# NOVA SCOTIA COURT OF APPEAL

**Citation:** *Children and Family Services of Colchester County v. K.T.*
2010 NSCA 72

**Date:** Decision Date 20100909
**Docket:** CA 325959
**Registry:** Halifax

**Between:**

Children and Family Services of Colchester County

Appellant

v.

K.T.

Respondent

**Restriction on publication:** **Pursuant to s. 94(1) *Children and Family Services Act.***

**Judges:** MacDonald, C.J.N.S.; Fichaud and Farrar, JJ.A.

**Appeal Heard:** June 25, 2010, in Halifax, Nova Scotia

**Held:** Appeal is allowed. The access provisions in clause 2 of each of the orders under appeal are rescinded. No order for costs.

**Counsel:** S. Raymond Morse, Q,C. and Sarah Lennerton, for the appellant
Anne MacL. Malick, Q.C. and Amber Snow, for the respondent
Peter C. McVey for the Minister of Community Services (Intervenor)

**Restriction on publication: Pursuant to s. 94(1) *Children and Family Services Act***

**PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT s. 94(1) OF THE CHILDREN AND FAMILY SERVICES ACT APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.**

**SECTION 94(1) PROVIDES:**

> **94(1) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.**

**Reasons for judgment**:

OVERVIEW

[1] In child custody matters, a trial judge's fundamental task is to formulate a decision that reflects the child's bests interests. Yet, in child protection matters, specific statutory directives may serve to limit the available options. This is the second in a pair of decisions where we have been asked to address this reality.

[2] In the first decision, (**Nova Scotia (Minister of Community Services) v. T.H.**, 2010 NSCA 63) the trial judge, at a disposition hearing, found it to be in the children's best interests to have them placed in the permanent care of the Minister. He also found it to be in their best interests that they not be adopted. Yet, that was not an available option under the legislation. Instead, according to our *Children and Family Services Act*, S.N.S. 1990, c. 5 (*CFSA*), once a permanent care order is made, it is up to the Minister and not the disposition hearing judge to decide if and when the children should be placed for adoption. Further, it would be up to another judge in a later process to decide if a proposed adoption should be granted. Both the Minister and the adoption judge are to make those decisions in accordance with the child's best interests. Thus, Fichaud, J.A. concluded:

> ¶ 55 The *CFSA*'s processes and standards specifically channel the Legislature's intentions for promotion of the child's best interests respecting adoption. They are not just an alter ego to the child's best interests under s. 2(2), leaving a judge on the disposition hearing with an option to choose one or the other. Rather they flesh out "best interests" in s. 2(2) and, together with s. 2(2), embody the Legislature's prescription to satisfy the child's best interests respecting adoption.
>
> ¶ 56 The decision under appeal would preclude these legislated processes and standards for adoption. The role of the adoption court under ss. 73 and 78(1) would be eliminated. There would be no determination of the child's best interests under s. 78(1)(c). There would be no application of the adjusted adoption criteria for best interests in s. 3(3). There would be no opportunity for a ministerial recommendation to the adoption court under s. 77(2) or, for that matter, a ministerial consent under ss. 74(7) and (8). There would be no real people for the adoption court to appraise as potential parents, and no evidence of residence with the prospective adoptive family for the court to weigh, when the court decides whether adoption is in the child's best interests. In *Nova Scotia (Community Services) v. C.B.T.*, 2002 NSCA 101, at ¶ 12 this court adopted the trial judge's statement, in a ruling after a disposition hearing, that "[t]his court

> does not have jurisdiction over adoption". That is because the *CFSA* assigns that jurisdiction to another court at a later juncture.

[3] In the present appeal, Family Court Judge David Hubley also made a permanent care order. He further found it to be in the children's best interest for them to have continued access to their mother and other family members. The issue for us is whether, in ordering access, the judge paid sufficient regard to the statutory provisions limiting this exceptional form of relief. For the reasons that follow, I conclude that he did not. I would therefore allow the Agency's appeal and set aside the access provisions.

## BACKGROUND

[4] The children are [B.T.] (born in 2001), and [D.H.] (born in 2003). The respondent [K.T.] is their mother . The identity of [B.T.]'s father is unknown. [D.H.]'s father is [W.H.], whose whereabouts are unknown.

[5] [K.T.] has a third child, [M.G.] (born in 2005), who was initially included in the child protection proceedings. However, following the commencement of the hearing, an agreement was reached whereby [M.G.] was placed in the custody of her father, [C.G.].

[6] The Agency's involvement with [K.T.] dates back to when she was herself a child, running away from home and abusing drugs and alcohol.

[7] In 2001, the Agency became involved with [K.T.] and the first child [B.T.], after [K.T.] was assaulted by her then boyfriend (W.H.). At that time, the Agency voiced its concerns regarding the potential impact of domestic violence on the child.

[8] The Agency also had occasion to become involved in 2002 after another incident between [K.T.] and [W.H.]. Over the next few years, there were other incidents necessitating the involvement of child welfare agencies in Nova Scotia, New Brunswick and Ontario.

[9] In November 2006, the Agency received a referral from Truro Police Service following an argument between [K.T.] and the third child's father [C.G.]. The Agency subsequently received expressions of concern regarding [K.T.]'s lifestyle

and parenting of her children - that she was involved in drug use and prostitution, and leaving her children in the care of others, including teenagers, during her long absences from the home.

[10] In January of 2007, [C.G.] called the Agency alleging that [K.T.] worked for an escort service and had been abusing drugs and alcohol. The Agency determined that the three children - [B.T.], [D.H.] and [M.G.] - would have to be taken into care in order to ensure their safety and well-being. This they did.

[11] The Agency implemented random drug testing and also arranged for a parenting capacity assessment to be undertaken by Ms. Valerie Rule, a Registered Psychologist. The drug testing had to be suspended because [K.T.] failed to maintain a stable address.

[12] The stated objective of the Agency's plan of care dated 26 July 2007 was to provide services to remedy and alleviate the conditions that had placed the children in need of protective services. The specific goal for [K.T.] was to be able to obtain the necessary knowledge and skills to adequately parent her children and make the necessary parenting and lifestyle changes to enable her to meet her children's needs.

[13] At a review hearing in September of 2007, the Agency expressed its concern that [K.T.] was not participating sufficiently in its services. While the Agency advised that it was willing to continue to provide [K.T.] with the opportunity to participate in services, it indicated that it may be forced to proceed with an alternative protection plan.

[14] Things seemed to improve. In October 2007, [K.T.] completed a detoxification program. Around this time, she had entered into a relationship with one [A.C.], who had moved to Antigonish to be near her while she was in treatment. However, approximately one week after completing the detoxification program, [K.T.] was arrested for breach of the peace by being highly intoxicated, an incident which she characterized as a "slip".

[15] Circumstances seemed to improve again. At a case conference held on 29 May 2008, it was noted that [K.T.] was engaging appropriately with her therapist and that she had successfully abstained from the use of alcohol and illicit drugs since November 2007. Therefore, at a review hearing on 3 July 2008, the Agency

agreed to vary the temporary care order in favour of a supervisory order whereby the children would return to their mother and the Agency would continue to provide appropriate services and supports.

[16] Then matters began to deteriorate again. Unfortunately, several incidents of domestic violence between [K.T.] and [A.C.] were reported in the following months. At a review hearing on 11 December 2008, a further supervisory order was granted providing that any further contact between [K.T.] and [A.C.] could result in the children being removed from her care. With the Agency's support, [K.T.] moved to the New Glasgow area, while [A.C.] remained in Antigonish.

[17] Things got worse. On 4 January 2009, New Glasgow Police Services contacted the Agency about another domestic violence incident that had occurred between [K.T.] and [A.C.]. It appears that [A.C.] had contacted [K.T.] and had made plans with her to go out to a bar for drinks. While at the bar, they got into an argument. Later, at [K.T.]'s residence, a physical altercation took place in the presence of the child [M.G.]. The police were called and [A.C.] was arrested and charged with breach of undertaking.

[18] In light of this incident, the Agency determined that it was necessary to take the children back into its care, which occurred on 6 January 2009.

[19] Pursuant to a review application and notice of hearing dated 19 January 2009, the Agency confirmed its intention to apply for orders for permanent care and custody in relation to [B.T.] and [D.H.], and to support the father [C.G.]'s application for the custody of [M.G.]. A supplementary plan of care was filed with the Family Court on 6 March 2009, in which the Agency made clear that its plan for [B.T.] and [D.H.] was that they should be adopted.

[20] The application was heard in the late spring and summer of 2009. In a written decision issued on 8 February 2010, Judge Hubley ordered that [B.T.] and [D.H.] be placed in the permanent care and custody of the Agency, holding as follows (at page 95 of the reasons for decision):

> In light of the child-centred standard required by the *Children and Family Services Act* there is clear and convincing evidence that supports and justifies the conclusion that the best interests of the children will only be served by an order which places the children in the permanent care and custody of the Agency.

> An Order for Permanent Care and Custody is consistent with the best interests of the children insofar as it will provide the children with the security, stability and safety of a long-term foster placement where the children's physical, emotional and developmental needs will be adequately met on a consistent basis.

[21] The learned trial judge went on to order parental access for [K.T.], kinship access and sibling access, on the basis that [B.T.] and [D.H.] had established strong bonds with each other, their biological mother and their extended family. The judge offered ten reasons for this order:

> This Court has considered the whole of the evidence and, in the circumstances of this case, finds that the onus on the respondent to establish "special circumstances" which warrant access (including parent access, kinship access and sibling access) has been met and such "special circumstances" include the following:
>
> - At the commencement of these proceedings, the youngest child, [M.G.], was placed with her father. The Agency consented to and supported that arrangement. The Agency also supported "sibling access" and access to the Respondent mother, [K.T.]. (The Agency clearly and consistently stated, however, that "sibling access" would not be a condition of the intended adoption of [B.T.] and [D.H.]).
>
> - [B.T.] and [D.H.] are not infants. [B.T.] will be 9 in September and [D.H.] will be 7 in April. Their younger sister, [M.G.], was born in 2005. [B.T.] and [D.H.] have established strong bonds with each other, their biological mother and their next of kin.
>
> - The bond between the children and the mother is strong. The relationship is positive and the mother has been, without question and the Court so finds, the psychological parent to the children.
>
> - The children have a substantial and extremely positive relationship with their extended family and, in particular, the paternal grandfather, his partner, maternal aunt and uncle. The Court finds that these relationships have been consistently present and positive throughout the children's lives.
>
> - Agency involvement with this family has been ongoing for many years. During which time, the boys have not only maintained their strong

> connection with their biological mother, but also have strengthened the bonds with their extended families. Since the taking into care, there have been patterns of access established which have been, and the Court so finds, will continue to be consistent with the children's best interests.
>
> - The Agency concerns with respect to the Respondent, [K. T.], have primarily focused on addictive behaviours and exposure to domestic violence. Appropriate access can minimize the likelihood of exposure to continued risks of this nature.
>
> - Access, in the circumstances of this case is consistent with maintaining the integrity of the family and is less intrusive, in the circumstances, than severing connections for the purpose of facilitating adoption.
>
> - In the event there is some unforeseen change in circumstances in the future creating a situation where the children are exposed to risk, appropriate steps can be initiated to ensure that continued access remains consistent with the children's best interests.
>
> - Considering access as a "best interests issue", this Court finds that considering the whole of the circumstances of this case that it is in the best interests of [B.T.] and [D.H.] to have access.
>
> - Considering access in relation to Section 47(2), this Court has considered the issue of access/adoption in the context of the best interests of these particular children as opposed to the context of a mandated departmental policy in which access is precluded when adoption is the plan of the Agency.

## STANDARD OF REVIEW

[22] At the outset, I will consider the appropriate standard upon which we should review the trial judge's decision. This depends upon the issue under consideration. For example, we accord trial judges significant deference when reviewing their factual conclusions. The same applies for exercises of discretion. However, on matters of law, we apply a correctness standard where our view of the law would prevail. For example, in **Children's Aid Society of Cape Breton-Victoria v. A.M.**, 2005 NSCA 58, Justice Cromwell (as he then was) said:

> ¶ 26 This is an appeal. It is not a retrial on the written record or a chance to second guess the judge's exercise of discretion. The appellate court is not, therefore, to act on the basis of its own fresh assessment of the evidence or to

> substitute its own exercise of discretion for that of the judge at first instance. This Court is to intervene only if the trial judge erred in legal principle or made a palpable and overriding error in finding the facts. The advantages of the trial judge in appreciating the nuances of the evidence and in weighing the many dimensions of the relevant statutory considerations mean that his decision deserves considerable appellate deference except in the presence of clear and material error: **Family and Children's Services of Lunenburg County v. G.D.** , [2003] NSJ No 416 (Q.L.) (C.A.) at para. 18; **Family and Children's Services of Kings County v. B.D.** (1999), 177 N.S.R. (2d) 169 (C.A.); **Nova Scotia (Minister of Community Services) v. C.B.T.** (2002), 207 N.S.R. (2d) 109; **Van de Perre v. Edwards**, [2001] 2 S.C.R. 1014 at paras. 10 - 16. A.M.

[23] Here, although the decision to grant access is a discretionary one commanding deference, the issue for us is whether the judge properly interpreted the statutory provisions allowing for this type of relief. That is a question of law which I will review on the correctness standard.

## ANALYSIS

### The Best Interests of the Child - The Judge's Role

[24] I begin with the fundamental goal of all proceedings involving children. Their best interests shall be paramount. The *CFSA* reflects this from the outset:

> 2(1) The purpose of this Act is to protect children from harm, promote the integrity of the family and assure the best interests of children.
>
> (2) In all proceedings and matters pursuant to this Act, the paramount consideration is the best interests of the child. 1990, c. 5, s. 2.

[25] Further, in addressing the child's best interests under this legislation, the decision-maker shall, if relevant, consider a host of circumstances:

> 3(2) Where a person is directed pursuant to this Act, except in respect of a proposed adoption, to make an order or determination in the best interests of a child, the person shall consider those of the following circumstances that are relevant:
>
> (a) the importance for the child's development of a positive relationship with a parent or guardian and a secure place as a member of a family;

(b) the child's relationships with relatives;

(c) the importance of continuity in the child's care and the possible effect on the child of the disruption of that continuity;

(d) the bonding that exists between the child and the child's parent or guardian;

(e) the child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs;

(f) the child's physical, mental and emotional level of development;

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

(h) the religious faith, if any, in which the child is being raised;

(i) the merits of a plan for the child's care proposed by an agency, including a proposal that the child be placed for adoption, compared with the merits of the child remaining with or returning to a parent or guardian;

(j) the child's views and wishes, if they can be reasonably ascertained;

(k) the effect on the child of delay in the disposition of the case;

(l) the risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent or guardian;

(m) the degree of risk, if any, that justified the finding that the child is in need of protective services;

(n) any other relevant circumstances.

(3) Where a person is directed pursuant to this Act in respect of a proposed adoption to make an order or determination in the best interests of a child, the person shall take into consideration those of the circumstances enumerated in subsection (2) that are relevant, except clauses (i), (l) and (m) thereof. 1990, c. 5, s. 3.

[26] Of course, a trial judge is one of the key decision-makers mandated to promote a child's best interests. It has been long recognized that trial judges are well positioned to make such key decisions. For example, over 30 years ago, Spence, J. for a unanimous Supreme Court of Canada said this in **Adams v. McLeod**, [1978] 2 S.C.R. 621 at p. 625:

> There is no need to cite any authority to delineate the task of a court upon an infant's custody issue. Time after time, and more particularly through all the latter part of this century, it has been said and repeated that the one cardinal issue is the best interest of the infant and that all else is secondary. How then is that best interest to be determined? Again our courts have been unanimous that the most authoritative pronouncement thereon is by the trial court judge who hears the evidence and assesses it. I commence with the statement by Lord Simmonds in *McKee v. McKee* , [[1951] A.C. 352 (P.C.)], at p. 360:
>
> > Further, it was not, and could not be, disputed that the question of custody of an infant is a matter which peculiarly lies within the discretion of the judge who hears the case and has the opportunity generally denied to an appellate tribunal of seeing the parties and investigating the infant's circumstances, and that his decision should not be disturbed unless he has clearly acted on some wrong principle or disregarded material evidence.

[27] Dealing specifically with the issue before us - parental access in conjunction with a permanent care order - the Supreme Court of Canada in **New Brunswick (Minister of Health and Community Services) v. L.(M.)**, [1998] 2 S.C.R. 534, highlighted the trial judge's duty to perform a delicate balancing act. Gonthier, J. explains:

> ¶ 51 The decision as to whether or not to grant access is a delicate exercise which requires that the judge weigh the various components of the best interests of the child. It is up to the judge to determine which of the child's interests and needs take priority (see *New Brunswick (Minister of Health and Community Services) v. D.T.P.*, [1995] N.B.J. No. 576 (QL) (Q.B.), at para. 41). A child's emotional stability is of prime importance. If the child is unduly disturbed by access, it is generally not granted (see *New Brunswick (Minister of Health and Community Services) v. K.E.B.* (1991), 117 N.B.R. (2d) 229 (Q.B.), at p. 239; *New Brunswick (Minister of Health and Community Services) v. P.P.* (1990), 117 N.B.R. (2d) 222 (Q.B.)).

[28] This court followed Gonthier, J.'s reasoning in **Children's Aid Society of Cape Breton-Victoria v. A.M.**, 2005 NSCA 58, where Cromwell, J.A. (as he then was) noted:

> ¶ 36 These submissions must be considered in light of three important legal principles. First, I would note that once permanent care was ordered, the burden was on the appellant to show that an order for access should be made: s. 47(2): **New Brunswick (Minister of Health and Community Services) v. L.(M.)**, [1998] 2 S.C.R. 534 at para 44 and authorities cited therein. Second, I would observe that, as Gonthier, J. said in **L.M** at para. 50, the decision as to whether or not to grant access is a "... delicate exercise which requires that the judge weigh the various components of the best interests of the child." It is, therefore, a matter on which considerable deference is owed to the judge of first instance for the reasons I have set out earlier. I would note finally that, in considering whether the appellant had discharged her onus to establish that access ought to be ordered, the judge should consider both the importance of adoption in the particular circumstances of the case and the benefits and risks of making an order for access.

[29] Yet when considering a child's best interests, a trial judge must work within the operative statute. In other words, a judge in a child protection matter does not write his or her own standards that are inconsistent with the statutory standards governing the child's best interests.

[30] That said, there may be topics and occasions when a judge can fill in a gap in the *CFSA*'s standards of best interests. As well, there may be a regime where a legislative void allows even greater scope. In Nova Scotia, one such regime is in the field of adult protection. For example, in **Nova Scotia (Minister of Health) v. J.J.**, 2005 SCC 12, 1 S.C.R. 177, the Supreme Court of Canada reviewed a trial judge's role in considering the best interests of an adult in need of protection under Nova Scotia's equivalent adult protection legislation. That *Act* mandated the judge to authorize the Minister to provide services to an adult in need of protection but offered no further direction. As the trial judge in **J.J. (Re)**, 2001 NSSF 12, 193 N.S.R. (2d) 13 pointed out, these provisions left gaps and were much less exacting than those in the *CFSA*:

> ¶ 94 The *Adult Protection Act* is notable for its lack of definition and safeguards, for its sweeping power to take complete authority over the person without meaningful judicial review and absent the more complex directions and procedure outlined in both the *Children's and Family Services Act* and the *Hospital's Act*.

. . .

> ¶ 98 Under child protection legislation, the court refrains from directing the Minister to place a certain child in a certain foster home. However, there are stringent conditions attached to the Minister's intervention, a legislated "least intervention policy" and a heavy civil burden on the Minister throughout the proceedings to justify the nature and extent of their involvement before a final order is made and the court is extracted from the evidentiary review. In the context of this legislation if the court accepts that it must not force a particular placement or facility on the Minister, what does that leave for consideration?

. . .

> ¶ 115 There is a gap in the legislative design between the authorization of significant intervention in an adult's life and the full removal of a persons right to choose for themselves where and with whom they live. For the court to become involved in the second stage of this hearing and both counsel appear to acknowledge the need for this review to move beyond this first stage, the process must fulfill a meaningful legitimate legislative and jurisdictional purpose.

[31] Thus even though the court's statutory mandate was to simply authorize services, to fill this legislative gap the Supreme Court interpreted this mandate broadly to include an assessment of those services:

> ¶ 20 While it is true that the Minister, and not the Family Court, is responsible for developing plans for a vulnerable adult, this does not mean that the Minister can unilaterally dictate the nature of the services or placement. The Act assigns to the court the responsibility to authorize only those services that are in the best interests of the adult because they "will enhance the ability of the adult to care and fend adequately for himself or which will protect the adult from abuse or neglect". It is inherent in that obligation that the court be able to assess whether those proposed services comply with the requirements in s. 9(3)(c). This in turn requires the court to be able to indicate to the Minister what aspect of the plan the court, as the statutorily designated guardian of the adult's welfare, finds acceptable or unacceptable based on whether it meets the statutory test.
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> ¶ 21 To meaningfully fulfil its statutory duty to measure the proposed services against the best interests standard, the court's jurisdiction must of necessity include the ability to amend proposals suggested by the Minister. That in turn means that in putting the Minister's plan on one scale and the adult's welfare on the other, the court must be able to attach reasonable terms and conditions to the

> Minister's suggestions (see *Nova Scotia (Minister of Community Services) v. L.K.* (1991), 107 N.S.R. (2d) 377 (Fam. Ct.), [page 186] at paras. 62-63, *per* Daley J.F.C.). It makes no sense to give a court the jurisdiction to assess the Minister's plan without including in that authority the ability to refine the government's intervention to ensure legislative compliance.

[32] My colleague Fichaud, J.A. also makes this point in **T.H.**:

> ¶ 27 That conclusion does not end the analysis. In *J.J.* the *Adult Protection Act*, a brief enactment, did not specify how the welfare of the adult in need of protection should be determined regarding her placement. So s. 12's statutory mandate to promote J.J.'s welfare infused the judge's general powers under s. 9(3)(c) with a judicial discretion to fashion conditions for J.J.'s welfare. In *Blois v. Blois*, the other authority considered by Judge Levy, the Appeal Division considered the former *Family Maintenance Act*, S.N.S. 1980, c. 6, the predecessor to the current *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160. The *Family Maintenance Act* similarly lacked specific statutory direction on the matter in issue (residence restrictions for custody). Here the *CFSA* is a comprehensive statute with specific provisions defining how, when, by whom, and the criteria by which the child's best interests are to be determined and promoted respecting adoption. These provisions belong in the interpretive exercise. Judge Levy's decision did not consider them. As I will explain, in my respectful view this led to an error of law.

[33] As well, superior court judges in Canada possess a residual *parens patriae* jurisdiction to protect the best interests of children but, again, that power is limited to the filling of legislative gaps (and judicial review). See **N.N.M. v. Nova Scotia (Minister of Community Services)** 2008 NSCA 69 at para. 37, and **Beson v. Newfoundland (Director of Child Welfare)**, [1982] 2 S.C.R. 716 at p. 724.

[34] In summary, while a consideration of a child's best interests is fundamental and important to a judge's role, specific statutory prerequisites cannot be sacrificed in attainment of this goal. It is, after all, within the province of the Legislature, if it so chooses, to prescribe how a child's best interests will be met. This is not the exclusive bailiwick of the judiciary.

**The Legislation**

[35] What then was Legislature's intention when it comes to the granting of access after an order for permanent care? First, I will consider the *CFSA* generally.

[36] The *CFSA* comprehensively details the various specific options available to meet a child's best interests. These options vary with each stage in the process from initial agency involvement up to and including third party adoptions. In **T.H.**, my colleague Fichaud, J.A. examined the various stages and how the legislative priorities changed with each. I will not repeat his comprehensive analysis except to highlight the Legislature's shift in priority when it comes to access.

[37] Before the issuance of a permanent care order, the legislative focus is on preserving the family unit. This would understandably mean that when the children are in temporary Agency care, parental access is to be encouraged so as to hopefully rehabilitate the family. However, with a permanent care order, the focus shifts. Any hope of preserving the family within the legislated time limits is presumably lost and the focus becomes a stable alternate plan. Thus, upon securing a permanent care order, the Agency under the *CFSA* effectively becomes the parent:

> 47 (1) Where the court makes an order for permanent care and custody pursuant to clause (f) of subsection (1) of Section 42, the agency is the legal guardian of the child and as such has all the rights, powers and responsibilities of a parent or guardian for the child's care and custody.

[38] This provision suggests the termination of the natural parents' relationship with the children. However, in special circumstances, post-permanent care access is possible although given the stark change in focus, such circumstances are rare and limited to those that would not jeopardize the new focus, namely an alternate stable placement. Thus, it is not surprising that the provision allowing for such access is highly restrictive:

> 47 (2) Where an order for permanent care and custody is made, the court may make an order for access by a parent or guardian or other person, but the court shall not make such an order unless the court is satisfied that
>
> > (a) permanent placement in a family setting has not been planned or is not possible and the person's access will not impair the child's future opportunities for such placement;

> (b) the child is at least twelve years of age and wishes to maintain contact with that person;
>
> (c) the child has been or will be placed with a person who does not wish to adopt the child; or
>
> (d) some other special circumstance justifies making an order for access.

[39] Therefore, from my reading of s. 47, three conclusions relevant to this appeal are clear. First, the Agency effectively replaces the natural parents. This puts the onus on the natural parents (or guardian) to establish a special circumstance that would justify continued access. Second, by virtue of ss. 47(2)(a) and (b), an access order must not impair permanent placement opportunities for children under 12. Section 47(2)(c) is consistent with this. It provides that if no adoption is planned then access will be available. This highlights the importance of adoption as the new goal and the risk that access may pose to adoption. Third, for children under 12, the "some other special circumstance" contemplated in s. 47(2)(d), must be one that will not impair permanent placement opportunities.

[40] Therefore, to rely on s. 47(2)(d) as the judge did in this appeal, the (special) circumstances must be such that would not impair a future permanent placement. When then would s. 47(2)(d) apply? Consider for example a permanent placement with a family member which will involve contact with the natural parent. Presuming that the adopting parents would be content with that arrangement, the adoption would not be deterred. See **Children's Aid Society of Cape Breton-Victoria v. M.H.**, 2008 NSSC 242 at para. 35.

[41] In short, access which would impair a future permanent placement is, by virtue of s. 47(2), deemed not to be in the child's best interest. This represents a clear legislative choice to which the judiciary must defer.

[42] Finally, I note that this court has made similar pronouncements in the past. See, for example, **A.J.G. v. Children's Aid Society of Pictou County**, 2007 NSCA 78, and **Children's Aid Society and Family Services of Colchester County v. E.Z.**, 2007 NSCA 99.

[43] Regretfully, as I will now explain, the judge in this appeal appeared to ignore this statutory prerequisite when making his access order.

**The Judge's Decision**

[44] Before addressing the judge's specific reasons for allowing access, I will first make some observations about the decision as a whole. In reading the entire decision, it is clear that the judge felt it to be in the children's best interests to maintain the *status quo* with the children remaining in foster care with access to the natural mother and her family continuing. He said:

> The children's mental and emotional needs and the appropriate care to meet those needs is best provided by way of an Order for Permanent Care and Custody permitting the children's existing foster placement to be maintained on a long-term basis (Section 3(2)(e)).

[45] This respectfully is incongruent with the scheme of the *CFSA*. I say this because the *status quo* that the judge wished to preserve was a regime of *temporary* care, which by the time of the disposition hearing had to have ended by the dismissal of the Agency's application and the return of the children to their mother, or an order of permanent care to the agency with or without access.

[46] Furthermore, an order that perpetuates foster care effectively pre-empts adoption. Yet, as we said in **T.H.**, a disposition hearing judge has no ability to make such an order. Furthermore, this approach would also have the effect of extending a temporary care order beyond the clear statutory time limits. As Fichaud, J.A. in **T.H.** explains, this too is problematic:

> ¶ 47 I said earlier that s. 45(1) states maximum time limits for temporary care and supervision, after which the options are either permanent care and custody [with or without access under s. 47(2)] or return of the children to the parent. Section 42(4) permits the court to issue an order for permanent care and custody only when the court is satisfied that the circumstances justifying that order are unlikely to change before the expiry of those maximum time limits. From that statutory perspective, Judge Levy directed Agency permanent care and custody for N.B. and J.B. His decision said:
>
> > Another aspect of the argument presents a real dilemma. With time running out, even if the Applicant's failures were more profound, what do we do? We simply cannot go beyond the end of April. All of the Applicant's shortcomings real or perceived, or those of the Respondents for that matter, can not be meaningfully rectified within that period of

> time. These children have been in and out of temporary care (more in than out) for going on six years. If we say that the Applicant's efforts fell short, do we keep these boys in temporary care longer while we start all over again, or if not all over again, if we just try to re-do all the things that went astray? I hold that we are at, or more likely past, the point where we simply have to bring this proceeding and the attendant uncertainty for all concerned to an end.
>
> ¶ 48 The judge's reasons use the nomenclature of permanent care and custody. But the judge's "conditions on the permanent care and custody order", directing indefinite foster care and, in ¶ 2 of the order, exhorting return to the mother without adoption, replicate the substance of temporary care. There are two difficulties with this, both sourced in the *CFSA*. First, s. 45(1)'s outside time limit for temporary care, discussed earlier, has passed. This time limit is mandatory, not directory: *Nova Scotia (Minister of Community Services) v. B.F.*, 2003 NSCA 119, ¶ 65-68, leave to appeal denied [2004] 1 S.C.R. v.; *A.J.G. v. C.A.S. of Pictou (County)*, 2007 NSCA 78, ¶ 20; *T.B. v. C.A.S. of Halifax*, 2001 NSCA 99, ¶ 24, 26; *C.A.S. of Cape Breton - Victoria v. A.M.*, 2005 NSCA 58, ¶ 32; *Nova Scotia (Minister of Community Services) v. L.L.P.*, 2003 NSCA 1, ¶ 24. Second, as discussed, the Legislature intended that permanent care and custody involve an opportunity for long term stable placement. The principal option for long term stable placement is adoption, according to the *CFSA*'s prescribed standards and procedures that I will address next.

[47] It is on this insecure footing that the judge went on to assess the merits of an access order. Furthermore, while he mentioned s. 47(2), he at no time addressed its very limited application. Instead, in his 10 points repeated below, he seemed to simply embark on a *best interests* analysis that ignored the prerequisites set out in s. 47(2) (while presuming that an arrangement which must be temporary could go on indefinitely).

[48] The first five points simply confirm that the children have a close bond with their mother and extended family:

> 1. At the commencement of these proceedings, the youngest child, [M.G.], was placed with her father. The Agency consented to and supported that arrangement. The Agency also supported "sibling access" and access to the Respondent mother, [K.T.]. (The Agency clearly and consistently stated, however, that "sibling access" would not be a condition of the intended adoption of [B.T.] and [D.H.]).

> 2. [B.T.] and [D.H.] are not infants. [B.T.] will be 9 in September and [D.H.] will be 7 in April. Their younger sister, [M.G.], was born in 2005. [B.T.] and [D.H.] have established strong bonds with each other, their biological mother and their next of kin.
>
> 3. The bond between the children and the mother is strong. The relationship is positive and the mother has been, without question and the Court so finds, the psychological parent to the children.
>
> 4. The children have a substantial and extremely positive relationship with their extended family and, in particular, the paternal grandfather, his partner, maternal aunt and uncle. The Court finds that these relationships have been consistently present and positive throughout the children's lives.
>
> 5. Agency involvement with this family has been ongoing for many years. During which time, the boys have not only maintained their strong connection with their biological mother, but also have strengthened the bonds with their extended families. Since the taking into care, there have been patterns of access established which have been, and the Court so finds, will continue to be consistent with the children's best interests.

[49] These five points would be highly relevant on the disposition hearing proper involving the judge's decision on whether to dismiss the Agency's application or to order permanent care. In fact, they would also be relevant to the access issue but only if limited exceptions set out in s. 47(2) applied. As noted, on this the judge offered no analysis.

[50] The sixth point actually focuses on the mother's best interests as opposed to those of the children:

> 6. The Agency concerns with respect to the Respondent, [K. T.], have primarily focused on addictive behaviours and exposure to domestic violence. Appropriate access can minimize the likelihood of exposure to continued risks of this nature.

[51] The eighth and ninth points seem to ignore the effect of the permanent care order by suggesting that the original family unit be preserved. Yet, the preservation of the family unit is a pre-permanent care consideration. The focus after permanent care is on an alternate permanent placement:

> 8. In the event there is some unforeseen change in circumstances in the future creating a situation where the children are exposed to risk, appropriate steps can be initiated to ensure that continued access remains consistent with the children's best interests.
>
> 9. Considering access as a "best interests issue", this Court finds that considering the whole of the circumstances of this case that it is in the best interests of [B.T.] and [D.H.] to have access.

[52] The seventh and tenth points seem to suggest that, in the judge's view, the opportunity for adoption should yield to parental access:

> 7. Access, in the circumstances of this case is consistent with maintaining the integrity of the family and is less intrusive, in the circumstances, than severing connections for the purpose of facilitating adoption.
>
> 10. Considering access in relation to Section 47(2), this Court has considered the issue of access/adoption in the context of the best interests of these particular children as opposed to the context of a mandated departmental policy in which access is precluded when adoption is the plan of the Agency.

[53] If I am interpreting these clauses correctly, they would run totally contrary to the scheme of the legislation and specifically to my reading of s. 47(2) which (as I have detailed above) directs that access should yield to alternate permanent placements, the most common of which is adoption.

[54] In fact, the judge's seventh point is the only place in his decision where he discusses adoption qualitatively. He clearly de-prioritizes adoption against the return of the family unit. This, in fact, contradicts the definition of "best interests" in s. 3(3) of the *CFSA* (which eliminates that comparison by deleting para. (i) from 3(2) in adoption matters). This was discussed in **T.H.**, *supra*:

> ¶ 49 The definitional section of the *CFSA* confirms the Legislature's repriorization of criteria for the child's best interests in adoption. Section 3(2) defines the factors for determining the child's best interests, "except in respect of a proposed adoption":
>
> > (2) Where a person is directed pursuant to this Act, **except in respect of a proposed adoption**, to make an order or determination in the best

interests of a child, the person shall consider those of the following circumstances that are relevant:

(a) the importance for the child's development of a positive relationship with a parent or guardian and a secure place as a member of a family;

(b) the child's relationships with relatives;

(c) the importance of continuity in the child's care and the possible effect on the child of the disruption of that continuity;

(d) the bonding that exists between the child and the child's parent or guardian;

(e) the child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs;

(f) the child's physical, mental and emotional level of development;

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

(h) the religious faith, if any, in which the child is being raised;

(i) **the merits of a plan for the child's care proposed by an agency, including a proposal that the child be placed for adoption, compared with the merits of the child remaining with or returning to a parent or guardian**;

(j) the child's views and wishes, if they can be reasonably ascertained;

(k) the effect on the child of delay in the disposition of the case;

(l) the risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent or guardian;

(m) the degree of risk, if any, that justified the finding that the child is in need of protective services;

> (n) any other relevant circumstances.
>
> [emphasis by the author]
>
> Then section 3(3) alters those factors for a proposed adoption:
>
> > (3) Where a person is directed pursuant to this Act **in respect of a proposed adoption** to make an order or determination in the best interests of a child, the person shall take into consideration those of the circumstances enumerated in subsection (2) that are relevant, **except clauses (i), (l) and (m) thereof.** [emphasis by the author]
>
> ¶ 50 Of particular interest in s. 3(3) is the exclusion of clause 3(2)(i) from the criteria that govern adoption. A judge is not to consider, in his analysis of the "best interests of the child" respecting adoption, the "merits of ... a proposal that the child be placed for adoption, compared with the merits of the child remaining with or returning to a parent or guardian". Judge Levy's decision did not mention ss. 3(2) or (3), or their revised criteria for determining the child's best interests respecting adoption. Yet the decision said that "this order will preclude the children being placed for adoption", and clause 2 of the order (quoted above ¶ 15) directs that, if the existing foster placement ceases, "the Minister shall also give serious consideration to placing the child in the care of the respondent, [T.H.], having regard to the best interests of the child". The judge compared the Agency's plan for adoption with the merits of returning the boys to their mother, then chose to encourage the latter and preclude the former.

[55] In summary, the judge ordered access after a permanent care order without paying meaningful consideration to the legislative directives set out in s. 47(2).

[56] Further on this point, consider the front end of the child protection process when agencies first become involved. Then the legislative focus is on preserving the family unit by offering services. Permanent care at that stage under the same legislation is to be considered a last resort. See for example:

> 42(2) The court shall not make an order removing the child from the care of a parent or guardian unless the court is satisfied that less intrusive alternatives, including services to promote the integrity of the family pursuant to Section 13,
>
> (a) have been attempted and have failed;
>
> (b) have been refused by the parent or guardian; or

> (c) would be inadequate to protect the child.

[57] Yet, what if the judge at that stage could consider only what he viewed as the best interests of the children without reference to those statutory prerequisites? He may very well have been tempted to order an immediate adoption so as to prevent any further risk to these children. But that simply is not how the legislation operates.

[58] In my view, it is no different at the other end of the spectrum. The limitations of the statute must be respected however strongly the judge may feel about the child's best interests.

[59] Thus, the judge seemed to have applied pre-permanent care priorities to the post-permanent care end of the process. This lured him into reversible error. It therefore falls to us to consider an appropriate remedy.

**Appropriate Remedy**

[60] To honour the important time lines prescribed in the legislation, it would be completely impractical for us to remit this matter to the trial court. Instead we should, based on the extensive record, decide whether special circumstances justify an access order under s. 47(2).

[61] The answer in my view is clearly no. I say this for the following reasons.

[62] The Agency's plan is for adoption and having received a permanent care order, that is its decision to make. It is equally clear that an access order would impair this proposed future placement. In fact the judge acknowledged this when apparently accepting the evidence of Adoption Supervisor, Ms. Katherine Gate:

> Ms. Gate testified that the most adoptable child is the one that comes without strings attached. These would be the children without openness or legal access orders and she confirmed that legal access orders cause a barrier that can be problematic to adoption placement. Ms. Gate testified that openness agreements or legal access orders are a barrier to finding an adoption placement match. She explained that even an openness agreement can reduce the number of available adoption homes.

[63] Ms. Gate's evidence on this point bears highlighting:

> Q. Okay. And again, with respect to a scenario, how would -- in a scenario where there was a -- where the agency, for whatever reason, took the position that they were looking for an adoptive home willing to facilitate direct access contact between the children or child and the biological parent, how would that, in your experience, in your assessment, how would that impact upon the ability of the agency to find a suitable adoptive home?
>
> A. It would be a tremendous barrier. Essentially, when we're seeking adoptive homes, we are trying to match the children and their needs and their interests, health, essentially matching the children to an appropriate adoptive home with the interests and abilities and such of the adoption parent -- adoptive parents. So free and clear, that's the best way to match, is who are these children and what do they need, and the adoptive parents, who are they and what can they provide. That is kind of the easiest but also the most successful way to do that. Once you add on openness agreements, indirect, the pool is not tremendously reduced because many are willing to consider it. It's not a guarantee but they're willing to consider it. As soon as we talk about direct contact, I'm not familiar with any adoptive home for a parent to facilitate direct contact with a biological parent. Might there be one that would facilitate extended family? Possibly. I'm aware of one, for example, and that's through our adoption worker being well versed in terms of who does she have within our pool. But in terms of direct parental contact, I'm not aware of any that would. So although legally they are available for adoption, the adoptive pool, if you will, that we would have to choose from would be, if there's any -- I don't know if there would be any to start with, and if there was, that would not be matching the children and what their needs are to an appropriate adoptive home. That would be matching on, well, there's nothing left. And that's not an approp -- that's not the appropriate way to do an adoption placement.

[64] Further on cross-examination, Ms. Gate added:

> Q. Okay. I understood you to say that the adoptive worker is always in a dialogue with homes and suggesting, you know, have you considered this, would you consider that. So...
>
> A. Yes. And I don't have any. In the last five years, I have not heard of one in my office, nor in my region, who is open -- and this is the stranger adoptions -- who are open to legal access orders, because you're speaking...

Q. How many -- how...

A. ...about legal access orders.

Q. And how many have you asked?

A. It's a constant discussion when we're -- when one is talking about their -- with their home studies, the openness agreement is talked about. There's a section in their home studies that speaks to the -- when we say openness agreement, they're speaking about what type of contact. I have yet to read one where they are open to having direct contact. And if they're not willing to do it during an openness agreement where they maintain the care and control of the child, they can discontinue if they feel it's appropriate, they're not willing to do that. It doesn't have a section where they talk about if there's a legal access order, because that's even more intrusive or more involved.

Q. So what you're suggesting is that, despite what the legislation says, despite what your policy says, there's no such thing as access if you want adoption?

A. Legally, there are tenets that make that available. The reality is people are not -- in this day and age, they're not ready for that yet and they're not open to that. The exception is the foster parent that are prepared to adopt. And that's where the legislation and the standards encompass those possibilities too.

## DISPOSITION

[65] In conclusion, the access provisions in the orders under appeal impair the children’s opportunities for an alternate permanent placement. They must be struck.

[66] I would allow the appeal and rescind the access provisions, being clause 2 in each of the orders under appeal. I would order no costs.

MacDonald, C.J.N.S.

Concurred in:

Fichaud, J.A.

Farrar, J.A.