NOVA SCOTIA COURT OF APPEAL

Citation: *P.N. v. Nova Scotia (Community Services)*, 2020 NSCA 70

Date: 20201029
Docket: CA 498049
Registry: Halifax

Between:

P.N.

Appellant

v.

Minister of Community Services and
C.C. and B.C.

Respondents

Restriction on Publication: pursuant to s. 94(1) of the *Children and Family Services Act*

Judge:	The Honourable Justice Anne S. Derrick
Appeal Heard:	September 8, 2020, in Halifax, Nova Scotia
Subject:	**Child Protection Proceedings; Permanent Order for Care and Custody; Access; s. 47(2), of the *Children and Family Services Act*, S.N.S. 1990, c. 5; Procedural fairness.**
Summary:	The Appellant is the biological father of M., a ten-year old girl. During the entire time M. was the subject of child protection proceedings, the Appellant was incarcerated. He participated in the proceedings remotely and, in their latter stages, was represented by counsel. He acknowledged he was in no position to physically care for M. The plan he proposed for her foster care was rejected by the Minister. He sought only ongoing access, which, as a matter of law, cannot be ordered once an Order for Permanent Care and Custody has been made.

Issues: (1) Did the trial judge order permanent care and custody on the basis of no evidence?
(2) Did the trial judge deny the Appellant procedural fairness in the course of the protection proceedings?

Result: Appeal dismissed. The trial judge ordered M. into the permanent care and custody of the Minister on the basis of the evidence before her. The Appellant provided no evidence and made no request for an opportunity to do so. He did not seek to cross-examine the Minister's evidence. He produced no alternative plan of care for M. His sole focus throughout the proceedings was on obtaining access to M., either by telephone or electronically. His complaints that he was denied procedural fairness were without merit.

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Judges:	Bryson, Van den Eynden and Derrick, JJ.A.
Appeal Heard:	September 8, 2020, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Derrick J.A.; Bryson and Van den Eynden JJ.A. concurring
Counsel:	Raymond W. Kuszelewski, for the appellant Peter C. McVey, Q.C. and Angela Swantee, for the respondent

Restriction on publication: Pursuant to s. 94(1) *Children and Family Services Act*, S.N.S. 1990, c. 5.

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:

Introduction

[1] P.N. is the biological father of M. who is now 10 years old. C.C. is M.'s mother. P.N. has had no access to M. since he was incarcerated in mid-2017. In June 2019, proceedings were commenced pursuant to the *Children and Family Services Act*, S.N.S. 1990, c. 5, s. 2 ("*CFSA*") in relation to M. and her two younger half-brothers. The two brothers are the children of C.C. and B.C. and are not the subject of this appeal.

[2] P.N. participated in the child protection proceedings relating to M., seeking access. He now claims to have been treated unfairly.

[3] On March 19, 2020 Judge Corinne Sparks of the Family Court rendered her decision placing M. in the permanent care and custody of the Minister of Community Services. The Order for Permanent Care and Custody was issued on March 24. C.C. has not appealed this Order.

[4] When the Order for Permanent Care and Custody was granted, P.N. was incarcerated, as he had been throughout the entire proceedings before the Family Court. He acknowledged he was in no position to physically care for M. The plan he had proposed for her foster care was rejected by the Minister. He had sought only ongoing access, something that, as a matter of law, cannot be ordered where an Order for Permanent Care and Custody has been made. (s. 47(2), of the *CFSA*.)

[5] P.N. has appealed the trial judge's Order, saying it was made "without evidence" and that he was denied natural justice. For the reasons that follow, there is no merit in these claims and I would dismiss the appeal.

Agency Involvement with P.N. and M. – 2011 to 2017

[6] As the trial judge found on the evidence before her, M. experienced ongoing instability throughout her short life. Residence stability has been a particular concern of the Department of Community Services (the "Agency").

[7] A first application by the Agency for protective services for M. on September 9, 2011, when she was just short of her first birthday, led to an order that provided

P.N. with supervised access. That proceeding was terminated on July 4, 2013 and M. was placed in P.N.'s primary care.

[8] P.N.'s care of M. unravelled over time.

[9] There were referrals to the Agency concerning P.N. in June and October 2016. The June referrals included allegations of intoxication, unfit living conditions, emotional abuse and a "substantial risk of sexual abuse". They related to his care of M. and a younger brother with a different biological mother. None of the allegations were substantiated. The referral source reported that: P.N.'s apartment was dirty, the children were sleeping on the bare floor in sleeping bags, P.N. yelled and swore at the children constantly, and M. was telling P.N. to stop inappropriate touching.

[10] In October 2016, there were reports of disruptions in M's school attendance and P.N. appearing to be under the influence of drugs when M. was dropped off for an access visit with C.C.

[11] In June 2017, M. was placed in the care of her mother, C.C.

[12] P.N. reacted to the June 2017 court order by taking M. out of Nova Scotia. Police and child protection authorities eventually located them in Newfoundland, living in a tent.

[13] Once back in Nova Scotia, M. was returned to her mother. She continued to be subject to the chaos and turmoil that characterized her mother's circumstances.

The 2019/2020 Child Protection Proceedings in relation to M.

[14] On June 3, 2019, the Agency initiated a second child protection proceeding in relation to M. In the supporting Affidavit of the same date, the Agency social worker detailed "a long history of involvement with [C.C.] and her children". In summary,

> …[C.C.] has demonstrated significant instability with respect to [M.] and now with respect to her two younger children. The Agency has concerns about [C.C.'s] emotional stability and mental health, which are negatively impacting her ability to parent and make safe choices for her children.

[15] Of relevance to this appeal is P.N.'s status in June 2019. He had been convicted in late 2018 of multiple offences and given a jail sentence. He was incarcerated at the Northeast Nova Correctional Facility (located in Pictou, Nova

Scotia). P.N. had a pending charge of assaulting a correctional officer. He was appealing his convictions although the appeal had not yet been heard.

[16] In the June application for protective services for M. and her two brothers, the Agency alleged that, pursuant to ss. 22(2)(b)(g) and (k) of the *CFSA* the children were at substantial risk of physical harm, emotional abuse and neglect. The Agency's lengthy Affidavit contained the allegations and intended evidence, and the orders sought in the proceeding.

[17] The Protection Hearing had to be completed no later than 90 days after the date of the application. (s. 40(1)(a), of the *CFSA*)

[18] On June 6, 2019, there was an Interim Hearing (pursuant to s. 39(1), of the *CFSA*) before Judge John Comeau of the Family Court. P.N. participated by video-conference. He could hear counsel for the Minister and make submissions. He said Mr. Eugene Tan had been retained to represent him and would attend the next court appearance.

[19] P.N. took issue with aspects of the Agency's Affidavit evidence and responded accordingly. He told Judge Comeau he understood the need to prepare an affidavit to explain himself more clearly. The court informed him he could file an affidavit within the 30-day time period (a time period established under s. 39(4), of the *CFSA*) and before the next appearance.

[20] P.N. asked the court to order telephone access between himself and M. as provided for in a previous court order. He said he was "seeing Psych for ADHD and depression and anxiety regarding my children" and that he would be released from jail in March 2020 at the latest. He acknowledged that "[M.] has been through far too much for any child…more than any child should have been through and she deserves stability for sure". He added that he had been "a large part" of M.'s stability in the past and said "that should not have been interrupted. I'm asking that that be continued…that I be allowed to contact her via phone".

[21] Judge Comeau found there were reasonable and probable grounds to believe the children were in need of protective services. An Interim Order was granted that included a recital concerning access, pursuant to s. 39(4)(c). It was ordered that P.N. "shall not reside with or contact or associate in any way with [M.] unless otherwise approved by the agency". The matter was adjourned for continuation within 30 days as required by s. 39(4) of the *CFSA*.

[22] The protection application returned to court on June 20, 2019 before Judge Sparks ("the trial judge"). P.N. appeared by videoconference. He had not filed an affidavit. He advised he had retained Eugene Tan. (Mr. Tan informed the Agency he expected he would be retained.) P.N. again asked for telephone contact with M..

[23] The Agency was seeking to have M. remain in the care of her great-grandparents where she had been living. The trial judge asked P.N. if he had anything he wished to add. P.N. responded:

> I certainly have no objections with [M.] remaining with her grandmother[1]. The only objection I have is contact with my daughter…And what I'd like…I'd like to have a phone…be able to contact her by phone weekly.

[24] The trial judge directed P.N. to take the matter of access up with Mr. Tan "…and he can address that matter with the Court when we next appear on this matter."

[25] A further Interim Order was granted, concluding the Interim Hearing. The court-ordered prohibition on contact between P.N. and M. was continued.

[26] The trial judge completed the Protection Hearing on August 29, 2019 with a finding on the balance of probabilities under all three grounds under ss. 22(2)(b), (g) and (k) that the three children were in need of protective services. She had before her an Affidavit from the Agency's social worker sworn August 22, 2019. Her Order continued the terms of the previous Interim Orders, including that P.N. was not to have any contact with M. without Agency approval.

[27] P.N. was not present on August 29. The trial judge noted he had acknowledged the return date when it was set on June 20. She directed the Agency to share the outcome of the hearing with him. There is nothing in the record before us to explain why P.N. missed the August 29 appearance.

[28] On October 18, 2019, in accordance with s. 41(1) of the *CFSA*, the Agency sought a Disposition Order in relation to the children. A Notice, an Agency Plan for the Child's Care, and a supporting Affidavit from the Agency's social worker sworn October 24, 2019 were filed.

[29] The Agency Plan sought an Order continuing a supervisory placement of M. with her maternal great-grandmother. Areas of concern disclosed in the Agency's

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[1] M. was in the care and custody of her maternal great-grandparents (C.C.'s grandparents), subject to supervision.

Plan included: Parental Substance Abuse; Family Violence; and Parental Mental/Emotional Health relating to C.C.. The Agency sought a continuation of therapy for M. to address "healthy attachment, exposure to trauma, and [her] emotional regulation in times of stress." The Plan noted that M.'s great-grandmother was working with M.'s therapist "to provide context of what [M.] has experienced, and support the strategies [M.] is learning in her sessions".

[30] The Agency stated its position regarding P.N. as follows:

> [P.N.] has been incarcerated for all of the time that the Agency has been involved with [B.C.] and [C.C.] for this most recent court involvement. The areas of concern that have been identified for which services have been put in place, are related to personal and relationship issues for [C.C.] and [B.C.], and do not currently include [P.N.] The Agency does, however, have concerns related to concerning behaviours for P.N. prior to and during his incarceration that are of a child protection nature and expect[s] that he avail himself to [of] any services that the correctional facility provides.

[31] On October 31, 2019, the trial judge granted a Disposition Order commencing the 12 month maximum period established by s. 45(2)(a) of the *CFSA* for the disposition phase of the protection proceedings.

[32] The Disposition Order, made pursuant to s. 42(1)(c) of the *CFSA*, provided that M. would remain in the care and custody of her great-grandparents, subject to the supervision of the Agency. It provided for the continuation of the no-contact between P.N. and M. "unless otherwise approved by the agency". (The no-contact provision was included pursuant to s. 43(1)(d) of the *CFSA*. An identical provision was imposed denying access to C.C.) Mr. Ray Kuszelewski, acting for P.N. by this point, consented to the Order.

[33] At the Disposition Hearing, P.N. told the court he wished to "re-establish contact with M.". Mr. Kuszelewski said P.N. was,

> …serving a sentence and he doesn't want to lose touch with [M.]. And there is no order in place that allows him or…to make contact with her or she with him and [P.N.] would like to see some form of electronic contact be it by telephone or some other electronic means in the interim.

[34] The Agency wanted to get M.'s therapist's input on the issue, whether it would be to M.'s benefit and something she could handle, as there had been no contact with P.N. for some time. Introducing instability was a concern given the upheaval M. had experienced.

[35] The trial judge said she would find it "helpful" to hear from M.'s therapist "before ordering any type of contact even via telephone or digitally".

[36] There were some efforts by the Agency to speak with P.N. between the time of the October 31 Disposition Hearing and when the matter returned to court on December 12, 2019: a November 6 call did not happen due to miscommunication and, on November 14, P.N. declined to participate in a call. On November 29, 2019 P.N. called the Agency's social worker who detailed the conversation in the Affidavit she filed in support of the Minister's application for permanent care and custody of M. Later in these reasons, I will set out those details.

[37] The Agency filed a Review Application dated December 3, 2019 seeking to have M. placed in the temporary care and custody of the Minister pursuant to s. 42(1)(d) of the *CFSA*. The application was supported by the Affidavit of the Agency's social worker. The Affidavit indicated M. would be taken into the care and custody of the Minister prior to the December 12 court appearance, "based on the request of [M.'s great-grandmother] and [C.C.]". M.'s great-grandmother had advised the Agency she and her husband were "no longer a viable long-term plan for [M.] and [C.C.] has indicated that she is leaving Nova Scotia and giving up her parental rights with respect to all of her children".

[38] At the December 12 Review Hearing, P.N. appeared by videoconference from jail. Mr. Kuszelewski attended in court as did the lawyer for the Agency. Mr. Kuszelewski advised that P.N. hoped to maintain contact with M. pending his anticipated return to the community in the first week of May 2020. The trial judge was told a proposal by P.N. for contact would be forthcoming before the next Review Hearing, scheduled for March 5, 2020.

[39] The Order for no contact was continued. Mr. Kuszelewski consented on P.N.'s behalf.

[40] On February 20, 2020, the Agency applied for an Order for Permanent Care and Custody of M. P.N. was provided with notice through Mr. Kuszelewski. Attached to the Notice was the Agency's revised Plan of Care dated February 18. It stated there were no services beyond those in place or attempted; P.N.'s proposal for a kinship foster placement with T.S., a family friend of P.N.'s, should be rejected; and P.N. should not have access to M.

[41] The Agency identified services provided to P.N. between 2012 and 2013 as: psychiatric assessment, supervised urine collection, parental capacity assessment,

family support with an Agency Family Support Worker, individual therapy, and New Start Counselling.

[42] The Agency sought an order for no access with M. on the basis that access "would hinder adoption". It was the Agency's opinion that access with P.N. was not in M.'s best interests.

[43] The Plan of Care contained the Agency's reasons for recommending against access for P.N.:

> …he also lacks insight into the risks associated with his decision making and its effects on his child. Also, the Agency has previously been recommended by the correctional facility that they could not guarantee the safety of the child with the nature of the behaviours while incarcerated, by P.N..
>
> …
>
> P.N. has no contact with his child at this time. He has been asked to show commitment to services that would demonstrate his ability to follow through with Agency intervention and stability, however, due to his incarceration, it is impossible to determine what this would look like outside of incarceration.

[44] The Agency's rejection of T.S. as a foster placement related to her presence at the home when, in anticipation of a change of custody, P.N. took M. out of Nova Scotia in 2017. (This was the Agency's view of P.N.'s motivations which P.N. disputed.) The Agency noted that T.S. lived in Newfoundland and "[M.] does not appear to have a long-standing relationship" with her. (Under s. 42(3)(a) of the *CFSA*, a "meaningful relationship" is a requirement for a placement with "a relative, neighbour or other member of the child's community or extended family" as an alternative to the court making a temporary or permanent care and custody order.)

[45] The Agency Plan confirmed that October 30, 2020 was the deadline for making a final decision regarding M.'s future care and custody. The Agency indicated it would be seeking an adoptive home consistent with M.'s religion, culture, race and language. The Plan of Care reiterated that M.'s great-grandmother had "removed herself from consideration as a long-term option" for the care of M.

[46] The trial judge heard the application on March 5, 2020. Mr. Kuszelewski participated with P.N. appearing by videoconference. Mr. Kuszelewski agreed to the matter being adjourned to permit review of a significant amount of documentation filed by the Agency. In the meantime, he said he was prepared to simply "let things lay" as they were until the new date.

[47] A further Review Order was granted continuing M.'s placement in the temporary care and custody of the Agency. The Order maintained the denial of access to P.N. Mr. Kuszelewski consented to the Order for P.N.

[48] The parties were next before the trial judge on March 19, 2020. Mr. Kuszelewski attended by telephone. P.N. was to participate by videoconference as he was still incarcerated. However, he had not joined by the time the hearing got underway. Mr. Kuszelewski said he had instructions and advised it was not critical for P.N. to be present.

[49] The trial judge asked if P.N. was "putting forward a Plan of Care for custody for [M.]". Mr. Kuszelewski responded:

> As the Court is aware, my client is only interested in gaining access with [M.]…he wishes to maintain…at this point in time, telephone or electronic contact with her…

[50] Mr. Kuszelewski explained the duration of P.N.'s continued incarceration was uncertain. He said it was "not definitive as of this point because there are still outstanding matters before the criminal court." He reiterated his client's interest in "telephone or electronic contact" with M..

[51] A further exchange followed:

> **The Court**: And is he putting forth a Plan of Care for custody of [M.]?
>
> **Mr. Kuszelewski**: At this point in time, he's in no position physically to put forward a Plan of Care because he's still at a stage in the trial process where that hasn't been determined. So he can't say if he will paroled or he will be released so, no, he can't at this point.
>
> **The Court**: All right.
>
> **Mr. Kuszelewski**: But he would like to at least maintain electronic communication.

[52] The trial judge observed that a plan from P.N.,

> …may unfold in the fullness of time. But Mr. Kuszelewski says that his client is not putting forth a Plan of Care now and that it's impossible for him to do so. Obviously time is of the essence…(inaudible).

[53] The trial judge recognized that time was of the essence in terms of settling the issue of M.'s permanent care and custody.

[54] The Minister's lawyer encapsulated the instability that characterized M.'s experience:

> [M.] has had a difficult life being shuttled between her parents at certain points in time, has lived with their great-grandmother who has indicated she (does not have? [*sic*]) a long-term plan, and to be able to provide her with some permanency and something that she … (inaudible) settled in her life and moving forward and find an adoptive family for her would be extremely beneficial in the Agency's view".

[55] In response to the trial judge asking Mr. Kuszelewski if P.N. was consenting to the permanent care order, Mr. Kuszelewski said "clearly I can't consent. I don't have instructions to consent but I have no evidence to offer so I'm offering no evidence as well."

[56] Based on the Affidavit evidence before her, the trial judge ordered M. placed in the permanent care and custody of the Minister, stating:

> …the order for permanent care and custody will go forward as of today's date based upon the affidavit evidence before the Court. The Court is fully aware of the background, and grave circumstances which [M.] has had to endure and which she now faces… (inaudible). The court is also aware of the difficulties she has had, and the manifestations with respect to the mother and father, and their ongoing circumstances which do not make it possible for the parents to provide for [M.] …(inaudible) right now.
>
> …
>
> But just to summarize, an order will go forward placing the child, [M.], in the permanent care and custody of the Agency. I do so in the overall best interests of [M.]. And, I also find the permanent care and custody order to be the least intrusive option in the legislation, consistent with [M.'s] overall welfare (inaudible). This is the best option in the present circumstances.
>
> I do note that neither parent is available today. However, both are represented by legal counsel. And neither parent has put forward a Plan of Care for [M.'s] long term care …(inaudible). So the order will go forward unfortunately.

[57] The trial judge was aware of the legal effect of making the Order for Permanent Care and Custody, saying: "It's a difficult situation because if an order of permanent care and custody is granted by the Court, there cannot be any provision for access". She was referring to s. 47(2) of the *CFSA* which states:

> Where the court makes an order for permanent care and custody, the court shall not make any order for access by a parent, guardian or other person.

[58] The trial judge's Order for Permanent Care and Custody was issued on March 24, 2020. It stated that:

- She had found M. to be in need of protective services pursuant to the ss. 22(2)(b), (g) and (k) of the *CFSA* on August 29, 2019.
- The trial judge had read the Review Application and Notice of Hearing dated February 20, 2020 "and the documents attached thereto, and all other documents on file".
- The decision respecting disposition, included "a statement of the plan for the children's care[2] and the reasons for the decision on March 19, 2020.
- Counsel for C.C. had taken no position on the application and presented no evidence.
- Mr. Kuszelewski, representing P.N., had taken no position on the application and presented no evidence.

[59] P.N. appealed none of the Orders granted during the protection proceedings except for the Order that is the subject of this appeal, the final Disposition Order placing M. in the permanent care and custody of the Minister.

P.N.'s Grounds of Appeal

[60] Mr. Kuszelewski filed P.N.'s Notice of Appeal. The grounds stated that the trial judge had erred:

- In deciding the issues of permanent care for M. "without requisite or reliable evidence".
- In applying s. 22(2)(b), (g), and (k) of the *CFSA*.

[61] In his Factum, P.N. used slightly different wording to describe the trial judge's alleged errors and added two additional issues. He framed the original grounds around the trial judge having decided "the matter without evidence" and having decided, without evidence, that ss. 22(2)(b),(g), and (k) applied.

[2] The children included M. and her two brothers although only M. was placed in the permanent care and custody of the Minister. The two boys were placed with their father, B.C..

[62] The two added grounds alleged that:

- P.N. was "denied natural justice in not being allowed to present a case plan".
- P.N. was "denied a right to be heard without a hearing".

[63] We permitted submissions on P.N.'s added grounds of appeal. The Respondent Minister did not oppose P.N. advancing them. She noted this Court could apply *Civil Procedure Rule* 90.11(1) to allow P.N. to raise the new issues. The Respondent addressed the issues fully in her factum and they were argued and responded to before us at the appeal hearing.

[64] It is useful to set out the content of the *CFSA* sections referred to by P.N. in his grounds:

> s. 22(2)(b) A child is in need of protective services where there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (a). ["Substantial risk" means a real chance of danger that is apparent on the evidence.]
>
> s. 22(g) A child is in need of protective services where there is substantial risk that the child will suffer emotional abuse and the parent or guardian does not provide, refuses or is unavailable or unable to consent to, or fails to co-operate with the provision of, services or treatment to remedy or alleviate the abuse.
>
> s. 22(k) A child is in need of protective services where there is a substantial risk that the child will experience neglect by a parent or guardian of the child, and the parent or guardian does not provide, refuses or is unavailable or unable to consent to, or fails to co-operate with the provision of, services or treatment to remedy or alleviate the harm.

[65] P.N. asked for his appeal to be allowed and the trial judge's order "vacated". (The wording in P.N.'s Notice of Appeal is slightly different: there he asked for the order to "be rescinded and the court below rehear the appellant").

Standard of Review

[66] The issues being advanced by P.N. are questions of law. Accordingly, the standard of review is correctness.

[67] It is an error of law to make a finding of fact for which there is no supporting evidence. (*R. v. J.M.H.*, 2011 SCC 45, at para. 25)

[68] It is an error of law to fail to ensure procedural fairness. An assessment of the process in the court below generally does not engage a standard of review analysis. As stated by this Court in *Slawter v. Bellefontaine*, 2012 NSCA 48, at para. 18:

> However, with respect to the issue of procedural fairness, it is the duty of this Court to assess the process that led to the decision under appeal, as opposed to the actual decision itself. As such, there is generally no standard of review…[*cites omitted*] Whether the duty to ensure procedural fairness was breached is a question of law, and as such the adjudicator either fulfilled the duty required or did not (*NS (Community Services) v. N.N.M.*, 2008 NSCA 69).

[69] The Minister correctly notes that procedural fairness includes notice of the issues before the court to be adjudicated, and an opportunity to cross-examine, lead evidence, and/or make submissions on those issues. (*Slawter v. Bellefontaine*, paras. 5 and 56)

The Essence of P.N.'s Attack on the Trial Judge's Decision

[70] Broadly speaking, P.N.'s attacks on the trial judge's decision to place M. in the permanent care and custody of the Minister fall into two categories – "no evidence" and a denial of procedural fairness. What P.N. means by saying the trial judge made the order "without evidence" is this: the substantive grounds on which she relied – ss. 22(2)(b), (g), and (k) of the *CFSA* – either related to C.C.'s issues with no proof they had any relevance to P.N. or were inapplicable to him because he had been unable to file a Plan of Care due to being incarcerated.

[71] P.N seeks to draw an analogy to *NS (Community Services) v. C.K.Z.*, 2016 NSCA 61. In *C.K.Z.*, this Court in reviewing s. 22(2)(b) said the trial judge there had failed to undertake any analysis as to whether the evidence established a substantial risk of harm to the children.

[72] P.N. makes the further complaint that his lawyer was not given the opportunity to cross-examine the evidence placed before the trial judge by the Agency. He argues there was still time for a further hearing before the outside date by which a final disposition order would have to be made – October 30, 2020.

[73] As for the denial of procedural fairness, P.N. advances several complaints. He says:

- He was never considered as a placement for M. "at any time throughout the proceedings although he maintained his interest and involvement and his release date was defined".

- The Agency's plan for him, included in its "Agency Plan for the Child's Care" dated October 17, 2019 and filed with the Application for Disposition of October 18, 2019, was "non-specific, vague and general".

- The foster placement P.N. proposed for M. was rejected by the Agency.

- He was never interviewed by the Agency which relied on previous recommendations of the correctional facility, "which recommendations were never specifically directed to P.N."

- The Agency provided no evidence to the trial judge of requests for his "commitment to services". (Here, P.N. is referring to the Agency's "Plan for the Child's Care" dated February 18, 2020, in which the Agency said P.N. "has been asked to show commitment to services that would demonstrate his ability to follow through with Agency intervention and stability…")

- P.N. was not present at the March 19, 2020 hearing at which the protection proceedings involving M. were concluded with a permanent care and custody order in favour of the Minister.

[74] P.N. says his lawyer did not consent to the Permanent Care and Custody Order being issued. He takes issue with the trial judge deciding the matter "based on affidavit evidence alone".

The Position of the Respondent Minister of Community Services

[75] The Respondent notes that when the Order for Permanent Care and Custody was made, P.N. was incarcerated, as he had been throughout the entire proceedings before the Family Court. P.N. acknowledged he was in no position to physically care for M., and offered no acceptable plan for her custody. He expressly sought only ongoing access, which is not available where an Order for Permanent Care and Custody has been made.

[76] Notwithstanding his complaints about fairness in the process, P.N. did not seek to cross-examine the Agency's social worker whose affidavits supported the

Minister's application. He did not offer any evidence or ask for a further adjournment to formulate a viable plan for M.'s future custody.

[77] M.'s circumstances had been before the Court over many years, during the course of two child protection proceedings. She had variously been in the custody of her mother (C.C.), her father (P.N.), and her great-grandparents. She had experienced dislocation and instability in her living circumstances and her schooling. The Order for Permanent Care and Custody was made on the basis of Affidavits sworn by the Agency social worker on June 3, 2019, August 22, 2019, October 24, 2019, December 3, 2019, and February 20, 2020. The trial judge had no other plan before her to consider other than the Minister's.

Analysis

[78] I am satisfied P.N. has not established the trial judge made the Permanent Care and Custody Order without an evidentiary basis. Nor has he shown that he was denied procedural fairness during the proceedings.

[79] The trial judge ordered M. into the permanent care and custody of the Minister on the basis of the evidence she had before her. There were five Affidavits from the Agency's social worker and two Plans of Care for M., all filed in accordance with the *CFSA*, the *Family Court Rules*, and the *Civil Procedure Rules*. There was no evidence from P.N. and no request for an opportunity to present evidence. Throughout, P.N. emphasized his focus: it was on obtaining access to M., either by telephone or electronically.

[80] P.N. placed no evidence before the court notwithstanding there were opportunities to do so.

[81] P.N. was not denied procedural fairness. His catalogue of complaints are set out in paragraph 73 above. He was never considered by the Agency as a placement for M. because he never provided any plan in relation to having M. in his care and custody. The court was told on March 19 that he was in no position to offer a plan as he was incarcerated. His proposal for T.S. to be a foster placement was rejected by the Agency for sound reasons I already described in paragraph 44. In any case, P.N. provided no evidence to the trial judge about or from T.S. As for the "plan" for P.N. in the Agency's October 17, 2019 Plan of Care, which he criticizes as vague, P.N. never sought to cross-examine the Agency social worker about the Agency's stated concerns relating to his behaviour "prior to and during his incarceration that are of a child protection nature…"

[82] P.N. says he was never interviewed by the Agency. However, he initiated a telephone call with the Agency social worker on November 29, 2019. The content of that call was included in the social worker's Affidavit of February 20, 2020. It has not been disputed by P.N.

[83] According to the Affidavit, the call covered a range of issues and topics:

> 8. On November 29, 2019, [P.N.] called me from the Correctional Facility where he is incarcerated. He asked what he could do to show the Agency that he should have contact with [M.] and I indicated that at this time [M.] had enough challenges on her plate and I did not believe that adding contact with him at this time would be good for her. I encouraged [P.N.] to do everything he could to stabilize his own life and demonstrate he had the ability to make better choices. [P.N.] said that while he had some trouble when he was first incarcerated, over the past year he had been on privilege range, had taken a substance abuse program, and was planning to take an anger management course.
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> 9. I explained to [P.N.] that [M.] would be coming [into] the Agency's care and explained why, specifically that [M.'s great-grandmother] was not longer [sic] able to care for [M.]. [P.N.] indicated that he had put an enormous amount of effort into changing his life and I emphasized that he needed to continue to stabilize, but that he also needed to realize that stabilizing in jail is very different from being stable outside of jail. [P.N.] told me that he has an appeal on March 23rd and 24th and anticipates being released on May 4, 2020. [P.N.] recognized that he could have made better choices.
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> 10. I told [P.N.] that the Agency did not feel it was in [M.]'s best interest to go back into the instability that both of her parents have caused to her throughout her life and therefore I would not be recommending that either parent have contact with [M.]. [P.N.] indicated that he has a release plan for when he gets out of jail and will have work right away and will be able to demonstrate stability.
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> 11. My understanding is that on January 11, 2019, [P.N.] was sentenced to a total of 51 months incarceration when he was found guilty on two charges of sexual assault, two charges of unlawful confinement, and seven charges of assault, which all stemmed from events occurring from September 1st to October 21st in 2015. At that time, [P.N.] was credited for time served and ordered to be incarcerated for a further 23 months and 20 days followed by a 2-year period of probation.
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> …
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> 16. On January 8, 2020, I spoke with [P.N.]. He told me that he did not think anyone understood what [M.] was feeling more than he did and that [M.] needed to hear his voice. [P.N.] indicated that he felt that [T.S.] would be a good placement option for [M.] and explained that he had left Nova Scotia to go to his family and to [T.S.] and that he did not run to cause issues, referring to when the Court granted

> custody of [M.] to [C.C.] and [P.N.] then left with [M.] and his younger son for Newfoundland.
>
> 17. [P.N.] talked about his difficulties while incarcerated, including assaulting a guard, explaining that he was being attacked by the guards, and said that since he had been in the Pictou facility he had been seeing a counsellor and Buddhist, did some program, and would be starting anger management in the near future. [P.N.] indicated that his previous lawyer was being investigated for not helping him see [M.] and that he was appealing his charges. [P.N.] then explained why he had missed some calls, indicated that he did not try to "shirk" his duties as a father, and that [M.] did not know what had happened to her father and that this would be damaging for her. [P.N.] indicated that if the Agency supported [M.] living with [T.S.], he would not have contact with [M.] until the Agency agreed that this should happen.

[84] P.N. could have also filed an Affidavit that included information about what was discussed. He did not. It is to be remembered that by this time, P.N. was represented by counsel. Presumably, had P.N. and his counsel seen a benefit in the Agency interviewing him further, that could have been arranged.

[85] P.N. points to there being no proof from the Agency that they made requests of him to commit to obtaining services to deal with child protection concerns. Again, there was opportunity for P.N. to put evidence before the trial judge about what he had been doing to address concerns raised by the Agency. P.N. would have been well aware of the Agency's concerns, some of which I mentioned earlier and are documented in the filed Affidavits.

[86] As for P.N. not being present on March 19 when the trial judge heard from the parties and granted the Minister's application for a Permanent Care and Custody Order, he had counsel who appeared on his behalf. The trial judge was advised counsel had instructions, it was not critical for P.N. to be in attendance and his "only interest" was access to M.

[87] P.N. knew he was entitled to put evidence before the court. On June 6, 2019, at the start of the child protection proceedings while giving a response to the Agency's Affidavit he said he understood he could file an Affidavit to explain himself better. He never did.

[88] There were opportunities throughout the protection proceedings for P.N. to request cross-examination of the Agency's social worker, call evidence on his own behalf, and make submissions on the central issue of M.'s best interests. He never sought to do so nor did he ask for time to enable him to take any of these steps. He

was in no position to physically care for M. and did not seek to present a Plan of Care for her other than a temporary placement with T.S.

[89] P.N. would have known from the Review Application and Notice of Hearing dated February 20, 2020 that the Minister was seeking an Order for Permanent Care and Custody of M. pursuant to s. 42(1)(f) of the *CFSA* and that the next court hearing was scheduled for March 5.

[90] Even after the Minister disclosed a significant volume of additional evidence in advance of the March 5, 2020 Review Hearing, P.N. did not respond with any evidence.

[91] The Review Order issued following the March 5 hearing referred to a "pre-trial conference" being held on March 19. On March 19, P.N. did not request a trial. He did not present any evidence or an alternative Plan of Care for M. Through counsel, he asked for something the trial judge could not grant, as a matter of law – access upon granting an Order for Permanent Care and Custody. (s. 47(2) of the *CFSA*)

[92] When the trial judge granted the Minister's application for an Order for Permanent Care and Custody, the outside disposition date for the child protection proceedings related to M. was October 30, 2020. P.N. did not advance any evidence for the trial judge to consider about his plans upon release from jail back into the community, where he might be living, whether he would have a job, what he might be able to offer M. in terms of a stable living arrangement and school attendance, and what services he either had accessed or would be seeking to address the child protection concerns raised in relation to M. No such evidence was presented to the trial judge nor offered in the form of fresh evidence on appeal.

[93] Indeed, in oral argument before us, P.N.'s counsel said P.N. would not have had a plan of care prepared by the time he was released from jail. We were told it would have taken time for him to prepare one. He would first have had to get himself "settled".

[94] P.N. not only had no plan to provide the trial judge, he had no plan on his release from jail and did not seek to have fresh evidence of a plan admitted on appeal.

[95] By March 2020, the trial judge was recognizing that "time was of the essence" for M. She was entitled under s. 42(4) of the *CFSA* to view the circumstances justifying the order for permanent care and custody as "unlikely to change within a

reasonably foreseeable time…" This principle is also stated in s. 46(6) of the *CFSA*. As this Court has found, the legislation "does not oblige a judge to defer a decision to order permanent care until the maximum time limits have expired". (*P.H. v. Nova Scotia (Minister of Community Services)*, 2013 NSCA 83, at para. 88)

[96] The trial judge had been dealing with M. at least since the early days of the second child protection proceeding in June 2019. (Although the record does not tell us if the trial judge was involved with M.'s previous child protection proceedings, at the August 29, 2019 hearing, C.C. indicated she had been appearing before Judge Sparks for at least six years: "Your Honour, I have known you for six years, longer perhaps".)

[97] The trial judge's remarks on December 12, 2019, when M. was placed in the temporary care and custody of the Minister, indicate her appreciation for the facts of the case :

> Well, there are many aspects of this case pertaining particularly to [M.] which are deeply troubling for the Court and I would just make comment that [M.] regrettably has been placed in a situation where she has been subjected to horrendous trauma. Nevertheless, I do accept, based upon the affidavit filed by the Minister, that the great-grandparents are no longer physically able to meet this child's needs and so, therefore, consistent with the best interests of [M.], she is hereby placed in the temporary care and custody of the Agency. This is the least intrusive option currently consistent with her overall best interests.
>
> It is lamentable, given the history of this young child and the horrendous trauma which she has been subjected to over the years. But, nevertheless, it's the only option ... viable option consistent with her overall best interest at this time. The order will go forward according with respect to [M.].

[98] The trial judge exercised her discretion and made the permanent care and custody order with a keen understanding of the instability and uncertainty M. had been experiencing. P.N. was incarcerated and had put no plan forward. There was no plan for the trial judge to consider for M.'s care and custody other than the Minister's.

[99] The trial judge complied with the requirements of the *CFSA, the Family Court Rules* and the *Civil Procedure Rules.* Ample evidence informed her of what had been happening in M.'s short, turbulent life and grounded her decision. I am satisfied the record shows P.N. was not denied procedural fairness in the proceedings.

Disposition

[100] The loss of contact with M. is a sad outcome for P.N. but, for the reasons I have given, there is simply no merit to the complaints advanced by Mr. Kuszelewski on P.N.'s behalf. I would dismiss the appeal.

Derrick, J.A.

Concurred in:

Bryson, J.A.
Van den Eynden, J.A.