently in a clean and appropriate home. She had attended faithfully for all access visits despite significant transportation issues and, most importantly, she had given birth to and was providing care for a subsequent child who was found to be thriving.<sup>366</sup>

One might question this young mother’s judgment in becoming pregnant a second time given that her first-born child was in the Society’s temporary care. However, this questionable decision worked out very well in the mother’s favour. Her relationship with this second child gave the mother the opportunity to develop a parenting relationship with a child in a more normal setting. The mother accessed community resources in relation to her care of the second child and so had the opportunity to be observed in a parenting role by independent professionals. Those professionals observed her with the younger child in more relaxed and natural circumstances than those prescribed by the Society for

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examined, would appear on its face to be an example of a judge simply following the advice of an expert despite the availability of evidence lending itself to a contrary decision.).

<sup>365</sup> *Ibid* at para 112.

<sup>366</sup> *Children’s Aid Society of Halton (Region) v. N.(R.R.)* 2008 CarswellOnt 1196, 2008 ONCJ 95 at para 15-16.

her relationship with the older child.<sup>367</sup> The very fact of this mother's successful parenting efforts with the second child directly refuted Dr. Benoit's assessment in a manner that had not been accomplished by a competing expert in the case of *S.(M.)*.

In ruling on the matter of *S.(M.)*, Justice Wildman had expressed concerns about the adult attachment measures stating that "it seems . . . that a parent could have an unhealthy state of mind or unresolved issues about his or her [own] primary caregiver, yet still rise above this and become an adequate parent."<sup>368</sup> In this subsequent case it seemed that a parent had done just that.<sup>369</sup>

It is ironic that the systemic delays that are often found to be so problematic in litigation were instrumental in giving this young mother the time and the opportunity to demonstrate real and substantial change in her life – a new spousal relationship, a change of life style and a demonstrated abstinence from alcohol, drugs and criminal involvement. Those changes, combined with the additional parenting opportunity afforded this mother by having a second child so soon, enabled this mother to build a case to refute the certainty of Dr. Benoit's expert conclusions about her lack of capacity to ever parent.

A key factor absent in this case was any permanency issue generated by the child's placement with a potential adoptive parent. Despite withdrawing supportive services from the mother after receiving Dr. Benoit's assessment, the Society did not go on to prejudge the result by placing the child with a potential adoptive family. Had the Society done so and had the child been found to have formed an attachment to potential

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<sup>367</sup> *Ibid* at para 93-96.

<sup>368</sup> *Children's Aid Society of Simcoe (County) v. S.(M.)* [2006] W.D.F.L. 1817, 146 A.C.W.S. (3d) 284 affirmed by *Children's Aid Society of Simcoe (County) v. S. (M.)* 2007 [2008] W.D.F.L. 1104, 157 A.C.W.S. (3d) 986 at para 110.

<sup>369</sup> *Children's Aid Society of Halton (Region) v. N.(R.R.)* 2008 CarswellOnt 1196, 2008 ONCJ 95 at para 135 (Undeterred, Dr. Benoit defended her adult attachment measurements stating "I can't imagine for the life of me that, given the tools I've used, that you would see a dramatic change over one year given what the findings were and the long-standing nature of these findings.").

adoptive parents, it would have been more difficult for the biological mother to prevail in her efforts to secure return of the child. In those circumstances, Justice Zisman's decision would have been a greater challenge as it would have included consideration of precedents such as *M.(C.)*; the added consideration of the child's attachment to temporary caregivers could have led to a different result.

While not the only cases in which the courts have referred to Dr. Benoit's attachment testing for adults,<sup>370</sup> these two cases provide extreme fact situations in which the court was asked to rely heavily on the predictive results of adult attachment testing. The opposing results of these two cases provide some direction regarding the circumstances and manner in which predictive measures will be relied upon to determine parenting capacity. Both decisions stand for the proposition that predictive scientific tests alone will not determine parenting capacity and that there will have to be facts in evidence to support conclusions drawn from the predictive tests.<sup>371</sup> This is consistent with the approach to expert evidence generally.<sup>372</sup> This is also consistent with the view of family relationships as a universal experience to which we all bring views and knowledge.<sup>373</sup>

As an articulation of the benefits of good basic parenting, Attachment Theory bears an intuitive quality. However, in adopting this new predictive role, this otherwise

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<sup>370</sup> See eg. *Children's Aid Society of Ottawa v. B.(M.)* 206 CarswellOnt 3006, [2006] W.D.F.L. 2774, 2775 (*Ottawa CAS 2006*) at para 78.

<sup>371</sup> See *Children's Aid Society of Waterloo Region v. M. (L.)* 2012 CarswellOnt 5305, 2012 ONCJ 238 at paras 607 to 610 (The court relied on the caution expressed in both of those cases and reiterated the need to seek other "clues" within the evidence rather than rely solely on scientific testing.).

<sup>372</sup> *Children's Aid Society of Algoma v. L.(S.)* 2011 CarswellOnt 15647, 2011 ONCJ 847 [L.(S.)] at para 21-27 (reviewing the law as it relates to the application of expert evidence to assist the trier of fact rather than supplant their judgment and concluding with the admonition that "[i]n appellate case law, there is more than a passing reference to the role of the judge as a 'gatekeeper' with respect to what evidence is admitted in a particular case" and "judges must remain vigilant at the gates to ensure that only the evidence that meets the criteria established in our jurisprudence for admission of expert opinion evidence comes in").

<sup>373</sup> *Ibid* para 8 (noting that judges bring to their decisions their own general knowledge as well as their own education).

intuitive premise may have become a bridge too far. It is one thing to say that there are scientific conclusions to support the view that children need continuity of care; it is something else altogether to say that a psychological test, absent any additional evidence of risk, can conclusively determine a person's ability to parent.

#### **E. Conclusion (Chapter 4)**

The impact of Attachment Theory on the day-to-day practice of child protection agencies is revealed to some degree by matters brought before the court. In cases in which child protection agencies advance their position regarding the best interests of particular children by relying on attachment principles and expert evidence, the court has an opportunity to accept or reject that evidence as determinative of the issues at hand. These precedents influence the outcome of future cases before the courts. They can also inform choices being made by child welfare practitioners and set the parameters of acceptable decision making. The full impact of court decisions and legal precedent on the day-to-day practice of child protection agencies is difficult to assess but some impact can be presumed.

The Supreme Court has taken the lead in drawing a principled line in favour of focusing on a child's stable developmental needs and in particular, the importance of continuity of care by a caregiver to whom the child is securely attached.<sup>374</sup> Attachment Theory and related concepts have been and continue to be an important part of that shift

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<sup>374</sup> See *Children's Aid Society of London & Middlesex, Re* [2010] W.D.F.L. 2633, [2010] W.D.F.L. 2632, 85 R.F.L. (6<sup>th</sup>) 95 at para 16-18 (citing the Supreme Court's decisions in both *Racine* and *M.(C.)* for the significance of "attachment" and "bonding" as considerations in matters regarding the placement of children).

in focus toward the child as being first an individual with his or her own developmental needs and away from the child being first an element of his or her family of origin.<sup>375</sup>

As the science of attachment has developed, its influence on child welfare has broadened. No longer is attachment only relied upon in support of maintaining continuity of care. Attachment and attachment-related issues, as they are being diagnosed in children, have been relied upon as a more formal articulation of some of the emotional harm caused by the multiple risk factors that exist within families whose circumstances bring them into contact with child protection agencies. In those cases, Attachment Theory has assisted in defining and addressing the special developmental needs of individual children.

More recent developments in the field of attachment have pushed the limits of the court's willingness to accept expert evidence as determinative of the difficult permanency decisions being made for children at risk. The importance to children of being raised with stability and continuity of care is now a well-accepted principle of child development. However, where attachment experts extend their reach to include assessing adults for their attachment history and using those results to predict capacity to parent, the courts' faith in expert testimony may give way to a more collective understanding of the measures of "good enough" parenting.

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<sup>375</sup> The Supreme Court's 1994 decision in *M.(C.)* was a child protection matter and considered the issue of state removal of a child from a parent's care. However, the Court has extended the significance of concepts such as "attachment," "bonding" and the "psychological parent" into matters of custody and access thereby further broadening the impact of those principles. See e.g., *Gordon v. Goertz* [1996] 5 W.W.R. 457, 19 R.F.L. (4th) 177, 196 N.R. 321, 134 D.L.R. (4th) 321 at para 121 (the Supreme Court noting its own long-standing regard for the significance of "attachment" and "bonding" and stating that "[t]he importance of preserving the child's relationship with his or her psychological parent has long been recognized by [the Supreme] Court" and further noting a that there is a "vital link between continuity in the emotional bonding of the child with his or her psychological parent and the best interest of the child").

## **Chapter 5: Analysis and Conclusion**

### **A. Attachment and Children in Care**

When the circumstances of a young child's life impede the child's formation of positive early attachments with a consistent primary caregiver, the child is at risk for pervasive and long-lasting mental health difficulties. The treatment of the emotional and developmental challenges that can arise from the formation of unhealthy attachment patterns requires significant resources. Even if all those resources are available and applied, the unhealthy attachment remains a weak foundation that may be strengthened but can never be replaced. Since treatment of attachment-related mental health issues is difficult and yields limited remedial results, the key to abiding the basic lessons of Attachment Theory is prevention; children must be protected from the circumstances that are known to interfere with the formation of healthy attachments.

Nurturance and consistent care within a stable family give children the best opportunity to develop secure attachments and healthy relationship patterns. Barring other risk factors, young children with those secure attachments mature to be healthy, adaptable and capable adults. Young children develop unhealthy attachment patterns if they are denied consistent quality care or are subjected to neglect and abuse. Preventing risk-laden negative attachment experiences for children requires broad systemic knowledge of this critical developmental process and the impact that it has on long-term outcomes. All those involved in decisions regarding children are properly charged with the task of examining the impact of their decisions from this important perspective.

One finds the most vulnerable of Ontario's children within the field of child welfare. Often born to families facing the many challenges of poverty, these children come to the attention of child protection authorities only after they or their siblings have been exposed to the physical or emotional harm of neglect or abuse or to the risk of that harm. If the child protection agency finds it necessary to remove a child from the care of his or her family, the child is placed in alternate care pending efforts to address the risk factors within the home or pending the often slow-moving process of a court deciding whether to permanently sever the child's relationship to his or her family. The child enters state care having already been exposed to multiple attachment risk factors, one of which is the very apprehension that is intended to protect the child from further harm or risk.

Then, until a final decision is made to either return the child to the care of parents or to make the removal permanent, the child remains in temporary care. These arrangements of temporary care can last for months or years. From an attachment perspective, the luckiest among these children remain in one temporary placement with a caregiver who is willing and able to adopt the child when and if the opportunity arises. But even that "lucky" child spends developmentally critical months or years in an atmosphere of uncertainty with potential controversy over something as simple as who he or she will call "Mom." All children brought into state care are, at some point, denied the most basic elements of attachment formation – the stability of continuous care within a family unit that can and does regard the child as a permanent and necessary member.

## **B. Attachment and Current Case Precedents**

Among all aspects of the legal system it is within child protection litigation that, attachment issues and the developments of Attachment Theory have had the closest examination and the most definitive impact. That close examination can be observed in the subset of child protection cases that are fully litigated and for which the court renders a final written decision.

As discussed in Chapter 4, it is among reported decisions that one observes the development of Attachment Theory beyond its original role as the theoretical foundation for encouraging permanence and continuity of care. In recent years, Ontario child protection agencies have expanded the use of attachment-related research. First they have relied upon it as a tool used to examine the mental health needs of a particular child and then, with less success, have also proffered an attachment-based predictive test the purpose of which is to assess whether particular adults can successfully parent.

Where attachment has had the most significant impact is in those cases in which it is called upon – by litigants or *sua sponte* by the court – in support of the significance of a child’s continuity of care. In the child protection context, the 1994 Supreme Court of Canada decision in *M.(C.)* marked the clear emergence of the shift from a primary focus on children as first being members of their families of origin toward the current focus which is to regard children first as individuals with their own developmental needs. Guided by *M.(C.)* and its progeny, courts in Canada are required to consider a child’s attachment relationship with a temporary caregiver as being among the factors impacting the best interests of the child. In cases where there is a prospect of adoption, that

attachment relationship and the question of whether it can and should be allowed to continue will therefore influence the disposition of litigation regarding the child.

Following *M.(C.)*, the question that arose was “how long?” How long will a child remain in temporary care before that child’s relationship to the temporary caregiver will take priority? Although that question can only be resolved on a case-by-case basis, it is apparent that the five and a half years of temporary care considered by the Supreme Court in *M.(C.)* far exceeded what would now be considered acceptable limits.

There is at least one concerning implication of the Supreme Court’s decision to give consideration to the child’s relationship to temporary caregivers. Child protection litigation takes place within a system that is, from the perspective of child development, glacially slow. While litigation progresses, children will and do spend months and often years in the care of one foster family and it is inevitable and even developmentally healthy that these children and their foster parents develop their own relationships of significance. Foster families may initially or eventually make themselves available as adoptive placements thereby giving the child an opportunity for permanence that comes without the attachment disruptions that would come with any further changes in placement.

Although child protection agencies have come to rely on placements with potential adoptive parents to best serve the developmental needs of children, this practice has the added effect of strengthening the agency’s (and therefore the state’s) already strong position within the litigation. The child’s relationship to a long-term temporary caregiver willing to adopt may take precedence over the child’s continued relationship to his or her family of origin even if parents address the identified child protection concerns,

even if suitable family members come forward and offer to care for the child and possibly even if child protection concerns are determined not to have existed in the first instance,

This is an issue of fairness for families seeking the return of children removed from their care and it adds to the imbalance between the state and the parents as litigants. The use of resource foster placements is good for children generally because it minimizes attachment disruptions. But when considering the use of resource foster placements, it is important to acknowledge that such a placement decision serves both the developmental interests of the child and the litigation interests of the child protection agency.

However, the paramount purpose guiding child protection practice and litigation is “to promote the best interests, protection and well being of children.”<sup>376</sup> In a just society, fairness to the parents as litigants should always be a consideration but, following the Supreme Court’s decision in *M.(C.)*, such a goal of fairness will not be achieved at the expense of the best interests of a child. While it is true that the use of long-term temporary placements as an option for permanence will also make it harder for parents and families to meet the best-interests threshold, this cannot be a reason to forgo a placement that serves the child’s developmental interests.

Courts have come to accept the use of resource foster placements despite the fact that doing so furthers the imbalance against parents within child protection litigation. The use of resource foster placements serves an important role in minimizing placement changes for some of the children who are removed from the care of their families due to protection concerns. There is a resulting issue of fairness for parents however the real problem lies not in the nature of the placement chosen for the child but rather in the time

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<sup>376</sup> *Child and Family Services Act* R.S.O. 1990, c. C.11, as amended, s. 1.

that it takes for child protection agencies and courts to make permanent decisions and the time that it takes for parents to address issues that interfere with their ability to provide safe care of their own children.

### **C. Permanency Planning and the Need for Swift Decision Making: The Impact of the Legal Process**

Significant court involvement in matters regarding families and children is a relatively recent phenomenon. Court systems being utilized to resolve matters regarding children and families are systems that were designed to determine the resolutions of civil matters between parties and criminal matters regarding events that had occurred in the past. Those same processes are now called upon to address dynamic issues that change swiftly with the passage of time – questions of the best interests of a child. As changes in child welfare have brought matters of child protection more and more into the court process, those child welfare matters have found themselves competing for resources against all the other demands put on the court system as a whole. The court process is simply not structured to make final decisions regarding children with the dispatch that respects the vulnerability of this population of children and their ever-changing developmental needs.

As discussed in Chapter 3 (Legislation), the Ontario legislature imposed time limits beyond which courts cannot make final orders that children will remain formally in impermanent care. The limit for older children is twenty four months of cumulative time spent in impermanent care and, as of the 1999/2000 amendments to the *Child and Family Services Act*, that limit for children under the age of six years is twelve months. The

reduction in the time limit for younger children was in recognition of the more pressing developmental imperatives for younger children.<sup>377</sup>

When the legal process allows a question of Crown wardship to move forward to a trial and a final decision, the time limits provided for in section 70 of the *Act* prevent that final decision from being one that delays permanency for the child. Faced with a case that has met or exceeded the time limits, the court will have to decide that either the Crown wardship is warranted or that it is not warranted in which case the child must be returned to the care of his or her family. By introducing time limits and by shortening those time limits for younger children, the legislature has narrowed the options available for final disposition. This has the result of moving some matters forward to earlier final decisions once these matters reach trial.

However, as one solution to issues of permanency (and therefore to some of the issues of attachment), imposing time limits on impermanent care has proven to have one very significant gap. The time limits are not truly mandatory inasmuch as they do not require that a court or any party intercede to force litigation forward within those prescribed time limits. There is no prohibition against a court making a series of temporary orders pending the resolution of the litigation. Those temporary orders can and often do allow matters to continue well outside the prescribed time limits while a final result on an application remains pending. For reasons often described as systemic and relating to the limited availability of court resources, delays up to or beyond the

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<sup>377</sup> *Child and Family Services Act* R.S.O. 1990, c. C.11, as amended, s.70(4)(There is provision for a six-month extension to that time limit if such an extension is found to be in the best interests of the child); and see *Catholic Children's Aid Society of Hamilton v. T. (J.)* 2012 CarswellOnt 8986, 2012 ONSC 3893, 217 A.C.W.S. (3d) 617 at para 875 *et seq* (reviewing the law of extensions granted under *CFSA* s. 70(4) and concluding that there are two schools of thought regarding whether multiple six-month extensions can be granted where they are found to be in the best interests of the child).

prescribed time limits are the rule rather than the exception in child protection matters that are not resolved on consent.

What has emerged from the clear wording of section 70 is a distinction between temporary orders (pending the resolution of litigation, usually including a provision for continued access) and impermanent final orders (final orders for time-limited Society wardship, again usually including a provision for access). That is a distinction that is lost in the light of the realities of child development.<sup>378</sup> Regardless of the nature of the order, the child is in the formal care of the state and permanency is still pending. One difference is that, with a temporary order, there are no time limits except those the courts may choose to impose.

Time limits were imposed and then, for younger children, they were shortened. However these limits were set in the context of a court system that is plagued by systemic delay. It is that issue of delay that is preventing the existing time limits from being fully applied. With children remaining in care even beyond the legislated time limits, it is not enough to have these prescribed time limits regarded as a ceiling beyond which final court orders for Society wardship will not go.<sup>379</sup> For these legislated time limits to positively affect the circumstances of more children, the limits have to represent a mandatory maximum beyond which courts will not make any order that a child will remain in temporary or impermanent care.

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<sup>378</sup> Linda van den Dries et al, "Fostering security? A Meta-analysis of Attachment in Adopted Children" (2009) 31(3) Child Youth Serv Rev 410 (concluding that children adopted before the age of twelve months were as likely to be securely attached as children raised by their biological parents and children adopted after the age of twelve months were less likely to be securely attached but also less likely than institutionalized children to have a disorganized attachment).

<sup>379</sup> *Catholic Children's Aid Society of Hamilton v. M. (M.A.)* (2003), 121 A.C.W.S. (3d) 889, 16 O.F.L.R. 235, [2003] O.J. No. 1274, 2003 CarswellOnt 1122 (Ont. S.C.J.).

Whereas child protection litigation addresses the needs of individual children, legislation addresses the broader perspective of the needs of children generally. It guides child welfare practitioners and courts and sets priorities and limits within which decisions regarding individual children will be made. In the legislature's rough-cut efforts to address the needs of children generally, those time limits have been set for final orders. However, it is not possible to truly assess the impact of a twelve or twenty-four month time limit in circumstances where those time limits are not being fully applied. Where there is a widespread lack of adherence to the legislated time limits, the discussion cannot begin with the sufficiency of the existing time limits. Rather, the discussion should begin with the necessity of doing more to enforce the legislature's chosen time limits of twelve and twenty four months of impermanent care.

One solution is to amend section 70 of the *Child and Family Services Act* so that the time limit therein applies to all court orders and not only to final orders for Society wardship. If courts were prohibited from making either temporary or final orders that had the effect of keeping children in any form of impermanent agency care for more than twelve or twenty four months (depending on the age of the child), then the parties and the court system would have no option but to respond with the resources necessary to have matters decided within those time restrictions, particularly if one of the consequences of failing to adhere to the timelines was a possible loss of the court's jurisdiction over the matter at hand.<sup>380</sup>

Certainly there are facts and circumstances that would make adherence to such restrictions problematic or even impossible. One example is when a child is apprehended

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<sup>380</sup> *Kenora-Patricia Child & Family Services v. G. (J.)* 2001 CarswellOnt 2100 at para 33 (holding that a court loses jurisdiction over a matter regarding a children's aid society's removal of child from parental care where the society fails to bring that matter before a court within the prescribed five days).

after having previously spent a period of time in temporary care. If at the time of the subsequent apprehension, the cumulative period of time spent in temporary care is at or near the maximum allowed for the child given his or her age, then some amount of an extension may be called for. To account for such circumstances, section 70 should be further amended to include a clearly worded provision allowing an extension of the period of the temporary order pending trial. However, such extensions should be the exception rather than the rule and should only be ordered when the court can find that doing so is in the best interests of the child in question. Any decision to allow an extension should be required to be framed so as to demonstrate that it is best interests of the child and not, for example, systemic delays that are driving the decision to extend the time periods.

However, legislative change is not the only means by which application of the current legislated time limits can be better accomplished. The Ontario *Family Law Rules* provide specific timelines within which child protection matters are to be heard. The relevant rule, *Family Law Rule 33: Child Protection*<sup>381</sup> stands apart from the rules that apply to other matters in Family Court – usually custody, access, support and property matters being litigated as a result of separation and divorce. The timetable set out in *Family Law Rule 33(1)* provides a schedule for litigation of child protection matters fixing time frames for all steps in the matter including the temporary care and custody hearing, the settlement conference and the trial. The final step in the process, the trial of the child protection application, must be heard within four months of the removal of the child and the resulting commencement of the application.<sup>382</sup>

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<sup>381</sup> *Family Law Rules* O. Reg. 439/07, s. 33.

<sup>382</sup> *Ibid* at s.33(1).

The wording of *Family Law Rule 33* is clear and mandatory. *Rule 33(4)* provides that the parties “may not” consent to exceeding the restrictions of the timetable<sup>383</sup> and the *Rules* twice state that the court may only order an extension to the child protection timelines where “the best interests of the child require it.”<sup>384</sup> However, despite that mandatory language, the restrictions within those timetables are routinely exceeded.<sup>385</sup> The reasons cited are often the lack of availability of court resources – in particular court time available for temporary care and custody hearings, conferences and trials.

What is required to override these issues of systemic delay is a reordering of priorities within the court system as a whole. This would include a higher priority of resources for matters directly affecting children and, within that, a first priority of resources for matters regarding the involuntary removal of children from the care of their families. Accepting that resources are finite, the intent of this solution would be to first apply available court resources to matters affecting this most vulnerable population that is so sensitive to delay.

The application of a higher priority to matters deemed to be urgent is not without precedent, even within child protection litigation. For example, priority is given to the strict interpretation of the five-day rule requiring that any apprehension of a child be brought before a court for a hearing as soon as is practicable but in any event within five days.<sup>386</sup> This timeline is treated as mandatory and the court loses jurisdiction over the

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<sup>383</sup> *Ibid* at s.33(4).

<sup>384</sup> *Ibid* at s. 3(5) and 33(3).

<sup>385</sup> See eg. *Children's Aid Society of Algoma v. L. (M.)* 2012 CarswellOnt 9036, 2012 ONCJ 456, 219 A.C.W.S. (3d) 603, [2012] W.D.F.L. 5875 (“[M]ost of the universe concedes that the timelines in *Rule 33* are rarely observed (when there is any contest whatsoever) . . .”).

<sup>386</sup> *Child and Family Services Act* R.S.O. 1990, c. C.11, as amended, s. 46(1); *Family Law Rules* O. Reg. 439/07, s. 33.

child and will dismiss the application if that timeline is exceeded by the agency bringing the application following removal of the child.<sup>387</sup>

However, unlike the other timelines set out in *Family Law Rule 33 (1)*, the five-day rule regarding apprehension appearances is also included in the *Child and Family Services Act*, thereby giving it greater authority. As well, relatively speaking, arranging a hearing for an apprehension is not a difficult accommodation for the court to make even given existing limits on court resources. Although they happen on short notice, such appearances are brief and largely uncontested for the very practical reason that the evidence before the court at those appearances is usually only the affidavit evidence provided to the court by the agency.

Once the parties are beyond the first hearing and the children are ordered into formal care, courts do not generally adhere to the additional time restrictions provided in *Family Law Rule 33(1)*. All those involved currently operate with an understanding of the system's resource limitations and the much longer timetables that are the realistic result. Enforcing strict adherence to the *Rule 33(1)* timeline for all steps of the child protection litigation timetable would have significant implications for the agencies, for the parents and for the courts.

Agency staff members are aware that they have months before a temporary care hearing and often years before a trial. They operate with the knowledge that they have time to gather more information with which to refine their course of action and pursue that result. The strict imposition of the existing restrictions would eliminate this potential advantage for the agency and put the agency to their case much sooner – possibly sooner than they would be prepared to go forward. Such a change could reasonably be expected

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<sup>387</sup> *Kenora-Patricia Child & Family Services v. G. (J.)* 2001 CarswellOnt 2100 at para 33.

to result in agencies adopting a higher standard of initial investigation as well as heightened care in choosing a prayer for relief in the initial application.

Adherence to the existing time restrictions would have serious implications for the parents as well. A slow moving court process is a common complaint of parents who have had their children removed from their care. However, with the time that is provided by delays in the system, parents and other family members have more opportunity to address the child protection concerns that led to the removal of their children.

Minimizing systemic delay will have a negative impact on those parents who need the time to effect change or gather evidence in support of their positions. Parents are often competing for social services resources such as counselling, parenting courses, domestic violence awareness programs and addictions services, all to assist them in their efforts to achieve and demonstrate improvement. Many of these parents are legally aided within the litigation. New shorter timelines would be an added point of practice disincentive for counsel willing to represent parents in child protection matters and so parents may have even more difficulty retaining counsel than is currently the case.

A new more swift approach to resolving child protection matters would also be problematic for the courts. In addition to dealing with strained resources and all the systemic results of prioritizing court matters to favour displaced children, courts would also have a more difficult time assessing risk. With the additional time that is currently built into the process by delay, judges have become accustomed to being able to refer matters out for assessment. They then await the results of those assessments before proceeding. In turn, the paucity of public resources applied to the assessment process has created waiting periods that further delay the results of those complex third-party

assessment efforts. With this proposed adherence to regulated timelines, either the assessments would have to be forced forward on a shorter schedule or the court would have to proceed without the guidance of the assessment results and the testimony of the assessor.

History has demonstrated that the problems of child protection are extremely complex and that an effort to solve one aspect of the collection of issues can give rise to other complications that may or may not have been anticipated. This is likely no exception. If such a change were implemented, possibly beginning with a pilot project in a limited number of jurisdictions, a careful review of all the consequences would be necessary to assess and address any of those unintended consequences. It is, however, necessary that action be taken to address the significant and immediate problems of child protection proceedings routinely exceeding mandated time limits and the result of children remaining in care beyond even those periods of time specifically allowed by the legislation. Both the *Act* and the *Rules* provide that exceeding those timelines should only be permitted when doing so is found to be in the best interests of the child.

As discussed in Chapter 3 (Legislation), the original definition of “permanency planning” for children was a two tiered decision-making process. The tiered understanding of permanency planning was founded in the attachment principle that changes to a child’s placement are themselves risk factors and a child who can safely remain in the care of his or her parents should be allowed to do so. Where that was not possible, however, the principles of permanency planning favoured eliminating delay in the decision to remove the child from the family and place the child with an alternate permanent caregiver. For such a child-focused process to be allowed its full effect, that

admonition regarding delay must extend to all aspects of the decision-making process up to and including the judicial system.

#### **D. Issues of Continuity of Care, the Focus on Extended Family, and the Loss of Court Oversight for Involuntary Removals**

As discussed in Chapter 4 (Case Law) Canadian courts consider favouring continuity of care for a child who has developed an attached relationship to a temporary caregiver willing to adopt. However, few of the decisions relating to continuity of care are, in fact, ever put before a court. Child protection workers and supervisors have responsibility for deciding whether children are moved within foster placements and whether or not children are placed in resource foster placements. Agency decisions to remove children from foster care and return them home to the care of their parents or place them in the custody of other family members are unlikely to be questioned by the parents in the context of the litigation and so are likely to be accepted by the courts. The reality is that child protection agencies have a broad scope of responsibility regarding placement changes for children in their care and only a limited number of those decisions fall into the purview of or even come to the attention of any court. Until recent years, the one significant limit on an agency's authority was the court's oversight of the first and most significant placement change – the initial removal of the child from the care of the parents.

The court process normally becomes and remains engaged in matters of child protection when the child protection agency's involvement is involuntary from the perspective of the family. At no point are involuntary child protection services more

intrusive than with the removal of a child from the care of the parents. That step, the apprehension, properly places a number of significant obligations on the agency including obtaining a warrant (except in cases of emergency) in advance of the removal,<sup>388</sup> initiating an application, and bringing the urgent matter of temporary custody before a judge for review within five days of the removal.<sup>389</sup>

Once the agency formally apprehends and commences an application, the court assumes oversight of the matter. The agency must provide the court and parents with written details of the relevant allegations. The court's oversight extends to the substantive decisions being made for the child and also to the issues of process that affect the timelines in which those decisions are being made. Because there has been a formal court process commenced, parents requiring the assistance of legal aid have the opportunity to consult and retain legal counsel to assist them. The use of the court process also provides a forum in which parents can challenge decisions made regarding the child's care, beginning with a challenge of the initial removal.

However, that traditional model of involuntary removal of children is no longer the only model of involuntary removal in Ontario. As discussed in Chapter 3 (Legislation), changes to child welfare practice in Ontario have given rise to a focus on "kin" or family and community members as an alternative to state-funded and operated foster care. With a kinship service placement, the apprehension of the child and his or her placement in formal state care is avoided when the agency invites the parent to agree to an informal placement with an approved member of their family or community.

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<sup>388</sup> *Child and Family Services Act* R.S.O. 1990, c. C.11, as amended, s. 40(2).

<sup>389</sup> *Child and Family Services Act* R.S.O. 1990, c. C.11, as amended, s. 46(1); *Family Law Rules* O. Reg. 439/07, s. 33 (1).

The immediate difficulty with the use of kinship service placements is the theoretical presumption that the arrangements are voluntary on the part of the parent. Most parents will disagree with any assessment of their care of their own children as being so substandard as to warrant removal of their child. However, the parents' choice between a "voluntary" placement of their child with extended family or an apprehension of the child with placement in foster care is only nominally a choice. It is not surprising that, despite disagreeing with the necessity of any removal, many parents will choose the former.

With very few exceptions, the assistance of counsel funded by legal aid is generally only available once a formal legal process has been commenced. Given the lower socioeconomic status of many of the families working with child welfare agencies, parents given this less formal choice are often making a decision without legal advice. Since the removal is not a formal apprehension requiring a warrant or an application to the court, the parents have no opportunity, with or without legal counsel, to review the agency's rationale in the detail that would have been provided in a written application and supporting materials. The placement is voluntary on its face and so is not open to challenge by the parents. The irony in these circumstances is that the parents will only be afforded due process of the law, including the appointment of counsel (for those that require the assistance of legal aid) and the opportunity to examine and challenge the facts against them, if they choose the course that is likely more disruptive for their children – a formal apprehension and a placement in foster care.

A more insidious implication is the possibility that these informal apprehensions may lead to an increased removal of children. The less formal process of kinship service

placements does not set in motion the onerous requirements placed on an agency formally apprehending a child. There is no need for the agency to commence a child protection application, there is no need for the agency to bring the matter before a court within five days and there is none of the expenditure of agency resources that comes with an ongoing legal matter. Further, kinship service arrangements come at a minimum of ongoing costs to the agency since the agency does not compensate kin service providers.

As a result of these implications of kinship service placements, child protection agencies are now able to contemplate and achieve the removal of children more easily than they could with a more traditional apprehension. One anticipated result of the increased ease and reduced cost to the agency is an increased reliance on kinship service. Although this seems a likely result, it is difficult to confirm. The kinship service alternative is a result of the recent transformation of child welfare practice in the province and so there are no available statistics regarding such placements in Ontario prior to 2006.<sup>390</sup> Even the available statistics regarding the use of kinship service since 2006 are difficult to rely upon due to variations in the manner in which this less formally controlled apprehension alternative is utilized and tracked across agencies.<sup>391</sup>

Further, since the definition of “kin” can be quite broad and will vary from agency to agency, a child’s placement with “kin” may not mean that the child will remain in his or her own geographic community or that he or she is placed with people who are related or known to him or her. As a result, a kinship service placement may be, from the perspective of the child, more disruptive than placement in foster care.

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<sup>390</sup> *Measuring 2005 Transformation Goals to 2010 Child Welfare Practices: Interim Progress Report*, Ontario Association of Children’s Aid Societies June 14, 2011 at 35.

<sup>391</sup> *Ibid.*

This renewed focus on family – now with the expansion to extended family and community – has political appeal but is one that is potentially disruptive to more children. If involuntary removals are being made easier for agencies to achieve, more children are likely to suffer the significant placement disruption that is the initial removal from the care of their parents. Where the use of kinship service leads to more placement disruptions, even if those placements are within a circle of extended family and community members, those disruptions risk interfering with healthy attachment formation.

Adding to the concern, these placement changes within informal care do not count toward legislated time limits for children “in care,” the purpose of which is to reduce the time that children spend in circumstances of impermanence. A child that is formally apprehended following a kinship service placement or a series of such placements, has already suffered impermanence of care. Nevertheless, he or she comes to the experience of formal care with the full twelve or twenty four months of allowable formal care before a decision of permanence is required. Despite being touted as furthering permanency planning, the use of kinship service may well be interfering with continuity of care and delaying resolutions for children.

The solution to the dilemma caused by kinship service placements is not immediately apparent. The renewed focus on family has appeal in all quarters and so interference with that model will not be well received. Certainly a return to added court oversight is not the answer. The toll of the court process is high for all concerned, the delay within the court process is already chronic and, as noted, these placement changes represent only a subset of the possible placement changes that fall within the purview of

these agencies and their staff. However, this issue of involuntary removal through kinship service placements is demonstrative of the complexity of all the issues of child protection. Proposed solutions cannot be expected to resolve all that is wrong and can certainly be expected to give rise to some new and differing challenges.

## **E. Conclusion**

Child protection is a complex balance of the often conflicting needs of children – the need to be emotionally and physically safe, the need for continuity of care and the need for a relationship with one’s family of origin. Historical examinations can help to prevent the repeat of past mistakes and to consolidate the victories of those lessons already learned. Current and ongoing examinations are critical because the vast multi-disciplinary knowledge base influencing the field of child welfare is ever growing and changing.

Within the legal system, Attachment Theory and attachment-related concepts have had their most measurable impact on the body of child protection cases where the best interests of individual children are considered. The impact of attachment issues on the development of legislation reveals recognition of the general concepts but also a failure to adhere strictly to the principles that could result in substantive change for more children. Most concerning is that the wording and the application of the current legislative and regulatory regime neither demand nor allow proactive management of the time that children remain in the temporary care of the state.

In addition to focusing on the need for decisions of permanency for children, there must be room within the formation and the application of the legislation to put an added priority on minimizing the number of moves to which a child is subject, beginning with the initial removal from the family, so as to minimize the trauma and the resulting risk due to interrupted attachments.

Some solutions available to address the sometimes cyclical problems of child welfare require added or redistributed resources. In times of broad fiscal restraint, calls for more resources are not well-received. Inasmuch as solutions offered here require more funding for court resources or for social services, these solutions may be unavailable. However, it is both true and trite to frame such efforts as an investment in the children and therefore an investment in the future. Where a child's attachment needs are not met, there is a risk of intergenerational child protection concerns. Children who develop without secure attachments are at risk for mental health difficulties that can interfere with their own parenting. This will put their own children at risk for abuse and neglect that will, in turn, impede attachment formation for those children thereby likely repeating the cycle of substandard care and child protection involvement.

Attachment disruption increases the risk of negative outcomes for children. Ontario child protection law and practice have changed a number of times since the 1960s and each of those changes was made in recognition of, if not in response to, that accepted truth. However, in Ontario, such changes have been made without assessments of the outcomes for the children whose lives have been impacted by the changes that have come before. Resources have not been dedicated to the long-term research that could demonstrate the impact of the various choices and decisions that are made for

children generally and for individual children during the course of child protection involvement. Given the far-reaching, long-lasting and potentially devastating impact of failed attachment formation, such studies, if completed, could highlight the necessity of investing resources in the preventative services for children that will protect the province from the many costs of these poor outcomes not the least of which is the cost of multigenerational child welfare engagement.

Largely excluded from this review is the aspect of child protection practice that has the most significant impact on children and families – the day-to-day practice of child protection agencies. To spend years pursuing cases such as *M.(C.)* in furtherance of the best interests of one child and of principles regarding the best interests of children generally, child protection agencies require the resources and the will to assert those principled positions. It is clear that, from the attachment perspective, there is certainly work to be done within the legal system. That said, the reality is that few of the day-to-day decisions of a child protection agency make their way into the legal system. Workers and supervisors spend their days making many decisions that will go without much or any court oversight. Such decisions include the use of kinship services arrangements, the transfer of children among temporary care providers and the removal of children from the care of attached foster relationships for placement with members of the family of origin. These decisions represent changes in placement that can be as devastating to a child as would have been the return of the child S.M. to the care of her mother in *M.(C.)* The legal system will provide some boundaries and some direction but in the Province of Ontario, abiding the lessons of 60 years of Attachment Theory research and practice is first and foremost the responsibility of child protection workers and managers.

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