FAMILY COURT OF NOVA SCOTIA

Citation: *Nova Scotia (Community Services) v. S.L.W.,* 2015 NSFC 1

Date: 2015-02-23
Docket: FAMCFSA No. 086199
Registry: Truro

Between:

Minister of Community Services

Applicant

v.

S.L.W, K.C., B.G., S.W.

Respondents

Restriction on Publication: Pursuant to s. 94(1) of the *Children and Family Services Act,* S.N.S. 1190, c.5.

Revised Decision: The text of the original decision has been corrected according to the attached erratum dated March 5, 2015.

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

Judge: The Honourable Judge S. Raymond Morse

Heard August 25, 2014, December 8, 2014, December 9, 2014, December 11, 2014, in Truro, Nova Scotia

Counsel: Sarah Lennerton, for the applicant
T.M., (representative) for the respondent, S.L.W.
Tammy MacKenzie, for the child O.C.

By the Court:

Introduction

[1] The respondent S.L.W. is the mother of three children; O.C. (DOB April […], 1998), A.G. (DOB May […], 2006) and S.W. (DOB December […], 2010).

[2] The respondent K.C. is the father of O.C., B.G. is the father of A.G., Mr. S.W. is S.W.'s father.

[3] The Minister of Community Services is seeking an order for permanent care and custody, without provision for access in relation to the youngest child S.W. S.L.W. is opposed to the Minister's application.

[4] The Minister and S.L.W. have confirmed their consent to an appropriate order under the *Maintenance and Custody Act* in favour of B.G. respecting the child A.G.

[5] The Minister has confirmed a request for termination of the existing supervision order in regard to O.C., such that the oldest child would remain in the care of her mother S.L.W. S.L.W. is not opposed to this request.

[6] Accordingly, the only contest at this point in the proceeding relates to the Minister's request for an order for permanent care and custody for the youngest child, S.W.

Proceedings

[7] Pursuant to protection application and notice of hearing dated May 24, 2013, the Minister maintained that the three involved children were in need of protective services pursuant to section 22 (2), subparagraphs (b), (e), (g), (h) and (ja). The application confirmed the Minister's request for an initial supervision order in favor of the children's mother S.L.W., subject to appropriate terms and conditions.

[8] The initial five day hearing was held in Amherst, May 28, 2013. The respondents appeared on their own behalf with the exception of Mr. S.W. who did not attend the five day hearing. At the conclusion of that hearing the court made the necessary finding as to reasonable and probable grounds and adjourned the interim hearing for completion on June 18. The court granted the Minister's request for an initial supervisory order in favor of S.L.W.

[9] The interim hearing was completed June 18. Mr. Melvin appeared on behalf of S.L.W. The respondent fathers each appeared without legal counsel. The court made the necessary findings at the conclusion of the hearing and granted the Minister's request for extension of the existing supervisory order.

[10] A protection hearing was held July 29. Mr. Melvin confirmed that S.L.W. was not contesting the application subject to a reservation of rights. Mr. S.W. took a similar position on his own behalf, as did K.C. B.G. was not in attendance. The court made the necessary protection finding and granted the Minister's request for extension of the existing supervisory order in favor of S.L.W. The matter was then scheduled for combined prehearing/disposition hearing on Wednesday, October 16.

[11] Pursuant to application and notice of hearing dated October 1, 2013, the Minister requested a variation pursuant to section 39 (9). The Minister's application was heard October 3. At the conclusion of that hearing the court granted the Minister's request for variation such that the child S.W. was placed in the temporary care and custody of the Minister. The child A.G. was also placed in temporary care and custody, but only until October 5, at which point in time he would be placed in the day-to-day care of his father B.G., subject to supervision by the Minister. O.C. was to remain in the care and custody of S.L.W. subject to supervision.

[12] A disposition hearing was held October 16. At that time Mr. Melvin, on behalf of S.L.W., confirmed that S.L.W. was asking that the matter be scheduled for contested hearing. In particular, S.L.W. confirmed a request that the child S.W. be returned to her care under the terms of a supervisory order. B.G. appeared on his own behalf and confirmed that he currently had care of A.G. and indicated that he was prepared to agree to a supervisory order in relation to his son. The court noted that K.C. was not in attendance because of some recent surgery. The court also noted that Mr. S.W. was currently understood to be working out West but had maintained some contact with the agency. The court confirmed a disposition order with respect to the children A.G. and O.C. based upon the consent of S.L.W. and B.G. The court confirmed that the section 41 disposition hearing had been completed in relation to A.G. and O.C. For purposes of the disposition application relating to the child S.W., the court made an interim disposition order maintaining the status quo pending the determination of the Minister's disposition application. The court confirmed that the disposition application relating to S.L.W. would be noted as having been commenced as of October 16, by the filing of the agency's

plan of care as Exhibit 1. The matter was adjourned for completion of the contested disposition application respecting S.W. on December 19 and 20, 2013. The court confirmed that the December 19 hearing would also serve as a status review in relation to the children O.C. and A.G.

[13] Subsequently by letter dated December 12, Mr. Melvin confirmed that S.L.W. no longer wished to proceed with a contested hearing respecting the child S.W. Counsel were then notified by the court that the matter would remain scheduled for hearing on December 19 which would involve a status review pursuant to section 46 with respect to the children A.G. and O.C. and completion of the section 41 disposition hearing for the child S.W.

[14] At the December 19 hearing the court was advised that S.L.W. had relocated to Truro. Counsel for the Minister confirmed the Minister's willingness to have the protection file transferred to the Truro agency. It was noted that Mr. S.W. had attended at the agency and confirmed a request for access with his son S.W. Mr. Melvin confirmed that S.L.W. was agreeable to the protection proceeding being transferred to the Family Court in Truro and Mr. Melvin advised that he would no longer be representing S.L.W. and that the file would be transferred to legal aid in Truro. Tammy McKenzie appeared as counsel for the child O.C. and confirmed that O.C. was not opposed to the Minister's request for extension of her supervisory order. The court granted the Minister's application for extension of the existing supervisory orders respecting O.C. and A.G. The court made the s. 41disposition findings in relation to the child S.W. and granted the Minister's application for an order for temporary care and custody. All orders were granted subject to a reservation of rights in favor of the respondent parents. Mr. Melvin was granted leave to withdraw as counsel for S.L.W. given his client's relocation to Truro.

[15] A status review hearing was held March 10, 2014, in Family Court in Truro. The respondent S.L.W. appeared her own behalf. None of the other respondents were present. Ms. Kowenberg appeared on behalf of Tammy McKenzie counsel for O.C. The court encouraged S.L.W. to retain legal counsel as quickly as possible. The court granted the Minister's request for extension of the existing orders, subject to a reservation of rights in favor of the respondents.

[16] A further status review hearing was held May 12, 2014. Again the respondent S.L.W. appeared on her own behalf and confirmed her willingness to

agree to the Minister's request for extension of the existing orders subject to a reservation of rights. None of the other respondents were present or represented.

[17] Pursuant to review application and notice of hearing dated July 24, 2014, the Minister requested termination of the disposition orders with respect to the children O.C. and A.G. and confirmed the Minister's request for an order for permanent care and custody in relation to the youngest child S.W.

[18] At time of the review hearing held July 28, 2014, counsel for the Minister requested that the matter be adjourned for several weeks to allow B.G. the opportunity to perfect an application under the *Maintenance and Custody Act* in relation to A.G. Counsel also noted that S.L.W. required the opportunity to consult with legal counsel regarding the Minister's application for permanent care and custody of S.W. The court encouraged S.L.W. to seek legal advice and granted the Minister's request for extension of the existing order subject to a reservation of rights in favor of all respondents. None of the respondent fathers attended the July 28 hearing. The matter was scheduled for further hearing on August 25, at which time the court confirmed that an exhibit would be filed on behalf of the Minister in order to commence the final disposition hearing for S.W. within the applicable timeline. [The outside limit for the proceeding would be Oct 16, 2014, the one year anniversary of the initial disposition order.]

[19] At time of the August 25 hearing, S.L.W. once again appeared on her own behalf. The respondent fathers were once again not present. Counsel for the Minister noted that B.G. had not as yet filed an application under the *Maintenance and Custody Act* and undertook to follow up with B.G. Counsel for the Minister confirmed the Minister's request for extension of the existing orders relating to A.G. as well as O.C. Counsel for the Minister confirmed that the Minister wished to proceed with the application for permanent care and custody respecting the child S.W. The respondent mother advised that she could not afford legal counsel and expressed some doubt as to whether or not she would qualify for legal aid. She did advise that she would be following up immediately with legal aid following the hearing. S.L.W. also confirmed that she was not prepared to consent to B.G. having sole custody of A.G. but would be willing to agree to an order for joint custody with B.G. having primary care and S.L.W. having a right of access contact. The Minister tendered Exhibit 1 for purposes of commencement of the application for permanent care and custody of S.W., consisting of the protection application and notice of hearing dated May 24 2013 and associated affidavit. The court scheduled the matter for continuation of hearing of the Minister's application

for permanent care and custody on November 6, 7 and 14. The court encouraged S.L.W. once again to try to arrange for legal representation. The court scheduled the matter for prehearing on October 27, 2014.

[20] S.L.W. did not attend the October 27 prehearing. Neither did S.L.W. attend a settlement conference scheduled with Her Honor Judge Dewolfe on November 4.

[21] The matter came forward for hearing on November 6. Mr. S.W. was present for the November 6 hearing. He advised that he wished to put forward a plan of care in opposition to the Minister's request for permanent care and custody. He acknowledged that he had not provided particulars of his plan to the agency. Counsel for the Minister advised that the Minister required time to assess Mr. S.W.'s plan since this was the first they had heard of it. Counsel for the Minister also confirmed that B.G. had not as yet filed his *Maintenance and Custody Act* application in relation to A.G. Met with these circumstances, the court determined that the matter would have to be adjourned for continuation of the final review hearing respecting the child S.W., if required, on December 8, 9 ,11 and 12 and a further pretrial was scheduled for December 1. Mr. S.W. was directed to provide particulars of his plan to the agency as well as S.L.W.

[22] At time of the prehearing on December 1, counsel for the Minister advised that B.G. had been served with a subpoena requiring his attendance on December 8. Counsel for the Minister also advised the Minister was not supportive of Mr. S.W.'s plan and that the Minister wished to proceed with the application for permanent care and custody respecting the child S.W. The respondent S.L.W. appeared on her own behalf and requested that the matter be adjourned to allow her further opportunity to possibly attempt to arrange for legal counsel. In the alternative she asked that her current partner T.M. be permitted to act as her representative. Counsel for the Minister opposed both requests. Tammy McKenzie, counsel for the child O.C., confirmed that an affidavit would be filed by O.C. and that she was supportive of her mother's request for an adjournment. The court declined to grant S.L.W.'s request for further adjournment noting that the matter had been scheduled for final hearing for some time and had already been adjourned on at least one occasion. The court noted that it had consistently encouraged S.L.W. to arrange for legal representation and noted that even now, when asking for a further adjournment, S.L.W. was not definite with respect to her intention to arrange for legal representation. The court emphasized the importance of the statutory timelines and declined to grant the respondent's request for adjournment. The court confirmed that the matter would proceed as scheduled on December 8.

The court did, however, grant S.L.W.'s request for appointment of T.M. as her representative pursuant to Family Court rule 5.04 (2).

[23] During the course of the December 1 prehearing, Tammy McKenzie, on behalf of the child O.C., and T.M., on behalf of S.L.W., agreed to waive cross-examination with respect to several of the witnesses who the Minister had indicated would be called on behalf of the Minister. It was agreed that the affidavits of Jennifer Gogan, Shallon Murphy, Aimee Maillet, Jillian Martin, Kelly Harvey, Janet Davidson and Heidi Melanson would be admitted by consent without cross-examination.

[24] B.G. appeared without counsel at the outset of the hearing on December 8. B.G. provided the court with what appeared to be an incomplete application for custody under the *Maintenance and Custody Act*. The court discussed B.G.'s application with B.G. and S.L.W. The parties to the application (the Minister, B.G. and S.L.W.) confirmed their willingness to agree to an order for joint custody in relation to the child A.G., with B.G. having primary care. The parties agreed that S.L.W. would have a right of reasonable access contact with the child, to occur at such time and place and be exercised in such manner as B.G. and S.L.W. may agree, subject to the requirement that S.L.W. provide at least 48 hours' notice of any request for access contact. The court proceeded to confirm other terms and conditions of the order as agreed upon, including a specific condition that the Minister would receive notice of any future variation respecting custody or access. After confirming the terms of the consent order respecting A.G. the court advised B.G. that he did not need to remain for the duration of the hearing unless he wished to, since the issues relating to his son had now been resolved by way of the consent order. B.G. then excused himself. The hearing with respect to the Minister's application for permanent care and custody in relation to S.W. then proceeded. It should be noted that Mr. S.W. was not in attendance on December 8 and did not participate in the hearing on December 9 or 11.

[25] Following the conclusion of trial on December 11, counsel for the Minister submitted correspondence to the court with a record of conviction attached and requested that the document be placed within the file. I directed that the correspondence and the document be returned to counsel for the Minister and that counsel be advised that if they wished to seek to introduce new evidence post trial, a formal application would be required. Subsequently, a formal application was filed on behalf of the Minister. When the application came forward for hearing, following preliminary discussions, counsel for the Minister requested that the

application be withdrawn. This request was consented to by the respondent S.L.W. and by Tammy McKenzie on behalf of the child O.C.

Summary of Evidence

[26] During the course of the hearing, 10 exhibits were tendered.

[27] Exhibit 1 as tendered on August 25, 2014 consisted of the protection application and notice of hearing dated May 24, 2012, and supporting affidavit of social worker Aimee Maillet.

[28] Exhibit 2 was identified as exhibit book 1 of the applicant, the Minister of Community Services, consisting of pleadings filed during the course of the protection proceeding, including all affidavits as filed by the Minister.

[29] Exhibit 3 was another large exhibit brochure containing case recordings and access facilitation notes.

[30] Exhibit 4 was a brochure containing several expert reports and associated curriculum vitae.

[31] Exhibit 5 contained supplemental case recordings and access facilitation notes.

[32] Exhibit 6 contained supplemental pleadings, in particular the supplementary affidavit of social worker Stacy Paupin, sworn November 21, 2014.

[33] Exhibit 7 was the RCMP criminal record check submitted by S.L.W.

[34] Exhibit 8 was the affidavit of O.C. sworn December 4, 2014.

[35] Exhibit 9 was the affidavit of S.L.W. sworn December 8.

[36] Exhibit 10 was a JEIN Offender Summary.

[37] The first witness to testify on December 8 was Dianna Robichaud-Smith. Counsel for the Minister acknowledged that Ms. Robichaud-Smith was testifying at the request of the court and confirmed that counsel for the Minister had been authorized to undertake a cross-examination of Ms. Robichaud-Smith. By consent of the parties Ms. Robichaud-Smith was qualified to provide opinion evidence as a social worker with experience and expertise in the completion of parenting capacities assessments. Ms. Robichaud-Smith identified her initial report as set

forth in tab 1B of Exhibit 4, as well as her final form parenting capacities assessment in tab 1C.

[38] During cross-examination by counsel for the Minister, Ms. Robichaud-Smith acknowledged that she had difficulty making the final decision respecting the assessment. She acknowledged that she had wavered with respect to her ultimate conclusion but then confirmed her opinion that S.L.W. has the ability to make changes and move forward. She noted that S.L.W.'s interaction with the child was quite good. She agreed that there were some neglect issues present in the home, but pointed out that both A.G. and S.W. are children with special needs.

[39] Ms. Robichaud-Smith acknowledged that the ability to make change is not necessarily the same as the ability to effect change. She agreed that S.L.W.'s decision to participate in her […] course created concern and that it would have been better for S.L.W. to participate in services rather than her course. She agreed that the missed family support worker appointments were also concerning and that she had recommended participation in family support services as a priority. She acknowledged the limiting factor with respect to S.L.W. is the fact that she is passive and that when she gets overwhelmed there is the possibility of avoiding follow-through. She testified that S.L.W. needs to be proactive in meeting S.W.'s needs.

[40] In responding to additional questions from counsel for the Minister, Ms. Robichaud-Smith testified to her conclusion at the time of her assessment that S.L.W. absolutely has the ability to make change and that she was participating in programs. Ms. Robichaud-Smith pointed out that it was hard for her to say that S.L.W. has not made changes due to her lack of contact with S.L.W. She expressed concern about lack of consistency in participation in programs and again expressed her belief that the child S.W. really needs consistency.

[41] During cross-examination by counsel for O.C., Ms. Robichaud-Smith confirmed her recommendation that the child S.W. be returned to his mother's care. She also acknowledged that she had recommended mental health treatment for S.L.W. but that that had not been set up. She also recommended couples counseling for S.L.W. and her new partner T.M. and acknowledged that that had not been set up. She agreed that she had recommended a gradual return of the child to the care of S.L.W. and indicated she had no knowledge that that had happened.

[42] Ms. Robichaud-Smith agreed that S.L.W. did have some insight and also agreed that had the services she recommended be put in place, we would have been

looking at a totally different situation. Ms. Robichaud-Smith expressed her belief that S.L.W. had been overwhelmed. She agreed with the suggestion that her situation was now dramatically different from what it had been. She expressed her view that the relationship between S.L.W. and T.M. appeared solid and that S.L.W.'s new circumstances would alleviate stressors. Ms. Robichaud-Smith also expressed her opinion that there was a secure attachment between the child S.W. and his mother. She had concluded that S.L.W. has the ability to parent the child S.W. and effect change. She was then asked if she would change her recommendations at this point and she responded by indicating probably not, but again noted that the timing of S.L.W.'s […] course was unfortunate, but that did not change her conclusion that S.L.W. has the ability to parent her son.

[43] Ms. Robichaud-Smith was then cross-examined by S.L.W.'s representative T.M. She agreed with the suggestion that it was easier to parent one child with special needs rather than two. She testified she was not aware that S.L.W.'s course involved a once-in-a-lifetime opportunity for S.L.W. She agreed with the suggestion that a job that gives S.L.W. flexibility would be helpful.

[44] The court allowed some supplementary cross-examination by counsel for the Minister. Ms. Robichaud-Smith testified that she agreed that S.W. should have taken priority to the […] course. However, Ms. Robichaud-Smith also noted once again that she believes that S.L.W. has the ability to parent S.W., but she has not had the opportunity to demonstrate that.

[45] The next witness who testified on behalf of the Minister was Joey Schurman, registered psychologist. Mr. Schurman identified his resume as set forth in Exhibit 4, tab 3A. Mr. Schurman was qualified as an expert in the area of autism intervention. Mr. Schurman confirmed that he is employed as a registered psychologist with Colchester Regional Hospital and is a team leader for the Early Intensive Behavioral Intervention (EIBI) program. He oversees the program's treatment plans and goals.

[46] He was referred to tab 3B, the orientation package for families for the program, as contained in Exhibit 4. He explained that the program works with children diagnosed with autism as preschoolers. They work with the parents of the child to try to help autistic children develop functional communication and language, and promote social interaction. The goals for any individual child depend upon the ability level of the child. The program tries to train the parent to

do the treatment. Mr. Schurman identified tab 3C as the agreement between the program and the parent.

[47] Mr. Sherman confirmed that the child S.W. was currently on the waitlist for the EIBI program. He explained that the main benefit of participation in the program is that autistic children have a better chance of developing better communication. Participation in the program gives the child a better chance to develop skills. He noted that when the child S.W. was assessed, his communication was noted as minimal. He confirmed he was not able to predict how the child S.W. would do if offered the opportunity to participate in the program.

[48] The next witness called on behalf the Minister was Becky McCarthy, occupational therapist. By consent Ms. McCarthy was qualified to give opinion evidence as an occupational therapist. She confirmed that she is an occupational therapist with Colchester Regional Hospital and that she has been involved with the child S.W. She identified her report dated October 29, 2014, as found in tab 5B. She testified that she had met the child S.W. twice and that she was still getting to know him, and still in the process of undertaking an assessment. She indicated that the child S.W. does not demonstrate any verbal communication. She has been working with the child on skill development, focusing primarily on dressing and feeding. At one point she indicated that the biggest risk of no follow through on the part of the parent is that there will be a lack of progress.

[49] The next witness to be called on behalf of the Minister was Laura Kindervater. Ms. Kindervater was qualified to give opinion evidence as a speech language pathologist. Her reports were included within tab 4 of Exhibit 4.

[50] Ms. Kindervater confirmed that when she first met S.W. he presented with severe receptive and expressive language delay. The child communicated through actions and some single words. She indicated that a child's understanding of what is happening becomes stronger with routine. S.W. also uses some gestures. In the context of routine he can let you know when he wants to eat or nap. If he wants to be rocked or lifted, he will push against you or lift his hands. She testified that S.W. was difficult to engage in play, but that he has shown some improvement over time. She noted that environmental factors play a part. A big part of the process is care giver training. She stated that the respondent S.L.W. had come to one session with family support worker Shirley Atkinson, and then on the second occasion had attended with her partner T.M.

[51] During cross-examination by T.M., Ms. Kindervater spoke about S.L.W.'s participation in the second visit and stated that S.L.W. had great anticipation and demonstrated good skills, and appeared open to the strategy. She also commented that during the meeting with S.L.W., she did ask very appropriate questions and was very open to feedback. They discussed how the child S.W. engages in some non-functional activities, such as his use of string, and she acknowledged that sometimes they can work with that by pretending the string is a clothes line, a snake or a plane.

[52] The next witness to testify for the Minister was I.S.M.. Ms. M. confirmed that she is the Inclusive Program coordinator for […] Day Care. As coordinator, she receives referrals for children who have developmental or behavioral issues. She undertakes the intake and gathers the information. Typically, referrals come from the Early Intervention Program. They gather the information and then prepare an appropriate checklist. After a period of observation of the child, they prepare an Individual Program Plan (IPP).

[53] With respect to the child S.W., Ms. M. testified that there was not room at the time in their inclusive program, but that they decided to bring S.W. in and offer supports with respect to issues such as feeding and mobility, and wait for a space to become available in the program. S.W. came to the daycare in October 2013, and she noted that his IPP is just starting. She expressed her hope that in January of 2015 they will have S.W.'s IPP in place. The child started in the inclusion program in September. She noted that S.W. had no way to communicate early on and had a number of meltdowns. She said the experience was overwhelming for him. However, they have gotten to know him better and have learned how not to overwhelm him.

[54] Ms. M. expressed her hope that the autism workers will come into the daycare and work with the child S.W. at day care. They are currently troubleshooting what works and what does not. She noted that S.W. is defensive to something new in his environment. After a bit he will come into contact, but it takes days and days. Eventually they get there. He is starting to watch the other children play. He does not interact with the other children. He can now feed himself and there is a lot more eye contact. Again, she noted that it took S.W. a long time to get used to his environment but that he now engages with all the staff at the daycare.

[55] Ms. M. expressed her hope that S.W. would not start school in September 2015, and that he would have the opportunity to participate in the EIBI program.

[56] During cross-examination by T.M., Ms. M. confirmed that she had not been asked to speak with S.W.'s mother. She indicated the more information they can get, the better, so she indicated she was very open to speaking with S.W.'s mother. She also testified that if S.W. was returned to his mother, it would be good for the child S.W. to stay with […] Day Care and again indicated that they were very open to working with S.W.'s mother. She also confirmed that any indications or signs of abuse or neglect would be immediately reported.

[57] The next witness to testify for the Minister was Rhonda Bagnell, program coordinator for the Early Intervention Program. Ms. Bagnell confirmed that she had done an intake on S.W. with his foster mother in March 2014. She testified that S.W. is on the waitlist for the Early Intervention Program, and she indicated her belief that there would be an opening in the program early in the new year. She had three scheduled appointments with Shirley Atkinson, family support worker, but these were canceled because the child was ill. She has seen the child S.W. at his foster home and at daycare. Once the child enters the program, there will be home visits and the emphasis will be on skills building. She referred to the program as a partnership with the child's parent or parents, and that they encourage parental contact. She confirmed that they work closely with EIBI and that both programs can happen simultaneously but acknowledged that sometimes the parent can become overwhelmed. Early intervention would work with the child until he goes to school.

[58] During cross-examination by T.M., Ms. Bagnell testified that early intervention would be a huge part of the child's transition to school and expressed her belief that early intervention is vitally important.

[59] The next witness to testify for the Minister was Shirley Atkinson, family support worker.

[60] Her affidavit was identified as tab 34 in Exhibit 2. She confirmed that the date in paragraph 17 of her affidavit should be July 3, 2014, rather than June 3. Ms. Atkinson has been a family support worker for 25 years. As a family support worker she provides parenting education and information on child development to parents, and assists in the training for parents who have children with special needs.

[61] Ms. Atkinson testified that she was assigned to work with S.L.W. in January 2014. She noted that there was delay in commencement of family support services because the respondent S.L.W. was in the process of moving to Truro. Her first meeting with S.L.W. was on January 30, 2014. The respondent S.L.W. was working and did not have a consistent schedule of days off. S.L.W. agreed to provide her work schedule to Ms. Atkinson, but did not do that. Ms. Atkinson did not hear from S.L.W. until mid-February 2014, and at that point they scheduled a visit which was then canceled due to a storm. Ms. Atkinson and S.L.W. met for the first time the last week of February 2014.

[62] Ms. Atkinson acknowledged that there were two breaks in family support services. The first was in connection with a planned vacation that she took in March. This meant that there was not much she could get started with when she and S.L.W. met at the end of February. Ms. Atkinson was off for a month on vacation. She returned first of April and connected with S.L.W. on April 3.

[63] In May, the first visit was canceled and then Ms. Atkinson confirmed she was off for surgery from mid-May till June 18. She participated in an access visit when she returned to work in June.

[64] Ms. Atkinson testified that communication with the respondent S.L.W. was very difficult. S.L.W.’s phone number changed twice and her e-mail address changed twice. She would leave messages and not hear back.

[65] Ms. Atkinson testified that the schedule of access for S.W. changed in September and that created problems with her ability to meet with S.L.W., and at one point she suggested that they just meet for family support sessions twice per week and bypass access. However, it was at this point they found out about S.L.W.’s intention to participate in the […] course. She indicated that S.L.W. asked for sessions to be on Fridays, but indicated that her schedule could not accommodate that request until late October.

[66] Ms. Atkinson testified that paragraph 39 of the respondent S.L.W.'s affidavit was not accurate. She testified that in her sessions with the respondent S.L.W., she was using the "You Can Make a Difference" book. She also noted that the last information package provided was with respect to the five basic therapies utilized for children with autism.

[67] She indicated that this was not effective and while S.L.W. and T.M. said they had looked at the material a little bit, she felt that they could not have a

conversation about the therapies. Ms. Atkinson indicated that she felt it was important for S.L.W. and T.M. to be familiar with the terminology. She wanted them to be aware of the therapies. However, she said it never got to the point where they were able to discuss the therapies.

[68] When referred to paragraph 41 of the respondent S.L.W.'s affidavit, Ms. Atkinson acknowledged that she did make mistakes in conveying information about the dates and time for appointments, and acknowledged in particular a mistake she had made with respect to an IW K appointment. She apologized for the mistake. The other mistake was with respect to a hearing and speech clinic appointment.

[69] Ms. Atkinson referred to the child S.W. as a very happy and loving child. She noted that he likes to be cuddled but also expressed her belief that he is very fragile. She noted that S.W. does not speak and that he is often sick. She also testified that he is very sensitive, and by way of example indicated that he had developed hives as a result of exposure to a carpet cleaner. She commented that "things seem to happen to him in the extreme".

[70] When asked to comment upon the respondent S.L.W.'s overall participation, Ms. Atkinson testified that she does not think that the respondent really had participated. She said the respondent tried to convince her that she does not need family support. The respondent, according to Ms. Atkinson, is really stuck using her old methods. She noted that the child S.W. has made gains at daycare based upon their techniques. She testified that S.L.W. still uses the same techniques she used when the child was younger. She noted that the respondent S.L.W. will not risk upsetting the child and does not want to see him have a tantrum. Ms. Atkinson said it was her job to teach S.L.W. that the child needs to progress and that you have to challenge him a little bit to do so. She noted that S.L.W. had explained that she wanted Ms. Atkinson to see that “we are happy and having fun”, and that she loves her son. However, Ms. Atkinson noted that she also needs to learn the skills she needs to help her son progress.

[71] When asked if the family support goals were met, she indicated they were not. When asked about progress, she said there was some. She testified that during the summer things were really on the upswing. She said she had advised the respondent S.L.W. and T.M. that she would recommend that S.W. come home if there was progress, but there was not enough progress. She said that after she had the conversation about the possibility of recommending the child come home,

S.L.W. started keeping appointments and it was going really well so she let S.L.W. and T.M. go with the foster mother to appointments. However, subsequently it just seemed to drop off.

[72] During cross-examination, Ms. Atkinson testified that when she was absent in March on vacation and then absent for her surgery, it would not be normal practice for the agency to provide another family support worker. Again she acknowledged that the respondent S.L.W. and T.M. were making progress during the summer of 2014.

[73] During cross-examination by S.W.'s representative T.M., Ms. Atkinson testified that when she saw their home, it was fine. She also acknowledged that T.M. and S.L.W. decided to fight the agency's application for permanent care and custody. She said that when the agency made the decision to request permanent care and custody, she told them not to feel defeated and to keep trying and that possibly the agency might reconsider.

[74] Ms. Atkinson confirmed that she was away four weeks on vacation and then off five weeks for surgery, for a total of nine weeks. When asked if the loss of nine weeks would affect things, Ms. Atkinson said that she takes responsibility for the time when she was not available, but noted that there were times when T.M. could have been there and was not, so she suggested that it worked out evenly in her view.

[75] The court referred Ms. Atkinson to her affidavit and she confirmed that there were positive visits on July 19 and 24. She acknowledged the decision to request permanent care and custody had been made July 17.

[76] In responding to supplementary questions from counsel for the Minister, Ms. Atkinson testified that she could not say when the notes from the visits on July 19 and 24 would have been put on the system.

[77] In response to supplementary questions from Ms. McKenzie, Ms. Atkinson testified that her observations on July 19 were a good indicator that things were getting better, but she did not know if it would impact on the Minister’s plan of care for the child S.W. She acknowledged another positive visit on July 24, and did not know or recall if she had taken any steps to let the agency know about that positive visit.

[78] The next witness to testify on behalf of the Minister was social worker Stacy Paupin, the long-term protection worker. She became the responsible worker when the file was transferred to Truro in January 2014. She confirmed that the Minister was now requesting an order for permanent care and custody without access in relation to the child S.W.

[79] Ms. Paupin testified that the respondent S.L.W.'s initial plan was for her to remain in […] with her daughter O.C. The new plan was based upon her relationship with T.M. That new plan was identified in January or February 2014. Her understanding was that S.L.W. planned to be a stay-at-home mom. In September, she was advised that the respondent was participating in a […] course.

[80] Ms. Paupin testified that communication with the respondent was difficult. On no occasion was she ever able to make a successful unannounced visit to the respondent's home.

[81] Ms. Paupin testified that access currently occurs two times per week and that it has been that way from the outset. When asked why, she explained that this was because the child S.W. needs consistency.

[82] Ms. Paupin indicated that there had been a discussion about expanding access to the respondent's home, but that this conversation was after the decision to go for permanent care and custody, and at that point the agency was not prepared to expand access.

[83] Ms. Paupin testified that there has been a lapse in the respondent's access due to her […] course. She indicated her understanding that the respondent cannot take time off, but noted that the course ended the week of November 24 and that the respondent has not contacted her regarding access. Ms. Paupin confirmed her understanding that the respondent had told her she would graduate on November […]. When asked about the respondent's track record in participation in access, she testified that at times her participation has been fairly consistent and at times it has not been. She acknowledged that the child S.W. was always happy to see his mother. Overall she felt that the access was inconsistent, but then indicated it was partly due to the child S.W. being sick and sometimes due to the respondent's non-availability.

[84] Ms. Paupin confirmed that family support services were provided to address parenting concerns and to help the parent develop routines and schedules. She noted T.M.'s participation as the respondent's partner, but then indicated that his

contact with the child S.W. has been limited to access, and therefore the relationship has not developed. She confirmed that he has attended some visits but not all, and then commented that she had not encouraged him to participate in access, but did not discourage his participation either. She acknowledged that T.M. has participated in family support, but not consistently.

[85] Ms. Paupin confirmed that the respondent S.L.W. had notified her regarding her […] course and asked that access be rescheduled for Fridays. She said the agency made a decision not to agree to that due to the child's need for stability and security. She noted that to accommodate the respondent's request, access would have to be outside the agency in the community and that was not part of the child's routine.

[86] When asked about her views on the respondent's decision to participate in the […] course, Ms. Paupin stated that she was not opposed to someone trying to better themselves, but the timing of the course and the impact upon family support sessions meant that the agency did not view this decision positively. She acknowledged that the respondent attended the course because of funding availability, but again said that the agency saw it as the respondent putting her needs ahead of her son's.

[87] When asked to explain the decision to seek permanent care and custody, Ms. Paupin noted that the timeline was short and that progress was minimal, so the decision was made to proceed with permanent care and custody.

[88] When asked about Dianna Robichaud-Smith's parenting capacities assessment, Ms. Paupin advised that the agency felt that Ms. Robichaud-Smith's recommendation for the child to return home was not in his best interests. The agency did not believe that it made sense to return him home because the agency's plan was based upon permanent care and custody, and introducing him to a new environment would be upsetting to the child.

[89] Ms. Paupin confirmed that the agency never made any attempt to provide therapy as recommended by Ms. Robichaud-Smith because, in Ms. Paupin's experience, short-term therapy was not effective.

[90] Again when commenting upon the decision to request permanent care and custody, Ms. Paupin explained that the decision was based upon S.L.W.'s lack of follow-through regarding access and family support services and lack of progress, and also based upon consideration of the child's best interests. She confirmed the

decision to request permanent care and custody was made July 17. She confirmed that she took the information from the risk conference to develop the plan of care. She said she was not aware of any positive visits as observed by Shirley Atkinson at that point, as far she could recall.

[91] At a later point in her testimony she indicated that the agency's concern is that the respondent S.L.W. will not follow through with service providers and adequately attend to the child S.W.'s needs. She expressed her belief that the respondent S.L.W. has put her needs ahead of her child's. She agreed that the respondent has the ability to parent, but suggested there was a difference between being able and actually doing it.

[92] During cross-examination, Ms. McKenzie asked Ms. Paupin whether or not the agency reconsidered its plan based upon permanent care and custody after the positive visits, as noted by Shirley Atkinson on July 19 and 24. In response, Ms. Paupin commented that there would have been a decision to monitor, but noted that the plan at that point was permanent care and custody. She acknowledged that the agency did not expand access to include home visits based upon its decision to apply for permanent care and custody, even though there were positive access visit reports, and assessor Dianna Robichaud-Smith had made her recommendations. Ms. Paupin noted that the agency was not accepting of the recommendations in the parenting capacities assessment and then commented that progress had just begun, and it was just a couple of positive access visits noted.

[93] Ms. Paupin agreed that the agency did not accommodate the respondent S.L.W.'s request to change the access schedule, in part, due to the fact the plan of care was based upon permanent care and custody, but also the fact that the agency felt that having access at night was not in the child's best interest.

[94] In reviewing the history of access, she expressed her belief that access was not consistent in January and February, and then participation was fairly consistent till September. She noted there were some cancellations due to illness on the part of the child S.W. She was asked if she ever consulted professionals in dealing with the access issues, and she said she did not and had no knowledge that any of the involved professionals were ever consulted.

[95] In discussing the recommendation for therapy made by Dianna Robichaud-Smith in her report, she confirmed the agency felt that it would not address the issues, and again acknowledged that no other mental health professionals were consulted.

[96] At a later point in her cross-examination, she confirmed that she could not recall discussing Ms. Robichaud-Smith's recommendations for couples counselling with another professional and noted that the agency also understood, at that point in time, that the respondent S.L.W. and her partner T.M. were doing well. She then indicated that she did not recall specifically discussing the recommendation for short-term therapy.

[97] When asked whether or not it would have been better for the agency to err on the side of caution and put services in place to assist in determining if the child could return home, Ms. Paupin admitted that it would probably be better, in hindsight, to have put services in place. At another point during her cross-examination, Ms. Paupin acknowledged that there had been a breakdown in communication regarding appointments. She agreed that sometimes appointment information was not communicated to the respondent, and sometimes the information that was provided was incorrect. She agreed that that would make it hard for the respondent S.L.W. to be consistent.

[98] During cross-examination by S.L.W.'s representative T.M., Ms. Paupin acknowledged that the *Act* mandates the agency to provide services to promote the integrity of the family. She was then asked if services were provided before the taking into care of S.W., and Ms. Paupin said she was not sure and that she would have to review the file to answer the question. When asked if the respondent S.L.W.'s problem was being a single parent and trying to cope with two children with special needs, Ms. Paupin said she did not know. She confirmed that one of the agency's concerns was S.L.W.'s ability to meet S.W.'s needs if she was pursuing employment as a […]. She was then asked if T.M.'s ability to attend Court spoke to the flexibility of his job, and she agreed that it did.

[99] Ms. Paupin testified that she was not aware that the information in the JEIN record was false. She was then referred to Exhibit 7, which was entered by consent of counsel, and could not explain why the JEIN record showed something different than the RCMP criminal record check.

[100] At another point, she agreed that one of the agency's concerns with respect to the respondent S.L.W., was her history of short-term relationships. She was then asked, if the respondent's relationship with K.C. had been four years, whether or not she would see that as being short-term, and she agreed that she would not. She was then asked if she would view the relationship with B.G. of nine years as being short-term, and she said she would not. She was then asked if she would see the

relationship of four years with Mr. S.W. as being short-term, and she indicated she would not. She then commented that the agency did not look at the timeline specifically. She agreed with the suggestion that it would not be correct to say that S.L.W. was involved in a series of short-term relationships given the information as to the length of her prior relationships.

[101] Several exhibits were tendered on behalf of the Minister in support of the Minister's application. The original protection application and notice of hearing dated May 24, 2012, as well as the supporting affidavit of social worker Aimee Maillet sworn May 23, 2013, were entered as Exhibit 1. The original application confirmed a request for referral of the respondent S.L.W. to public health, early intervention, and that S.L.W. follow through with appointments for the child A.G. at the IWK and with occupational therapy. The original application did not include a request for the respondent to participate in family support services, counselling or a parenting capacity assessment.

[102] The affidavit of Ms. Maillet confirms that on March 4, 2013, it was decided that the respondent appeared to be better engaged in services to meet the child A.G.'s needs, including medical appointments and school attendance, and that based upon the fact that there were no other child protection concerns it was decided to close the file. Subsequently, the agency received a further intake on May 7, 2013, in relation to the child A.G. It is clear from Ms. Maillet's affidavit that the primary protection concern at the outset of the protection proceeding was the lack of follow-through with services and medical appointments for the child A.G. The focus of the agency's plan at the outset of the proceeding was to ensure that the child A.G. attended all medical appointments, with appropriate referrals to occupational therapy, public health and early intervention. Early intervention was also to complete an assessment for the child S.W. The condition of the respondent's home was to be monitored through unscheduled home visits.

[103] Pursuant to application and notice of hearing dated October 1, 2013, the Minister requested a review and variation of the existing supervisory order in favor of the respondent S.L.W., such that the child S.W. would be placed in the care and custody of the Minister. The application noted that the child A.G. would be placed in the care and custody of his father B.G. The older child O.C. would remain in the care and custody of the respondent S.L.W., subject to supervision.

[104] The affidavit of social worker Kelly Harvey, sworn October 1, 2013, was filed in support of the application. The affidavit confirms that on September 26,

Ms. Harvey attended the respondent S.L.W.'s home. After the respondent arrived home, S.L.W. agreed that her daughter O.C. appeared to play a predominant role in the care of her brothers. At paragraph 14(j) Ms. Harvey noted that O.C. appeared to take good care of the children but suggested that she should not be responsible for overnight care given the children's high needs. At paragraph 15(e) Ms. Harvey confirmed that both the child S.W. and the child A.G. appeared clean, and in subparagraph (g) she noted that the home appeared very clean and tidy. On September 27, Ms. Harvey spoke with the acting vice principal at A.G.'s school and was advised that the child A.G. had not missed school yet this year, and that his hygiene had improved since last year. Ms. Harvey also contacted early intervention on September 27 and was informed that the respondent S.L.W. was always present when the early intervention worker attended the home and that the respondent S.L.W. appeared to be very engaged in the service. (See Exhibit 2, tab 9, paragraph 19 (g) and (h).) Ms. Harvey confirmed at paragraph 20(d) that the child S.W. remained in a feces filled diaper for the entire 2.5 hour visit which she conducted at the respondent's home on September 26. She indicates that this occurred despite numerous prompts to the child O.C., and the fact that she advised the respondent S.L.W. of the soiled diaper as soon as she arrived home. The affidavit also notes the worker's concern about O.C.'s failure to check on the child A.G. despite numerous prompts from the worker. Other concerns noted in the affidavit include concerns relating to the child S.W.'s diet and the fact that the child O.C. appeared to be taking a lead role in caring for the children, as well as O.C.'s poor high school attendance record. These concerns resulted in the decision to take the children S.W. and A.G. into care. Following the taking into care, the child S.W. was observed to have a severe diaper rash with open sores. Ms. Harvey's affidavit also confirms that another social worker spoke with the respondent's landlord and was advised that the family was three months behind on rent. The Minister's variation application was subsequently granted.

[105] The Minister's original plan of care, dated October 10, 2013, is set forth in tab 12 of Exhibit 2. The plan was filed in support of the Minister's request for a supervisory order in favor of B.G. in relation to the child A.G., a supervisory order in favor of the respondent S.L.W. in relation to the child O.C. and a request for an order for temporary care and custody in relation to the child S.W. The plan confirmed the Minister's intention to provide a family support worker for the respondent S.L.W. and to request that S.L.W. participate in a parenting capacities assessment. The plan contains the following paragraph:

> Ms. W. has discussed with myself and another co-worker that she feels at this time, that A.G.'s medical needs are too high and that she may not be in a position to care for A.G. however did express an interest in continuing to still maintain contact with him. Ms. W. believes that she would be in a position to meet S.W.'s needs and provide care to him.

[106] Pursuant to review application and notice of hearing dated July 24, 2014, the Minister confirmed a request for termination of the disposition orders relating to the child O.C. and the child A.G. and an order for permanent care and custody in relation to the child S.W. A plan of care was filed in support of the application dated July 23, 2014. The plan indicates as follows at page 4:

> Ms. W. has engaged in family support services with Shirley Atkinson. The service was late beginning as Ms. W. was not sure where she would be residing. It began in January, 2014. Ms. Atkinson had several weeks of vacation booked (March) and then was on a medical leave (May) which impacted the service. While there were gaps in the service, it would be expected that Ms. W. would practice the skills that had been taught. Ms. Atkinson indicated that she has not seen Ms. W. demonstrate the skills. Ms. Atkinson reports that Ms. W. has not been consistent in her ability to follow through with recommendations made by Ms. Atkinson. Ms. W. indicates that she does not follow through because she does not want to make him cry or make him upset. It appears as though Ms. W. is parenting S. the same way that she parented him a year ago despite the gains he has made.
>
> While Mr. M. presents as a kind and nurturing individual it was agreed that we could not consider him as a mitigating factor. Ms. W. has a history of engaging in relationships that do not last. In the event that would occur, it is believed that S. would be at risk. Ms. W. has not demonstrated that she's made the necessary changes to address the protection concerns. Mr. M. does not have a pre-existing relationship with S. and has no ties to him. There is no information to indicate that he would be able to mitigate the risk and there is not enough time left to develop a case plan.

[107] The affidavit of Shirley Atkinson sworn October 28, 2014, is found in tab 34 of Exhibit 2. Paragraph 34 of Ms. Atkinson's affidavit reads as follows:

> During the summer of 2014 Ms. W. appeared to make progress. She appeared more engaged with S. during visits, and was consistently attending

> appointments. However, in the past two months Ms. W. has appeared to regress; her interactions with S. and her commitment to services appear more similar to when we first began working together. Her energy levels have declined and she appears less able to consistently engage with S. to the level that is required.

[108] Tammy McKenzie, counsel for the child O.C., tendered O.C.'s affidavit as Exhibit 8 by consent of the parties. Ms. McKenzie confirmed that this was all the evidence to be presented on behalf of O.C. In her affidavit, O.C. disputed the accuracy of some of the information contained in the affidavit of social worker Aimee Maillet sworn May 23, 2013. O.C. disputed the accuracy of certain paragraphs as set forth and contained in the affidavit of social worker Kelly Harvey, sworn October 1, 2013. O.C. also disputed the accuracy of certain paragraphs as set forth in the affidavit of Ms. Paupin sworn October 24, 2014. In her affidavit, O.C. acknowledged that she assisted S.L.W. with the care of A.G. and the child S.W., but denied that she assumed a predominant caregiving role. O.C. also confirmed in her affidavit that she was supportive of her mother's plan to have the child S.W. return to her care, as well as the plan for the child A.G. to remain in the care of his father B.G. O.C. confirmed that she is close with both of her brothers and indicated that it would be devastating if she were to lose her sibling connection. As noted earlier, O.C.'s affidavit was admitted by consent and counsel for the Minister waived cross-examination with respect to the affidavit.

[109] The respondent S.L.W. testified on her own behalf. Her direct examination was undertaken by her representative T.M. At the outset of her direct examination S.L.W. identified her occupation as […]. She was referred to her affidavit sworn December 8, 2014, and confirmed that the affidavit was true.

[110] At one point during her direct she indicated that she did not believe the agency, in the beginning, offered enough services when she was struggling, and she did not believe that the agency was doing all that it could at present. However, the respondent also testified that she recognized the issues that have led to the agency's involvement and said that she had stated that to Ms. Paupin and others.

[111] S.L.W. expressed her belief that things have changed a lot during the past year. She stated that she has made a lot of changes in her life in order to be a better parent.

[112] She testified that on September 25, 2014, before she started her […] course on September 29,she asked if she could see the child S.W. after work hours. She

testified that she did not receive a response to this request right away. Ms. Paupin responded September 30, and S.L.W. had to resubmit her request and then on October 2, she was told her request was declined.

[113] S.L.W. testified that the first module for the […] course commenced September 29, with graduation on November […]. Following completion of the first module she then undertook a four-week period of internship with the final graduation scheduled for December […]. She indicated that her internship hours would be complete a week early.

[114] S.L.W. confirmed that she also asked the agency for after hour visits while participating in her course, and advised that she was also available Friday afternoon. She expressed frustration at the agency's position regarding access and noted that an access visit that had been scheduled for December 10 had been changed, and that an access worker texted her with the dates for the visit. However, she indicated that when she called to confirm, no one at the agency seem to know anything and then she was finally told that the visit had been rescheduled again, but she had not been advised. She indicated that every week the visits were to be Monday and Friday, but for the week of trial they had changed to Wednesday and Friday, and she indicated she will only get a visit if the trial finishes on December 11. S.L.W. testified that these changes in the scheduled visits would be disruptive to the child S.W.'s normal routine. She also indicated that she was not able to attend the child S.W.'s scheduled appointments because she was not given the dates of the appointments.

[115] S.L.W. was asked about her plan for the child S.W. if he was returned to her care. She testified that the child would stay in […]Day Care and she expressed her belief that he was doing really well in the daycare program. She stated that the program sounds impressive. The family would continue to live in their home in […]. She would work as a […] only during the hours that S.W. was in daycare. She indicated that her job would provide her with the flexibility to stay at home. She explained that she and T.M. […]. She testified that she is presently doing her internship […]. She stated that C[…] has confirmed that they are open to her taking time off should the child S.W. be ill. She also testified that her family would be involved, for support, as well as a close friend who resides in […]. She testified that while she and T.M. could share responsibility for the child S.W.'s appointments, she would be the main person. She testified that she would make certain that the child attends all his appointments.

[116] During cross-examination by Tammy McKenzie, S.L.W. testified that the access visit schedule was based upon two visits per week but that the schedule changed a lot. Initially the visits were Tuesday and Thursday from 1:00 p.m. to 2:30 p.m. and then changed to 1:30 p.m. to 3:00 p.m. On occasion the schedule would be changed. She testified that a couple of months ago they changed to Wednesday and Thursday from 1:30 p.m. to 3:00 p.m., and then more recently to Monday and Friday from 1:30 p.m. to 3:00 p.m. S.L.W. testified that she had frequently asked for changes and that the visits be outside or longer in duration. None of these requests were ever granted.

[117] S.L.W. testified that she was not notified consistently of the child S.W.'s appointments. The family support worker Ms. Atkinson gave her list of appointments on post-it notes. She testified that any appointment dates she was notified of, she attended. She indicated there was one appointment she could not go to due to her course. She said that she messaged the agency confirming that she would not be able to attend. She also missed one hearing and speech clinic appointment due to being involved in a car accident.

[118] The respondent testified that she knew something was wrong with the child S.W. when he was about 22 months old. She said she spent hours with the child just trying to get him to talk. On May 29th, 2013, she sought an appointment with her family doctor in order to get a referral to a pediatrician. Her family physician did not believe that S.W. had autism and felt that the problems were congenital. She took the child for a hearing test but the child would not cooperate with the testing and so the child had to be referred for a sedated test, but she noted that he was removed from her care before that appointment. The respondent also testified that she had made a self-referral to early intervention services in March or May 2013. She testified that she received a phone call from early intervention on June 4, advising that they would not be able to see him until the summer. He was assessed by early intervention on June 17. She said she was advised that she had not caused the child's issues but that he was born that way. The respondent also made a referral to mental health and attended mental health on September 23, 2013, and then the child was taken into care.

[119] When asked about the EIBI program and the level of commitment required from a parent, the respondent testified that she was prepared to follow through with EIBI.

[120] The respondent was then asked about the taking into care in October 2013. The respondent testified that at that point she was working all the time, trying to care for the three children, her rent was three months in arrears, her former partner had left for Alberta and she acknowledged that she was not home enough.

[121] When asked about the difficulty she had keeping the child A.G.'s scheduled appointments, she again indicated that she was working and that the child's father would not help with the appointments. Again she mentioned that S.W.'s father was looking into moving to Alberta and she was trying to keep her daughter in school. She was also behind with the power bill.

[122] The respondent was then asked why she did not ask for help, and she responded by indicating that she guessed that she did not see it as she was so overwhelmed that she was just muddling through. She did not see any way out of her situation. When the agency became involved, she testified that she did ask the social worker for help.

[123] The respondent testified that the first visit from a social worker was January 2013. At that time, the agency closed the file because S.W.'s father was still there and also working and things were okay. When the worker came back in May things were starting to go badly, and the relationship with the child's father had broken down. The Respondent testified that she asked for help and signed all the consents as requested. She acknowledged that she was somewhat resistant at first and again she testified that she told the worker she needed help with the children and with child care and with O.C.'s schooling. Subsequently, the worker called her and told her that the agency was proceeding with a supervision application. S.L.W. testified that no services were provided after the supervision order was put in place. Family support services were not offered until December of 2013, after the children had been taken into care. She was just offered family support services and access and nothing else.

[124] The respondent S.L.W. testified that at present her family is very stable. She referred to the relationship with T.M. as very stable. She said that T.M. is very supportive of her request for the child S.W. to return to her care. They have prepared a room for the child and they have developed a plan.

[125] The respondent testified that she and T.M. have discussed the work issue at length. In particular, they have discussed how they will arrange their employment and how she will be available to the child S.W. This played a big part in T.M.'s decision to go back to […] because as a […] he will have more flexibility with

respect to his work hours. T.M.'s hours are determined by […]. The respondent testified that she has the same options available to her. She testified that they know what is required by way of income each month and that they can keep track and determine when they will work. She testified that their budget includes an allowance of $30 per day for the child S.W. to attend daycare.

[126] S.L.W. testified that maintaining the child's placement at […]Care is a priority. She testified that he has made really good gains socially, and therefore it is important that he attend day care for social skills and to maintain his peer group. She stated that the child S.W. needs every bit he can get. She also testified as to her willingness to hold the child back for a year from school. If she needs help with additional child care she has arranged with her friend from […] to provide that care. She testified that she does not see her daughter O.C. caring for the child S.W., and that she now recognizes that it was not appropriate for her to have asked O.C. to care for the child previously.

[127] During cross-examination by counsel for the Minister, the respondent acknowledged that she decided to take the […] course knowing that the child protection proceeding was ongoing. She acknowledged that the course was available every month but explained that she had funding for this particular course and not for any subsequent course. She acknowledged that the child S.W.'s need to see his mother should take precedence but suggested that the agency should appreciate that as well.

[128] The respondent acknowledged that she is currently charged with animal abuse relating to […], but testified that she was not the owner of the animals and denied that she had any prior conviction for beating an animal. The respondent was then referred to Exhibit 10, a JEIN Offender Summary, and confirmed that her name appeared in the document as well as her birthdate. She denied the accuracy of the information contained in page 3 of the Exhibit, stating that it was not her charge and that she did not get charged for beating an animal. She testified that the current charge is scheduled for trial in the new year.

[129] The respondent testified that she and T.M. started dating officially in the summer of 2013, although they had known each other previously.

[130] The respondent acknowledged that prior to the taking into care, O.C. was providing a great deal of child care, but only once did this involve overnight as a result of a wheel bearing breaking on her vehicle. The respondent testified that the child S.W.'s paternal grandmother had been asked to provide care and that she had

been at the home, but then left and declined to take the child with her when she left, despite being asked to do so. She also indicated that she had asked A.G.'s father to help by picking up A.G. but he had not done so and as result her daughter O.C. had ended up looking after both children, and she acknowledged that it was not good.

[131] The respondent was referred to paragraph 41 of her affidavit, Exhibit 9, and testified that she did not really feel family support services have been helpful to her.

[132] At one point during cross-examination, the respondent testified that during the second module of her […] training program she has to […]. She confirmed that her partner T.M. is a […]. She has to put in 100 hours over a four-week period and she testified that she is working to complete it more quickly so she will have more time to visit with the child S.W.

[133] The respondent testified that she is considering not going back to work. She indicated that she will have to judge it based upon the number of appointments for the child S.W. She indicated that she will put the child's needs ahead of her own. She also commented that she took the […] training course knowing that there was a possibility that the child might not be returned to her care and recognizing that as a family they have to go on.

[134] The court referred the respondent to the affidavit of Jillian Martin sworn December 5, 2013, and the photographs attached as exhibit A, and asked the respondent to explain how the child S.W. had come to be in that condition as of September 27, 2013. The respondent indicated that it appeared that the child's diaper had been dirty for a period of time and she noted that he was home with her daughter O.C. that afternoon. The respondent was not aware of how the diaper rash got to be so significant. When asked who was responsible, the respondent indicated that she would be responsible and stated that she had not observed any diaper rash in the morning but noted that the child did have frequent diaper rashes.

[135] When asked about the recommendations in Ms. Robichaud-Smith's parenting capacities assessment report, the respondent testified that she felt that Ms. Robichaud-Smith was saying that her daughter O.C. should not be responsible for S.W.'s care, and she then indicated that other than when the child is in daycare, she will be the one to care for the child. If she was ill, her partner T.M. would step in.

[136] When asked about her view of the EIBI program, she confirmed that she would be happy to participate and learn because it would mean she could help her son, and that she felt the program is very effective for children with autism.

[137] The respondent S.L.W. was the only witness to testify on her behalf.

[138] No rebuttal evidence was presented on behalf the Minister.

[139] The preceding paragraphs provide a summary of some of the evidence as adduced by trial of the matter. As a summary, it is not intended to be comprehensive. I would, however, confirm that I have carefully considered all of the evidence in determining this matter.

Submissions

[140] The respondent's representative T.M. submitted that supports and services were not put in place by the agency, and suggested that the respondent had taken her own initiatives respecting services. He submitted that the respondent understands the seriousness of the issues, but submitted that the respondent has taken steps to better herself and improve her situation. T.M. submitted that the respondent acknowledges her past mistakes, but maintains that they have and will be remedied. T.M. submitted that the least intrusive option appropriate in the circumstances would be to return the child S.W. to his family.

[141] Counsel for the child O.C. emphasized the need to consider the respondent's circumstances when the agency became involved. She pointed out that the respondent was a single mom dealing with two high needs children, with little support, little finances, that she was struggling to make ends meet and facing eviction. It was clear that services were required. She submitted that if services had been provided prior to the taking into care, that would have been very helpful.

[142] Ms. McKenzie submitted that the primary issue is the determination of whether or not there is any risk of harm at this particular point in time. She submitted that there is no risk of harm at present. She emphasized that the respondent is now in a stable relationship, financial hardship issues have been addressed or lessened, and the respondent's circumstances have changed. Ms. McKenzie emphasized that even when she was struggling, the respondent did seek out help and services on her own, including contact with her family doctor,

requested a referral to the pediatrician, and contacted early intervention as well as mental health.

[143] Ms. McKenzie noted Dianna Robichaud-Smith's clear recommendation that the child be returned to the respondent's care.

[144] Ms. McKenzie acknowledged that non-attendance at access visits would certainly be concerning, but suggested that the Minister's refusal to reschedule access due to the respondent's participation in her […]course was also concerning. Ms. McKenzie submitted that the respondent's decision to take the course, given she was a mother with children to support, an individual with minimal education, who was being offered an opportunity to take a course fully funded, was understandable, and yet her request for rescheduling of access as a result of the course was declined.

[145] Ms. McKenzie indicated that it was important to note that Ms. Atkinson, the family support worker, had said until September, things were going well. Ms. Robichaud-Smith, as the responsible assessor, despite some concerns, recommended that the child be returned to the respondent's care. Her recommendations for services were intended to enhance, not create, parenting capacity. Ms. McKenzie indicated it was extremely concerning that the Minister refused to revisit the plan of care premised upon permanent care and custody, based upon either Ms. Robichaud-Smith's assessment report or signs of progress as confirmed by the family support worker. Ms. McKenzie submitted that once the agency had decided to proceed with a request for permanent care and custody, the process just seemed to shut down. The perception on the part of the respondent at that point was that it was a done deal and therefore it was understandable that she would have somewhat of a defeatist attitude given the agency's decision.

[146] Ms. McKenzie submitted that there was no evidence to justify a finding that the child continued to be in need of protective services.

[147] Ms. McKenzie also emphasized that it was important to recognize the secure attachment between the respondent and the child S.W. She also submitted that the respondent had submitted a suitable plan confirming her intention to follow through with services for the child S.W.

[148] Counsel for the Minister submitted that the parenting capacities assessment report submitted by Ms. Robichaud-Smith was outdated before it was complete. She noted that it was commenced in January, but not submitted till August. She

emphasized that Ms. Robichaud-Smith was not able to comment on any changes since her testing had been completed.

[149] Ms. Lennerton submitted that the agency was not questioning the respondent's ability to parent, but questioning her choices. She acknowledged that the respondent may be able to parent, but suggested that the respondent has not made the necessary commitment to parenting and noted that her commitment to the child A.G. was not adequate.

[150] Counsel for the Minister emphasized that prior to the agency's involvement, the respondent was not keeping scheduled appointments for the child A.G. Ms. Lennerton submitted that there was help available to the respondent but she was relying inappropriately upon her daughter O.C. Counsel for the Minister submitted that the respondent's first instinct was to blame her daughter O.C. for the diaper rash, just as she blamed A.G.'s father, B.G., for not being a support for A.G.

[151] Ms. Lennerton acknowledged that the respondent had been dealt a difficult hand, but suggested that the respondent had not taken steps to help herself. Ms. Lennerton submitted that the child S.W. requires a parent with more than average commitment, and that the history in the case does not demonstrate that the respondent can provide that level of commitment.

[152] Ms. Lennerton confirmed that the Minister was not comfortable with the respondent’s current plan, noting that it relies upon the relationship with T.M. She suggested that that relationship was not really stable and that T.M. does not know the child S.W. She queried what would happen if T.M. is not involved. Counsel for the Minister suggested that the respondent has a history of going from relationship to relationship. She submitted that the respondent’s plan was not well thought through and that the Minister had no confidence that the respondent would follow through appropriately if the child S.W. was returned to her care. Counsel for the Minister submitted that the respondent was just saying she understands the concerns or issues, but that she doesn't really understand.

Applicable provisions of the *Children and Family Services Act*

[153] The following provisions of the *Children and Family Services Act* have been considered in determining this application:

[154] The preamble to the *Act*, including the following paragraphs;

AND WHEREAS parents or guardians have responsibility for the care and supervision of their children and children should only be removed from that supervision, either partly or entirely, when all other measures are inappropriate;

AND WHEREAS children have a sense of time that is different from that of adults and services provided pursuant to this Act and proceedings taken pursuant to it must respect the child's sense of time;

Purpose and paramount consideration

2 (1) The purpose of this Act is to protect children from harm, promote the integrity of the family and assure the best interests of children.

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

.....

Interpretation

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.

.....

Child is in need of protective services

22 (1) In this Section, "substantial risk" means a real chance of danger that is apparent on the evidence.

(2) A child is in need of protective services where

(a) the child has suffered physical harm, inflicted by a parent or guardian of the child or caused by the failure of a parent or guardian to supervise and protect the child adequately;

(b) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (a);

(c) the child has been sexually abused by a parent or guardian of the child, or by another person where a parent or guardian of the child knows or should know of the possibility of sexual abuse and fails to protect the child;

(d) there is a substantial risk that the child will be sexually abused as described in clause (c);

(e) a child requires medical treatment to cure, prevent or alleviate physical harm or suffering, and the child's parent or guardian does not provide, or refuses or is unavailable or is unable to consent to, the treatment;

(f) the child has suffered emotional harm, demonstrated by severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour and the child's parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;

(g) there is a substantial risk that the child will suffer emotional harm of the kind described in clause (f), and the parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;

(h) the child suffers from a mental, emotional or developmental condition that, if not remedied, could seriously impair the child's development and the child's parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the condition;

(j) the child has suffered physical harm caused by chronic and serious neglect by a parent or guardian of the child, and the parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;

(ja) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (j);

.....

Disposition Order

42 (1) At the conclusion of the disposition hearing, the court shall make one of the following orders, in the child's best interests:

(a) dismiss the matter;

(b) the child shall remain in or be returned to the care and custody of a parent or guardian, subject to the supervision of the agency, for a specified period, in accordance with Section 43;

(c) the child shall remain in or be placed in the care and custody of a person other than a parent or guardian, with the consent of that other person, subject to the supervision of the agency, for a specified period, in accordance with Section 43;

(d) the child shall be placed in the temporary care and custody of the agency for a specified period, in accordance with Sections 44 and 45;

(e) the child shall be placed in the temporary care and custody of the agency pursuant to clause (d) for a specified period and then be returned to a parent or guardian or other person pursuant to clauses (b) or (c) for a specified period, in accordance with Sections 43 to 45;

(f) the child shall be placed in the permanent care and custody of the agency, in accordance with Section 47.

(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.

(3) Where the court determines that it is necessary to remove the child from the care of a parent or guardian, the court shall, before making an order for temporary or permanent care and custody pursuant to clause (d), (e) or (f) of subsection (1), consider whether it is possible to place the child with a relative, neighbour or other member of the child's community or extended family pursuant to clause (c) of subsection (1), with the consent of the relative or other person.

(4) The court shall not make an order for permanent care and custody pursuant to clause (f) of subsection (1), unless the court is satisfied that the circumstances justifying the order are unlikely to change within a reasonably foreseeable time not exceeding the maximum time limits, based upon the age of the child, set out in subsection (1) of Section 45, so that the child can be returned to the parent or guardian. *1990, c. 5, s. 42.*

.....

Review Order

46 (1) A party may at any time apply for review of a supervision order or an order for temporary care and custody, but in any event the agency shall apply to the court for review prior to the expiry of the order or where the child is taken into care while under a supervision order.

(2) Where all parties consent, the supervision by an agency of a child under a supervision order or the care and custody of a child under an order for temporary care and custody may be transferred to another agency, with the other agency's consent, and, where all parties, including the other agency, do not so consent, the court may, upon application, order the transfer of an agency's supervision or care and custody to another agency, in the child's best interests.

(3) Where an application is made pursuant to this Section, the child shall, prior to the hearing, remain in the care and custody of the person or agency having care and custody of the child, unless the court is satisfied, upon application, that the child's best interests require a change in the child's care and custody.

(4) Before making an order pursuant to subsection (5), the court shall consider

(a) whether the circumstances have changed since the previous disposition order was made;

(b) whether the plan for the child's care that the court applied in its decision is being carried out;

(c) what is the least intrusive alternative that is in the child's best interests; and

(d) whether the requirements of subsection (6) have been met.

(5) On the hearing of an application for review, the court may, in the child's best interests,

(a) vary or terminate the disposition order made pursuant to subsection (1) of Section 42, including any term or condition that is part of that order;

(b) order that the disposition order terminate on a specified future date; or

(c) make a further or another order pursuant to subsection (1) of Section 42, subject to the time limits specified in Section 43 for supervision orders and in Section 45 for orders for temporary care and custody.

(6) Where the court reviews an order for temporary care and custody, the court may make a further order for temporary care and custody unless the court is satisfied that the circumstances justifying the earlier order for temporary care and custody are unlikely to change within a reasonably foreseeable time not exceeding the remainder of the applicable maximum time period pursuant to subsection (1) of Section 45, so that the child can be returned to the parent or guardian. *1990, c. 5, s. 46.*

.....

Permanent care and custody order

> 47 (1) Where the court makes an order for permanent care and custody pursuant to clause (f) of subsection (1) of Section 42, the agency is the legal guardian of the child and as such has all the rights, powers and responsibilities of a parent or guardian for the child's care and custody.
>
> (2) Where an order for permanent care and custody is made, the court may make an order for access by a parent or guardian or other person, but the court shall not make such an order unless the court is satisfied that
>
> (a) permanent placement in a family setting has not been planned or is not possible and the person's access will not impair the child's future opportunities for such placement;
>
> (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.
>
> (3) Any access ordered pursuant to subsection (2) may be varied or terminated in accordance with Section 48.

Review of case authorities

[155] In **Minister of Community Services v. C. B.**, 2012 NSSC 358, Justice Jollimore determined an application by the Minister for an order for permanent care and custody without provision for access for the respondent mother. In granting the Minister's application, Justice Jollimore offered the following legal analysis commencing at paragraph 19:

> [19] The purposes of the *Children and Family Services Act* are to protect children from harm, to promote the family's integrity and to assure children's best interests. These purposes are expressed in the *Act*'s preamble and they are also repeated in the articulation of "best interests" found in subsection 3(2).
>
> [20] In *Children and Family Services Act* proceedings, the children's best interests are paramount. At different points in a child protection application, the *Act* directs me to consider "the best interests of a child" when making an order or a determination. When that happens, subsection 3(2) dictates that I consider those of enumerated circumstances which are relevant.
>
> [21] This is an application to review a temporary care and custody order. Section 46 of the *Children and Family Services Act* outlines the process I'm to follow in this review. Before I make an order in a review, I must consider: whether the circumstances have changed since the previous disposition order was made; whether the plan for the children's care applied in that order is being

executed; the least intrusive alternative that's in the children's best interests; and whether the requirements of subsection 46(6) have been met. Subsection 46(6) says that I may make a further temporary care and custody order unless I am satisfied that the circumstances which justified the earlier order are unlikely to change within a reasonably foreseeable time that doesn't exceed the statutory deadline….

[33] The Minister asks that I order the children be placed in its permanent care and custody pursuant to section 42(1)(f). Before I may do this, I must consider subsections 42(2) and 42(4) of the *Act*. The former section mandates that I do not make an order that removes the children from their mother unless I am satisfied that less intrusive alternatives have been tried and have failed, have been refused, or would be inadequate to protect them. The latter section instructs that I shall not make a permanent care and custody order unless I am satisfied that the circumstances which justify the order are unlikely to change within a reasonably foreseeable time, not exceeding the maximum time limits. I have already addressed the latter point, above, but will return to it, briefly, below…..

[37] I'm not to make a permanent care and custody order unless I'm satisfied that the circumstances which justify the order are unlikely to change within a reasonably foreseeable time, not exceeding the maximum time limits. The maximum time limit for C is approximately five weeks from now. For J, the maximum time limit is approximately seven months from now….

[41] My decision is to be based on the children's best interests, so I turn to consideration of subsection 3(2) of the *Act*. I am particularly mindful of: the importance of continuity of the children's care, the children's mental and emotional needs and the appropriate treatment to meet those needs, the level of the children's mental and emotional development, and family relations. The children have had enhanced foster care since August 2011. This has been integral to those gains J has made in her improved behaviour at school. J, in particular, has required counseling and C attends a developmental daycare. Through the Minister's involvement, the children have received the assistance they need.

[42] According to subsection 42(3) of the *Children and Family Services Act*, I am not to place children in the Minister's permanent care and custody without considering whether there is a possible placement with a relative, neighbour or other member of the children's community or with extended family. Here, no such placement has been identified for J or C….

[46] Where the Minister's application is unopposed, I still bear the burden of considering the evidence and the requirements of the *Children and Family Services Act* and determining whether to grant the Minister's application for permanent care and custody of the children. I have read the materials the Minister filed. I have conducted the analysis required by the legislation. I conclude that it is appropriate, under the terms of *Children and Family Services Act* and in the children's best interests, that I grant the Minister's application for permanent care and custody of J and C.

Order for no access

[47] The Minister asks that I order there be no access between Ms. B and the children. This request is pursuant to subsection 47(2) of the *Act*. Ms. B has not asked that I make an order for access, though she has asked me to consider various requests relating to the termination of her contact with J and C….

[49] According to subsection 47(2), I may not make an order for access unless I'm satisfied that one of certain circumstances enumerated in that subsection exists. Access may be available where an adoption isn't planned or where some other special circumstance justifies the access order, for example. I have evidence from Kandi Swinehammer that adoptions are planned for J and C and that an ongoing access order may impair the prospect of their adoption. In these circumstances, I grant the Minister's request that there be an order for no access.

[156] In **Mi'Kmaw Family And Children Services v. KD,** 2012 NSSC 379, Justice Forgeron considered an application for permanent care and custody. Justice Forgeron identified the following principles commencing at paragraph 18:

[18] In this case, the agency is assigned the burden of proof. It is the civil burden of the proof. The agency must prove its case on a balance of probabilities by providing the court with "clear, convincing, and cogent evidence"**: C.(R.) v. McDougall**, 2008 SCC 53. The agency must prove why it is in the best interests of the children to be placed in the permanent care and custody of the agency, according to the legislative requirements, at this time.

[19] In making my decision, I must be mindful of the legislative purpose. The threefold purpose is to promote the integrity of the family, protect children from harm, and ensure the best interests of children. The overriding consideration is, however, the best interests of children as stated in sec. 2(2) of the *Act*.

[20] The *Act* must be interpreted according to a child centred approach, in keeping with the best interests principle as defined in sec. 3(2). This definition is multifaceted. It directs the court to consider various factors unique to each child, including those associated with the child's emotional, physical, cultural, and social development needs, and those associated with risk of harm.

[21] In addition, sec. 42(2) of the *Act* states that the court is not to remove children from the care of their parents, unless less intrusive alternatives have been attempted and have failed, or have been refused by the parent, or would be inadequate to protect the children.

[22] When a court conducts a disposition review, the court assumes that the orders previously made were correct, based upon the circumstances existing at the time. At a review hearing, the court must determine whether the circumstances which resulted in the original order, still exist, or whether there have been changes such that the children are no longer children in need of protective

services: sec. 46 of the *Act*; and **Catholic Children's Aid Society of Metropolitan Toronto v. M.(C.)** [1994] 2 S.C.R. 165.

[23] Past parenting history is also relevant as it may be used in assessing present circumstances. An examination of past circumstances helps the court determine the probability of the event reoccurring. The court is concerned with probabilities, not possibilities. Therefore, where past history aids in the determination of future probabilities, it is admissible, germane, and relevant: **Nova Scotia (Minister of Community Services) v. Z.S.** 1999 NSCA 155 at para. 13; **Nova Scotia (Minister of Community Services) v. G.R.** 2011 NSSC 88, para. 22, as affirmed at **Nova Scotia (Minister of Community Services) v. G.R.** 2011 NSCA 61.

[24] Section 42(4) of the *Act* provides the court with the authority to make a permanent care order, even when the legislative time lines have not been exhausted, if circumstances are unlikely to change within a reasonably foreseeable time. Section 42(4) states as follows:

(4) The court shall not make an order for permanent care and custody pursuant to clause (f) of subsection (1), unless the court is satisfied that the circumstances justifying the order are unlikely to change within a reasonably foreseeable time not exceeding the maximum time limits, based upon the age of the child, set out in subsection (1) of Section 45, so that the child can be returned to the parent or guardian. 1990, c. 5, s. 42.

[25] Section 46(6) of the *Act*, notes a similar provision. Section 46(6) states as follows:

Where the court reviews an order for temporary care and custody, the court may make a further order for temporary care and custody unless the court is satisfied that the circumstances justifying the earlier order for temporary care and custody are unlikely to change within a reasonably foreseeable time not exceeding the remainder of the applicable maximum time period pursuant to subsection (1) of Section 45, so that the child can be returned to the parent or guardian. 1990, c. 5, s. 46.

[26] Although discretionary, secs. 42(4) and 46(6) of the *Act* do not provide the court with unlimited jurisdiction. All discretionary authority must be exercised judicially, and in accordance with rules of reason and justice, not arbitrarily and based upon a rational and solid evidentiary foundation: **MacIsaac v. MacIsaac** (1996) 150 NSR (2d) 321 (C.A.).

[157] In **Nova Scotia (Community Services) v. A. W.**, 2014 NSSC 393, Justice Haley determined an application for permanent care and custody. His Lordship noted the following with respect to burden of proof and test on statutory review commencing at paragraph 89 of his decision:

[89] The burden of proof is on a balance of probabilities, which is not heightened or raised because of the nature of the proceeding. In the case of **F.H. v. McDougall,** [2008] 3 S.C.R. 41, the Supreme Court of Canada held at paragraph 40:

Like the House of Lords, I think it is time to say, once and for all in Canada there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof.

[90] And further at paragraph 45 and 46:

45. To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.

46. Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[91] The burden of proof is on the Minister to show that the Permanent Care and Custody Order is in the child's best interest.

Test on Statutory Review

The Supreme Court of Canada set out the test to be applied on statutory Review Hearings in child protection proceedings in the **Catholic Children's Aid Society of Metropolitan Toronto v. C.M.,** [1994] S.C.J. No. 37 (SCC), where the Court held that, at a Status Review Hearing, it is not the Court's function to retry the original protection finding, but rather the Court must determine whether the child continues to be in need of protective services. Writing for the majority, Justice L'Heureux-Dube stated as follows at paragraphs 35, 36, and 37:

35. It is clear that it is not the function of the status review hearing to retry the original need for protection order. That order is set in time and it must be assumed that it has been properly made at that time. In fact, it has been

> **executed and the child has been taken into protective by the respondent society. The question to be evaluated by courts on status review is whether there is a need for a continued order for protection...**
>
> **36. The question as to whether the grounds which prompted the original order still exist and whether the child continues to be in need of state protection must be canvassed at the status review hearing. Since the Act provides for such review, it cannot have been its intention that such a hearing simply be a rubber stamp of the original decision. Equal competition between parents and the Children's Aid Society is not supported by the construction of the Ontario legislation. Essentially, the fact that the Act has as one of its objectives the preservation of the autonomy and the integrity of the family unit and that the child protection services should operate in the least restrictive and disruptive manner, while at the same time recognizing the paramount objective of protecting the best interests of children, leads me to believe that consideration for the integrity of the family unit and the continuing need of protection of a child must be undertaken.**
>
> **37. The examination that must be undertaken on a status review is a two-fold examination. The first one is concerned with whether the child continues to be in need of protection and, as a consequence, requires a court order for his or her protection. The second is a consideration of the best interests of the child, an important and, in the final analysis, a determining element of the decision as to the need of protection. The need for continued protection may arise from the existence or the absence of the circumstances that triggered the first order for protection or from circumstances which have arisen since that time.**

[158] In **Nova Scotia (community services) v. R. F**., 2012 NSSC 125, Justice Jollimore considered and determined the Minister's application for permanent care and custody. Justice Jollimore indicated as follows commencing at paragraph 165 of her decision:

> [165] According to Justice Saunders in *Children's Aid Society of Halifax v. B.(T.)*, 2001 NSCA 99 at paragraph 19, I'm to consider each of the possible dispositions in section 46(5) and, by virtue of section 46(5)(c), section 42(1). His Lordship's reasons limit my considerations. At paragraph 23, he explained:
>
> > As the proceeding nears a conclusion, the opportunity to grant disposition orders under s. 42(1)(c) diminishes until the maximum time is reached at which point the court is left with only two choices: one or the other of the two "terminal orders". That is to say, either a dismissal order pursuant to s. 42(1)(a) or an order for permanent care and custody pursuant to s. 42(1)(f).

> [166] This proceeding is nearing its conclusion: the deadline for a final disposition is April 7, 2012. As a result, the only two options available for my consideration are dismissing the Minister's application or placing C in the Agency's permanent care and custody.
>
> .....
>
> [172] As I've said, my task is to determine whether there continues to be a need for a protection order, considering C's changing needs and C's family. I'm to consider if the circumstances that gave rise to the original order still exist and if C is still in need of the state's protection. This is outlined in *Children's Aid Society of Halifax v. C.V.*, 2005 NSCA 87 at paragraph 8.
>
> .....
>
> [177] When considering the options available to me in the application under the *Children and Family Services Act*, I cannot lose sight of the obvious: only if C is in need of protective services can I order anything other than termination of the application.
>
> [178] Sections 22(2)(b),(g) and (ja) of the *Children and Family Services Act* are the bases for the Minister's application. Each of these sections refers to "substantial risk" of physical harm or emotional harm. "Substantial risk" means "a real chance of danger that is apparent on the evidence" according to section 22(1) of the *Act*. The Minister is to prove that there is a real chance of the described harm that must be proved to the civil standard. The Minister need not prove that this harm will actually occur on a balance of probabilities.

Legal analysis

[159] The Minister is seeking an order for permanent care and custody with respect to the child S.W. Accordingly the Minister bears the burden of proof in establishing that an order for permanent care and custody would be in the best interests of the child.

[160] Case authorities confirm that the burden of proof is the civil burden based on balance of probabilities (**C.(R.) v. McDougall**, 2008 SCC 53).

[161] In determining whether or not the burden of proof has been met in any given case it is a responsibility of the trial judge to review or scrutinize the evidence with care in determining the outcome of the application.

[162] It is important to bear in mind the purpose of the *Children Family Services Act* as set forth in section 2(1), namely, to protect children from harm, promote the integrity of the family and assure the best interests of children.

[163] Similarly, it is important to acknowledge that in all proceedings under the *Act*, the paramount consideration is the best interest of the child, as per section 2(2). This provision affirms the need for a child focused or centric approach to the determination of child protection proceedings.

[164] Section 3(2) of the legislation offers considerable assistance by identifying various circumstances that are to be considered in determining best interests. Nevertheless, consideration and determination of the child's best interests in any given case remains a challenging task.

[165] The Minister's application comes before the court by way of review application and notice of hearing dated July 24, 2014. Pursuant to that notice, the Minister requests a review of disposition pursuant to section 46 of the *Children and Family Services Act* and, in particular, confirms a request that the child S.W. be placed in the permanent care and custody of the Minister pursuant to section 42 (1) (f).

[166] I would also acknowledge that at this particular point in time, given the expiration of the timeline, there are only two possible dispositions, namely dismissal of the proceeding or permanent care. (**Nova Scotia (Minister of Community Services)** v. **N. J. H.**, 2006 NSCA 20.)

Need for Protection

a) Changes in Circumstance

[167] At a review hearing, the court must determine whether or not the child or children remain in need of protective services. The court is to consider and determine whether the circumstances that justified the prior disposition order still exist. (**Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)** [1994] 2 S.C.R.165).

[168] The protection application and notice of hearing as filed on behalf the Minister at the outset of protection proceeding maintained that all three of the involved children were in need of protective services pursuant to section 22 (2), subparagraphs (b),(e),(g),(h) and (ja). The protection order made July 29, 2013, found all three children, including S.W., to be in need of protective services under each of these provisions.

[169] Subparagraphs (b), (g) and (ja) are similar in so far as they refer to and identify "substantial risk" of physical or emotional harm. The legislation defines

substantial risk to mean a real chance of danger that is apparent on the evidence as per section 22 (1). Case authorities have clarified that the Minister is not required to prove that harm will actually occur on balance of probabilities. All the Minister is required to prove is that there is a real chance of the described harm (**M.J.B. v. Family and Children's Services of Kings County**, [2008] N.S.J. No. 299 C.C.A). Nevertheless, the burden rests with the Minister to establish, on a balance of probabilities, that the child S.W. remain in need of protection under one or more of the grounds relied upon.

[170] Based upon my review of the evidence I have concluded that there have been changes in circumstance since the protection finding was made.

[171] At the commencement of the proceeding, and when the protection finding was made, the respondent S.L.W. was experiencing considerable difficulty. Her relationship with Mr. S.W. had ended. As a single parent she was responsible for the care of two special needs children, as well as her daughter. S.L.W. was experiencing financial difficulty. She had had difficulty securing employment and was behind in her rent and power bill. She was having difficulty getting her daughter to attend school.

[172] I accept S.L.W.'s characterization of her situation when she testified that she was overwhelmed and just muddling through. S.L.W. admitted that she made a mistake in relying too extensively on her daughter O.C. to assist with the care of S.W. and A.G. Her circumstances led to S.L.W. being inconsistent in following through and keeping schedule appointments for the child A.G. The respondent S.L.W. was not attending properly to the care of S.W. and A.G., who as special needs children, obviously required more of a hands on parenting commitment then S.L.W. was providing or should have been providing at that point in time.

[173] The respondent S.L.W. is now involved in what appears to be a stable relationship with T.M. The relationship commenced in September of 2013. S.L.W. and T.M. are engaged to be married. They are currently living together in T.M.'s home in […]. T.M. is supportive of S.L.W.'s request that the child S.W. be returned to her care. T.M. is an integral part of S.L.W.'s parenting plan. The fact that S.L.W. is now involved in a stable relationship with a supportive partner constitutes a change in circumstance.

[174] The history of S.L.W.'s prior relationships does not support and justify the conclusion that S.L.W.'s relationship with T.M. is going to be of limited duration. During cross-examination, Ms. Paupin conceded that she could not categorize the

duration of the respondent's prior relationships as being short-term given the length of those relationships. There is no evidence upon which the court could conclude that the relationship between T.M. and S.L.W. is likely to be short term.

[175] While the Minister would not consider T.M. and his relationship as a mitigating factor sufficient to preclude an application for permanent care, it appears that decision was based in part on the understanding that S.L.W. had been involved in a number of unsuccessful relationships, and therefore her relationship with T.M. was likely to follow the same pattern. As indicated, the evidence does not allow the court to reach a similar conclusion. While no one can predict the outcome of the relationship between S.L.W. and T.M. with certainty, the evidence indicates that the relationship is stable and that T.M. is an integral part of S.L.W.'s current support system and plan of care.

[176] The evidence also supports and justifies the conclusion that S.L.W. is no longer experiencing the financial difficulties or stress to the extent she was at the outset of the proceeding. Her partner T.M. is employed as a […]. S.L.W. has successfully completed the first part of the […] program and is about to complete the second component which will qualify her as a […]. She and T.M. intend to […]. They have developed a budget and are confident that they will be able to earn adequate income to cover anticipated monthly expenses for their blended family, which they hope will include the child S.W. The fact that S.L.W.'s financial circumstances have changed constitutes a positive change in circumstance and should also assist in alleviating some of the obvious financial stress S.L.W. was experiencing at the outset, and also during the initial stages of the protection proceeding.

[177] S.L.W. also testified that she now recognizes the inappropriateness of allowing her daughter to care for S.W. and A.G. She has confirmed that she will not allow O.C. to care for S.W. if the child is returned to her care. She has testified that she will be responsible for S.W.'s day-to-day care. If she is going to work as a […], she will only work when the child is in daycare. If she is unable to care for S.W. as result of illness, she will arrange for an adult friend to provide child care or ask T.M. to assist.

[178] Another significant change in circumstance arises from S.L.W.'s decision to consent to the child A.G. being in the primary care of his father B.G. An appropriate *Maintenance and Custody Act* consent order was granted on December 8, placing A.G. in the day-to-day care of B.G. with a right of reasonable access for

S.L.W. The respondent S.L.W. advised the Truro agency that she recognized that she was not able to adequately parent A.G., given his special needs, soon after the Truro agency assumed responsibility for the protection file. Accordingly, if the child S.W. is returned to S.L.W.'s care, she would no longer be responsible for the care of two special needs children, but only one.

[179] The evidence also supports and justifies the conclusion that S.L.W. had taken steps to arrange for a pediatric referral for S.W. from her family physician prior to the commencement of the protection proceeding, and that she had also contacted early intervention. Since S.W. has been in temporary care, S.L.W. has attended any scheduled appointments that she was made aware of, except in two instances where she appears to have had reasonable excuse for her non-participation. Shirley Atkinson confirmed that she was responsible for some miscommunication or misinformation that would have interfered with the responsibility to participate in scheduled appointments on at least two occasions. It also appears that the respondent was not made aware of every scheduled appointment.

[180] S.L.W. is not the only parent to have difficulty with scheduled appointments. The case recordings from August 5, 2014, as found in Exhibit 3, tab 16, page 13, confirm that S.W.’s foster parent had cancelled appointments at the IWK several times, and that it had taken considerable effort to reschedule due to the number of professionals involved. As a result, the IWK indicated that the IWK would call the worker, not the foster parent, to confirm any future appointments and the Agency could then pass that information on to the foster mother. The IWK advised that it would be important that the child keep the next scheduled appointment or a new referral would be required.

[181] During the course of her testimony, the respondent S.L.W. testified that she will ensure that all of the child S.W.'s appointments are kept. It appears that S.L.W. now appreciates and understands the importance of keeping all scheduled appointments involving healthcare providers and professionals. S.L.W. also confirmed her intention to continue S.W.’s attendance at […] care if the child is returned to her care. She also confirmed her willingness to participate in the EIBI program and to work with early intervention. Clearly, participation in these programs would be consistent with S.W.’s best interests.

[182] The availability of daycare with a specialized program for the child S.W. also represents another change in circumstance.

[183] Based upon consideration of the evidence presented, I have concluded that there have been significant changes in circumstance on the part of S.L.W. since the protection finding pursuant to section 40 of the *Act*.

b) Determination of best interests under Section 3 (2)

[184] As part of a status review, the court is also required to consider the best interests of the child. As noted earlier, section 3(2) lists circumstances that the court is to consider in determining best interests. In the paragraphs that follow, I have commented upon the specific circumstances I believe to be relevant.

[185] 3(2)(a) The child S.W. has been with the same foster family since he was taken into care. In the event the Minister's application is granted, the Minister intends to place the child for adoption. The affidavit of adoption worker Shalyn M., sworn October 29, 2014, indicates at paragraph 19 that based upon the characteristics of the child S.W., there are currently approximately 19 approved adoption placements in the province Nova Scotia that would be open to his placement in their home. Of course the affidavit does not identify where any of the potential adoptive parents reside.

[186] One of the recurrent themes in the evidence presented on behalf of the Minister was the child's negative reaction to disruption in his routine. Indeed, this was one of the rationales upon which the Minister declined to grant the respondents request for a change in the access schedule when she commenced her […] program. Clearly a transition from the current foster home to adoptive home would represent a significant change for the child S.W. While the Minister maintains that adoptive placement would provide the child with the opportunity for a secure place as a member of his adoptive family, there is no evidence indicating or confirming that any adoptive placement would see the child continue to reside in […] County. Accordingly, it is uncertain or unknown whether or not any potential adoptive placement would allow the child to continue to attend […] Day Care or to participate in the […] Hospital EIBI program. There was no evidence suggesting that any potential adoptive parents would have an existing relationship with S.W. In the absence of any relationship, getting to know his adoptive parents would represent another significant change for S.W.

[187] S.L.W.'s parenting proposal is premised upon her resuming responsibility for S.W.'s day-to-day care, and S.W. becoming a member of S.L.W.'s and T.M.'s blended family. The Minister maintains that the respondent's plan is not well thought out. The Minister maintains that S.L.W. has not adequately demonstrated

that she can provide the necessary level of parental commitment required to care for S.W. In addition, the Minister expressed reservations as to the stability of the relationship between S.L.W. and T.M.

[188] S.L.W. participated in a parenting capacities assessment as requested by the Minister. In her initial report dated July 27, 2014, and in her subsequent parenting capacities assessment dated August 12, 2014, Dianna Robichaud-Smith referred to the respondent S.L.W. as a bright and articulate individual who has the ability to make changes that would enhance her ability to parent her child. Ms. Robichaud-Smith offered her opinion, based upon observation, that S.L.W. and the child have a secure attachment and she indicated "the child is comfortable with his mother. There is a genuine care and concern evident for her son." In addition, Ms. Robichaud-Smith expressed her view that S.L.W. and T.M. appeared to have a "stable, supportive relationship." Ms. Robichaud-Smith recommended that S.W. be returned to the custody of S.L.W. There were other specific recommendations contained in her report, including a recommendation that the child remain in his present daycare.

[189] 3(2)(b) The Minister's plan would see all ties between the child and his biological family severed. The Minister's plan of care dated July 23, 2014, confirmed the Minister's belief that continued access post adoption would not be in the child's best interest. There is nothing in the plan of care indicating any intention on the part of the Minister to maintain any contact between S.W. and his siblings post permanent care and custody. S.L.W.'s plan obviously would allow S.L.W. to resume her role as the child's primary caregiver and allow the resumption of the sibling relationship between S.W. and O.C. In addition, S.W. would also have the opportunity for periodic contact with his other sibling A.G. if he is in S.L.W.'s care. In addition, S.W. would have the opportunity for contact with the members of S.L.W.'s extended family as well as T.M.'s son.

[190] 3(2)(c) As noted earlier, the Minister's plan of care is premised upon an adoption placement. This would necessarily involve termination of the existing foster placement and therefore disruption of continuity in the child's care. Given S.W.'s special needs, the impact of such a change or transition upon the child would obviously be significant and challenging. S.L.W.'s plan, if approved, would involve termination of foster care and therefore also constitutes a disruption of continuity of care, with associated potential for negative impact on S.W. However, the evidence supports and justifies the conclusion that the impact associated with termination of foster care and return of the child to S.L.W. would involve less

disruption and negative impact on the child, given the positive bond and attachment between the child and S.L.W. In addition, S.L.W. has spoken positively about […] Day Care and has confirmed her intention to continue the child's daycare placement if S.W. is returned to her care. There was no evidence offered on behalf of the Minister with respect to continuation of the child's current daycare placement, if and when the child is placed for adoption. […]Day Care is playing a very important role with respect to S.W.'s care, and a parenting plan that recognizes the importance of continuing the daycare is clearly consistent with S.W.'s best interests. Similarly, there was no evidence offered on behalf of the Minister with respect to the child's ability to participate in the EIBI program following an adoption placement. As indicated earlier, participation in the EIBI program would certainly be consistent with the best interest of the child. It provides further opportunity for the child to reach his developmental potential. S.L.W. has indicated her intention and willingness to facilitate the child's participation if the EIBI program if he is returned to her care.

[191] 3(2)(d) I accept the evidence of Dianna Robichaud-Smith as to the secure attachment between S.L.W. and S.W., and the fact that S.W. is comfortable with his mother. This observation is corroborated by many of the access visit notes which confirm positive and affectionate interaction between S.L.W. and S.W. during access visits. For example, the access facilitator's note of May 27, 2014, indicates the following interactions between mother and child:

> S.L.W. was affectionate and appropriate with S.W., giving him constant attention and taking moments to give him hugs and kisses, talking softly to him consistently during this time. S.L.W. was very pleasant, but did well to set limits with S.W. regarding safety while playing. S.L.W. encouraged S.W. to play and engage with her throughout the visit, offering a variety of activities they could do together. However, S.W. chose to cuddle and wrestle back and forth between S.L.W. and playing with his string as he wandered the room.

[192] Overall the evidence supports and justifies the conclusion that there is a positive bond between S.L.W. and S.W.

[193] 3(2)(e) S.W. has been diagnosed with autism spectrum disorder. At age four, he has extremely limited verbal communication. He has not mastered the skill of eating solid foods. He does not interact with the other children at the daycare. He is easily overwhelmed and can become quite agitated when overwhelmed. It has taken the staff at […] Day Care some time to learn how to interact with S.W. and

avoid overwhelming him. He is on the waitlist for the EIBI program, which hopefully will facilitate and encourage additional developmental progress. Parental participation and commitment is fundamental to the success of the EIBI program. He is also on the wait list for early intervention services. He has had involvement with various specialists including a child psychiatrist, occupational therapist, speech language pathologist as well as various specialists at the IWK. It is essential that S.W.'s caregiver continue to cooperate with all the involved service providers and specialists in order to see that the child's physical mental and emotional needs are consistently and adequately met. The child S.W. will only be able to meet his developmental potential if his caregiver(s) are committed to following through with all necessary and available services. Half-hearted follow through, or an apathetic approach to services, will not be in the child's best interests, and will impact negatively upon his ability to attain his developmental potential.

[194] 3(2)(i) Based upon my review of the evidence, I find less merit in the agency's plan based upon permanent care and custody and adoption than the plan of care on behalf of S.L.W., that would see the child returned to her day-to-day care. I find, in the circumstances of this case, there to be more risk for S.W. associated with a plan premised upon potential adoption placement than a plan that would see S.W. reunited with his mother. As noted earlier, there have been several significant and positive changes in S.L.W.'s circumstances since the child was taken into care. The child and S.L.W. have a secure attachment and positive bond. S.L.W. has confirmed her intention to continue S.W. at […] Day Care and her willingness to participate in the EIBI program and early intervention. The Minister’s plan would see the child, in essence, placed with strangers.

[195] Based upon consideration of the evidence, I have concluded that the respondent S.L.W.'s plan of care offers the best opportunity for the child's development of a positive relationship with a parent and a secure place as a member of a family. Contrary to the submissions made on behalf of the Minister, I find that the plan proposed by S.L.W. is well thought out, reasonable and child focused. I accept Ms. Robichaud-Smith's evidence that the relationship between S.L.W. and T.M. is a stable and supportive relationship. I also find that S.L.W.'s plan provides the opportunity for maintaining the child's relationships with relatives. Importantly, it also affords the child the opportunity to attain his developmental potential by continuing his daycare placement and hopefully facilitating his participation in early intervention, as well as the EIBI program.

[196] 3(2)(l) Based upon my review of the evidence, I find that there is less risk that the child may suffer harm through being returned to the care of S.L.W. then the child being placed for adoption.

[197] 3(2)(m) The degree of risk that justified the original protection finding was significant. The child was not being adequately cared for. The respondent S.L.W. admitted this in her testimony. However, I am satisfied that there have been a number of positive changes in circumstance, as noted earlier in this decision, since the taking into care, which have substantially reduced the degree of risk. Based upon my consideration of the evidence, I find there to be minimal risk and no real chance of danger associated with return of the child to S.L.W.'s care at this point in time.

[198] I have concluded that the child S.W. is no longer a child in need of protective services pursuant to section 22(2), paragraphs (b),(e),(g),(h) or (ja) of the *Children and Family Services Act*. In reaching this conclusion I would confirm that I have attempted to adopt a child-centered approach and have not focused solely on S.L.W.'s parenting ability. I find that the Minister has failed to discharge the onus of proof that rests upon the Minister, and I am satisfied that, at this point in time, based upon my review of the evidence, that S.W. is no longer in need of protective services under any of these provisions.

[199] In reaching this conclusion, I want to acknowledge quite clearly that I have considered the testimony of Shirley Atkinson, family support worker, and in particular, Ms. Atkinson's conclusion that the goals of family support were not met. However, it is important to note that Ms. Atkinson also confirmed that during the summer of 2014, the respondent S.L.W. appeared to make progress and was more engaged with the child and consistently attending appointments. Ms. Atkinson then noted a regression on the part of S.L.W. during the latter part of the summer and continuing into the early fall.

[200] Family support services did not commence at the outset of this proceeding, but were only put in place after the file was transferred from Amherst district office to the Truro district office. Family support services commenced January 30, 2014. The first session at the respondent's home was on February 27, 2014. In March 2014, Ms. Atkinson was away for four weeks for a planned vacation. During that period, no substitute family support worker was made available to the respondent. Family support services resumed in April, and then, in early May, Ms. Atkinson was off on a medical leave and did not return until mid-June. Once again,

no substitute family support worker was provided to the respondent while Ms. Atkinson was off. It is apparently the Minister's policy not to provide a substitute worker in such situations. Family support services recommenced June 19, and then the agency made its decision to request an order for permanent care and custody at a case conference held July 17. The disruptions in family support service were not helpful in the circumstances of this case. There was only limited opportunity for participation in family support services, given the outside time limit for the proceeding. Significant gaps in service, or intervals where the service was not available, were not the fault of Ms. Atkinson, but should have been recognized as inconsistent with the best interests of the child and addressed.

[201] The timing of the Minister's decision to confirm a request for permanent care and custody cannot be ignored. The Minister's review application confirming a request for permanent care and custody was dated July 24, and supported by a plan of care dated July 23. Ms. Atkinson noted a negative change in the respondent's participation in family support services in the latter part of the summer. This change, therefore, was observed after the respondent was advised of the Minister's decision to seek permanent care and custody. In the circumstances, it is reasonable to infer that the Minister's decision to seek permanent care and custody impacted negatively upon S.L.W.'s participation in, and commitment to, family support services, despite the encouragement provided by Ms. Atkinson. There was no evidence that Ms. Paupin ever advised the respondent S.L.W. of any willingness on the part of the agency to reconsider its decision. The agency records confirm that the agency was unwilling to reconsider its position, even after receipt of Ms. Robichaud-Smith's report.

[202] Finally, I would confirm that I accept the opinion of Dianna Robichaud-Smith that S.L.W. is a bright and articulate individual who has the ability to make changes that would enhance her ability to parent her child. The court also accepts the evidence of S.L.W. that she is prepared to make the necessary commitment to parenting of S.W. if he is returned to her care.

Credibility Findings

[203] As part of this decision, I have, of course, carefully considered the Minister's contention that S.L.W.'s evidence with respect to her plan of care should be considered in light of her past history. The Minister maintains that little reliance should be placed on S.L.W.'s testimony, given the circumstances of this case,

including her past history. In effect, the Minister requests that the court find S.L.W.'s evidence not to be credible.

[204] In **Baker-Warren v. Denault**, 2009 NSSC 59, Justice Forgeron offered the following comments with respect to assessment of credibility:

> [15] The court must assess the impact of inconsistencies on questions of credibility and reliability which relate to the core issues. It is not necessary for a judge to deal with every inconsistency, but rather a judge must address in a general way the arguments advanced by the parties: **F.H. v. McDougall**, *supra*, paras. 40, and 45 to 49.
>
> [16] In considering the arguments advanced by the parties, I have applied the civil burden of proof. I have reviewed the totality of the evidence with reference to the internal consistencies and inconsistencies, and in reference to the position of each of the parties. In determining whether either party has met the civil burden of proof, I have looked for clear, convincing, and cogent evidence. I have made specific credibility findings based upon the evidence and in light of the civil burden of proof. Each party bears the burden in respect of the arguments which he/she advanced.
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> [17] **What factors have been considered in the credibility determinations which have been made?**
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> [18] For the benefit of the parties, I will review some of the factors which I have considered when making credibility determinations. It is important to note, however, that credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events." **R. v. Gagnon** 2006 SCC 17, para. 20. I further note that "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization." **R. v. R. E. M.** 2008 SCC 51, para. 49.
>
> [19] With these caveats in mind, the following are some of the factors which were balanced when the court assessed credibility:
>
> a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony, and the documentary evidence, and the testimony of other witnesses: **Re: Novak Estate**, 2008 NSSC 283 (S.C.);
>
> b) Did the witness have an interest in the outcome or was he/she personally connected to either party;
>
> c) Did the witness have a motive to deceive;

> d) Did the witness have the ability to observe the factual matters about which he/she testified;
>
> e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;
>
> f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: **Faryna v. Chorney** [1952] 2 D.L.R 354;
>
> g) Was there an internal consistency and logical flow to the evidence;
>
> h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant, or biased; and
>
> i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?
>
> [20] I have placed little weight on the demeanor of the witnesses because demeanor is often not a good indicator of credibility: **R v. Norman** (1993) 16 O.R. (3d) 295 (C.A.) at para. 55. In addition, I have also adopted the following rule, succinctly paraphrased by Warner J. in **Re: Novak Estate**, *supra*, at para 37:
>
> > There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See **R. v. D.R.**, [1966] 2 S.C.R. 291 at 93 and **R. v. J.H.** *supra*).
>
> [21] Ultimately, I have considered the totality of the evidence in making credibility determinations. I have thoroughly reviewed the *viva voce* and documentary evidence in conjunction with the submissions of counsel, and the applicable legislation and case law.

[205] In assessing credibility, I have of course considered all the evidence, but in particular the viva voce and affidavit evidence.

[206] S.L.W. gave her evidence both on direct and cross-examination in a straightforward fashion. It was clear that the Minister had concerns about her past history relating to a charge or charges under the *Animal Cruelty Prevention Act*, and saw this history as raising a significant credibility concern. However, the Minister chose to rely upon a JEIN record as opposed to a formal Record of Conviction issued by the relevant court. S.L.W. tendered an RCMP criminal record check on her behalf. The RCMP record was tendered by consent as Exhibit 7. During the course of S.L.W.'s cross-examination, the JEIN Offender Summary was

entered as Exhibit 10. S.L.W. was adamant during her cross-examination that she had never been convicted of beating an animal. She was not categorical in denying a conviction under the *Animal Cruelty Prevention Act*, just that she had never been convicted of beating an animal. She denied the accuracy of the JEIN record. Counsel for the Minister was not able to pursue this issue further in the absence of a record of conviction.

[207] As noted earlier, subsequent to trial, the Minister filed an application for leave to introduce new or additional evidence, which was subsequently withdrawn by the request of the Minister. Accordingly, the court was not in a position to draw any adverse credibility finding based upon the evidence as adduced during trial relating to a conviction under the *Animal Cruelty Prevention Act*.

[208] Generally, I found S.L.W. to be a credible witness. She did not embellish or exaggerate in her testimony in an effort to place herself in a more favorable light. She gave her evidence in a candid manner. She accepted responsibility for her poor judgment in relying too extensively on her daughter O.C. for the care of her two special needs sons. She acknowledged that she was ultimately responsible for the child S.W.'s condition at time of the taking into care. In the end result, I do not have any significant credibility concerns with respect to the testimony of S.L.W. I did find some of the statements in her affidavit, exhibit 9 to be inaccurate. For example, I find her assertion in paragraph 39 that she had never received any assistance from Shirley Atkinson, the family support worker, other than information on tooth brushing and a bath time pamphlet to be inaccurate. However, any concerns with respect to reliability of her affidavit are not so significant as to warrant or justify rejection of S.L.W.'s other testimony, or change my conclusion that she should be viewed generally as a reliable witness.

Consideration of Section 46

[209] Section 46 confirms that the court, on the hearing of an application for review may, in the child's best interests, vary the prior disposition order. However, before doing so the court is required to consider the various factors as set forth in subparagraph 4 of section 46.

[210] With respect to section 4 (a), I have already noted that there have been several significant changes in circumstance since the original disposition order was made. S.L.W. is now involved in a stable relationship with T.M. T.M. is supportive of S.L.W.’s request to have S.W. return to her care, and is an important part of her parenting plan. S.L.W.'s financial circumstances have improved. It appears that

S.L.W. will now qualify for employment as a […] and the evidence indicates that, in her particular situation, she will have considerable flexibility with respect to her employment, both with respect to hours of employment and the […] she will undertake during employment. Her decision to consent to B.G. having primary care of A.G. means that she would only be responsible for the care of one special needs child, if S.W. is returned to her care, and therefore S.L.W. should be able to focus appropriately on attending to S.W.'s needs. Availability of specialized daycare for S.W. is another significant change in circumstance.

[211] With respect to section 4 (b), I find that S.L.W. did participate in the Minister's plan of care, albeit her participation did not always meet the agency's expectations. Ms. Paupin testified that initially, S.L.W. was inconsistent in her participation in access in January and February 2014, after she became the responsible worker, but she also testified that S.L.W. then became more consistent in her participation in access and remained consistent until September 2014 when she entered her […] program. S.L.W.'s request for a change in the access schedule to accommodate her […] program was declined by the agency, even though the access schedule had previously been subject to change. The Agency saw her decision to pursue the […] program as an indication that the respondent was placing her own needs ahead of the needs of the child S.W. While that is one interpretation, clearly the respondent saw it as a unique opportunity to acquire employment skills which would be of benefit to herself and her family. The timing of the respondent's decision is also relevant. The decision to take the course came after the Minister's decision to seek permanent care and indeed, after the hearing of the application had commenced. I am not prepared to accept the agency's perspective as accurate.

[212] S.L.W. participated in a parenting capacities assessment as requested by the Minister. Unfortunately, the assessment report was not made available until after the Minister had determined to proceed with a request for permanent care and custody. The respondent S.L.W. was not responsible for the delay in submission of the report. The Minister was unwilling to reconsider the decision to seek permanent care and custody despite Ms. Robichaud-Smith's recommendation that the child S.W. be returned to S.L.W.'s care. The agency did not arrange for any of the services as recommended by Ms. Robichaud-Smith. During her cross-examination, Ms. Paupin acknowledged that in hindsight it would have been better if the agency had provided services in accordance with her recommendations.

[213] Family support services were also an important part of the Minister's original plan of care. Initially there was some delay in arranging for provision of family support services as result of the transfer of the protection file from Amherst to Truro. Further delay was encountered as a result of the respondent S.L.W.'s move from Springhill to Truro. This led to some difficulty in communication with S.L.W. As a result, family support worker Shirley Atkinson and S.L.W. did not make contact until end of January, and the first in-home family support meeting did not happen until February. Shortly after the initial meeting, Ms. Atkinson was absent on vacation for four weeks. When she returned, she resumed working with S.L.W. but was then off for several weeks on a medical leave. She returned mid-June and approximately four weeks later the agency decided to request permanent care and custody. In accordance with its policy, the agency did not provide a substitute family support worker during the weeks that Ms. Atkinson was unavailable. Given these circumstances, it is clear that the respondent S.L.W. only had limited opportunity to participate in family support services by the date of the decision to seek permanent care and custody. The court is concerned that the impact of disruption in family support services in the context of this particular case, while not the fault of the responsible worker, was significant. This conclusion is supported by Ms. Atkinson's testimony which indicates that shortly after Ms. Atkinson's return, during the first portion of the summer, the respondent was making progress, appeared more engaged, and was consistent in keeping appointments. It was after the agency confirmed its decision to seek permanent care and custody that S.L.W.'s participation in family support services took a turn for the worse.

[214] S.L.W.'s participation in appointments for the child S.W. was also seen as an important part of the Minister's plan. The evidence confirms that S.L.W. was reasonably successful in participating in scheduled appointments, but that her track record was affected by miscommunication by the workers on occasion, and failure on the part of the agency to notify her of all scheduled appointments.

[215] On balance, the evidence supports and justifies the conclusion that the respondent S.L.W. was reasonably cooperative and compliant with the Minister's plan of care. However, the Minister concluded on July 17, 2014, that the protection concerns had not been adequately addressed and that, in light of the approaching outside limit, it would be in the best interest of the child to proceed with a request for permanent care and custody.

[216] With respect to section 4(c), I have concluded that the least intrusive option consistent with the child S.W.'s best interest would be to confirm dismissal of the Minister's application and return the child to the care of S.L.W.

[217] I find that the respondent S.L.W. is now in a position to provide a stable and safe level of parental functioning. I am also satisfied, based upon the evidence, that S.L.W. will voluntarily continue with services and programs consistent with S.W.'s best interests following dismissal of the Minister's application for permanent care and custody, which services will include facilitating the child's continued attendance at […] Day Care, continued cooperation with early intervention services, and hopefully the opportunity to participate in the EIBI program. In addition, I am satisfied that the respondent appreciates and understands the importance of keeping any and all of the child's scheduled appointments with involved healthcare professionals. I find the respondent S.L.W. has adequately established that she is ready and able to assume responsibility for parenting of her son.

[218] Most importantly, I would confirm my conclusion that returning S.W. to the care of S.L.W. would be in the child's best interests.

[219] Accordingly, the Minister's application is denied and the child S.W. shall be returned to the day-to-day care of S.L.W.

S. Raymond Morse, JFC

FAMILY COURT OF NOVA SCOTIA

Citation: *Nova Scotia (Community Services) v. S.L.W.,* 2015 NSFC 1

Date: 2015-02-23
Docket: FAMCFSA No. 086199
Registry: Truro

Between:

Minister of Community Services

Applicant

v.

S.L.W, K.C., B.G., S.W.

Respondents

Restriction on Publication: Pursuant to s. 94(1) of the *Children and Family Services Act,* S.N.S. 1190, c.5.

Judge:	The Honourable Judge S. Raymond Morse
Heard	August 25, 2014, December 8, 2014, December 9, 2014, December 11, 2014, in Truro, Nova Scotia
Erratum:	March 5, 2015
Counsel:	Sarah Lennerton, for the applicant T.M., (representative) for the respondent, S.L.W. Tammy MacKenzie, for the child O.C.

ERRATUM:

In paragraph 157, change Justice Hayley to Justice Haley.