FAMILY COURT OF NOVA SCOTIA

Citation: ***Mi'Kmaw Family and Children Services of Nova Scotia v. A.W.*****, 2019 NSFC 1**

Date: 20190128
Docket: FKCFSA-092561
Registry: Kentville, N.S.

Between:

Mi'Kmaw Family and Children Services of Nova Scotia

Applicant

v.

A.W. and R.T.

Respondents

Restriction on Publication:

Publishers of this case please take note that s. 94 (1) of the *Children and Family Services Act* applies and may require editing of this judgment or its heading before publication.

Section 94 (1) provides:

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

Judge:	The Honourable Judge Jean Dewolfe
Heard:	May 28, 30, 31, June 4, 5, November 5, 6, 27, 29, 30 and December 18, 2018, in Kentville, Nova Scotia
Decision:	January 28, 2019
Counsel:	M. Ann Levangie, for the Applicant Deborah E. Bowes, for the Respondent, A.W. Darlene Lamey, for the Respondent, R.T.

By the Court:

INTRODUCTION

[1] This is an application by Mi'Kmaw Family and Children Services ("the Agency") for an order placing a three-year old child, U., in permanent care and custody, pursuant to the *Children and Services Act* ("The *Act*).

[2] The Respondent, R.T., is U's father; he is Mi'Kmaw. The Respondent, A.W., is U's mother; she is Innu. The Respondents are the parents of six children: M. (almost 11); K. (almost 9); N. (almost 8); I. (6); A. (4) and U. (3).

[3] On June 5, 2018, after the commencement of this hearing, kinship placements were suggested for the children. The Agency agreed to adjourn the hearing to explore these potential placements which were ultimately approved for the five older children. As a result, the Agency terminated its proceeding on July 9, 2018 with respect to all the children except U. Efforts failed to find an acceptable family or community placement for U. Dates to continue the hearing were set in November 2018. The Respondents continued to advance their plan to co-parent U.

[4] On November 5, 2018, counsel for the Respondents advised that R.T.'s mother, E.T., was being put forward as an alternate placement for U. She had made application to the Agency in June 2018, but the Agency had advised they would not support this placement. E.T. filed an (unsworn) affidavit on November 23, 2018 (subsequently sworn) which set out her plan for U.'s care.

[5] The hearing continued on November 29 and 30, 2018. E.T. was cross-examined and her partner testified on November 30, 2018. The matter was scheduled for completion on December 18, 2018.

[6] On December 18, 2018, Respondents' counsel advised that the Respondents, who were scheduled to be cross-examined on that date, were withdrawing their affidavits and their plan to have U. returned to their care, and were instead supporting the plan to have U. placed in E.T.'s care. Counsel for the Agency was offered an adjournment and an opportunity to address the new Plan, but the matter continued by consent.

[7] The Court has since been provided with a *Parenting and Support Act ("P.S.A.")* application by E.T., seeking sole custody of U., with supervised access for the Respondents.

[8] The statutory time lines with respect to U. expired in December 2017. The matter adjourned with consent past this date to accommodate disclosure and preparation requests, and then to allow for the preparation of a cultural assessment. Further adjournments occurred to allow the Agency to assess potential placements.

[9] The Agency does not support the Respondents' plan to place U. in the care of E.T.

[10] This Court must therefore assess the Respondents' Plan of Care, that is, to place U. in the care in the care of his paternal grandmother, E.T., with supervised access to the Respondents.

[11] The evidence in this matter must be viewed with a different focus than when it was heard. In particular, evidence with respect to the other children and to the Respondents' respective

parenting abilities now relate to the Court's consideration as to any potential benefits and concerns relating to continued access by the parents if U. is placed in E.T.'s care.

MINISTER'S EVIDENCE

Agency Evidence – Experts

[12] The Agency filed numerous expert reports and records.

[13] **Dr. James Chandler**, pediatrician, testified regarding the child, K.'s diagnosis of ADHD and behaviour issues, and the child A.'s behavioural issues.

[14] **Dr. Tracey Williams**, pediatrician, testified regarding N.'s ADHD.

[15] **Dr. Lindsay Bates**, psychologist, testified regarding a psycho-educational assessment she had prepared with respect to N.

[16] **Devin Rankin**, counselling therapist, testified about a child's needs assessment she had completed with respect to N. She noted a closeness and calming effect between Ms. W. and N.

[17] **Dianna Robichaud-Smith**, social worker, provided counselling for N. and M. She observed that M. saw herself as a caregiver to her younger siblings, was proud of taking care of them and her parents, and worried about them, in particular U. Ms. Robichaud-Smith also noted that M. and N. really loved their family, that N. and M. had a good rapport between them, and that N. was particularly close to Ms. W.

[18] **Laura Lang**, psychologist, testified as to her therapy with Ms. W. She testified that Ms. W. acknowledged symptoms of anxiety and the trauma she had experienced, developed insight, and progressed during therapy.

[19] **Trevor Moores**, counsellor, testified as to his ongoing counselling with K. and I. and his previous counselling with Mr. T. and Ms. W. in 2013.

[20] **Susan Squires**, psychologist, provided counselling to Mr. T. prior to his involvement with Tay Landry, and noted no engagement or progress.

[21] **Tay Landry**, clinical social worker, provided therapy to Mr. T. He identified Mr. T. as having experienced trauma in his past, and focused primarily on helping Mr. T. identify his emotions and deal with his anger. He noted that Mr. T. was disconnected from his community, and did not see his mother, E.T., as a protective, supportive parent to him. He characterized Mr. T. as engaged and insightful after overcoming initial reluctance.

[22] **Dan Walsh**, runs a men's outreach program at Millbrook Healing Centre for First Nations. He testified that Mr. T. attended two group meetings in 2013 and two group meetings in 2016 and also met individually with Mr. Walsh until July 2017. He noted that Mr. T. did not want to engage with cultural practices in his community.

[23] **Elaine Boyd-Wilcox**, psychologist, prepared a Parental Capacity Assessment in June 2017. She noted that Mr. T. had suffered long-term intergenerational trauma relating to his father who is Mi'Kmaw. She had concerns as to both Respondents' ability to accept feedback. She also noted that children who have special needs require caregivers with better parenting skills and an enhanced ability to communicate and collaborate with service providers.

[24] Ms. Boyd-Wilcox identified numerous strengths of the parents in her report, including:

- commitment to children.
- commitment to full-time employment (Mr. T.).
- maintenance on methadone program and no substantiated substances abuse concerns since 2012.
- positive changes made in therapy, most recently with Tay Landry (Mr. T.) and engagement in therapy with Laura Lang and family support (Ms. W.).
- knowledge of appropriate parenting strategies and active engagement with children during access.
- No significant mental health issues.

[25] However, she concluded that Mr. T. hides behind a "wall of denial and hostility while insisting the he is being untreated unfairly". She characterized him as being antisocial with paranoid personality traits. She questioned whether he would support assessment and services for the children, if they were in his care.

[26] She also noted that both parties are rigid, and make inappropriate comments in front of the children.

[27] Mr. T. told her that his mother (E.T.) had tried to help him, and that he would like to have her back in his life.

[28] Ms. Boyd-Wilcox recommended that both Respondents continue in individual counselling and take domestic violence education. She also recommended that if the Respondents did not participate fully in services and exhibit behavioural signs of change (e.g., no more hostility toward service providers, consistent attendance, taking responsibility for their actions and supporting the children's needs), the children should not be returned to their care. (Exhibit 1, Tab 1, p. 56).

[29] **Dr. Michael Nash**, pediatrician, saw U. shortly after his birth, initially due to concerns relating to small head size and failure to gain weight. He noted that U. had suffered from withdrawal at birth due to Ms. W.'s use of methadone.

[30] Dr. Nash has seen U. regularly since he was taken into care. In early 2017, at age 16 months, Dr. Nash noted that U. had had no immunizations, was still crawling, barely talking and suffered from eczema.

[31] In his August 9, 2018 report, Dr. Nash observed "global" delays for U. in all areas, but in particular in motor skills and language, so that he presented approximately one year younger than his age. He recommended ongoing early intervention, speech/language therapy and physiotherapy/occupational therapy.

[32] Dr. Nash referred U. to a neurologist for a developmental assessment and to an ophthalmologist.

[33] Dr. Nash testified that a child with U.'s delays would require parents who can manage and co-ordinate a lot of interventions and appointments. He also related that in his experience, parents of children with similar issues found it to be "a lot to juggle", a lot of work, exhausting and often frustrating. In his opinion, U. can be expected to make gains, but he will do at his own pace, and that his current of level of care is at a full calendar year younger. He also indicated that early years are critical for U.'s development, and that if he is not parented in a way that recognizes his issues and is able to co-ordinate his care, he would not be able to "catch up" at a later date. While U.'s prognosis is uncertain, it appears he will require a "high level of care demands" going forward, and that consistency and continuity will be paramount for U.

[34] **Meghan Forster-Raymond** was qualified to give expert evidence as an early interventionist to provide opinion evidence in the area of child development.

[35] Ms. Forster-Raymond began working with U. in June 2017, at which time she identified delays in all areas, i.e., communication, fine and gross motor skills, personal and social development and problem solving. She indicated that he has made "some" gains, but expected that he would continue to require ongoing interventions in the areas of speech and mental health. She also testified that he requires additional patience and flexibility from his caregivers.

[36] Ms. Forster-Raymond indicated that she also saw the second youngest child, A., on several occasions. She described her as having "behavioural issues".

[37] Ms. Forster-Raymond testified that she did not determine the causes for U.'s delays, but rather treated the delays. She noted that U. appeared to attach to adults and then if the adult left his environment, he would become agitated.

[38] **Rebecca Holstead**, occupational therapist, first saw U. just before he turned two. She reported that as of November 2017, U. was delayed in the majority of his activities of daily living, i.e., eating, dressing, play, fine motor skills. Her reports indicate that U.'s behaviour can be challenging at daycare (biting, throwing), but that daycare had helped him.

[39] **Terri Roach**, physiotherapist, noted that in November 2017, U. was an "immature" walker and noted a possible problem with his eye rolling upwards. She indicated that his gross motor development was delayed but he was making "continuous gains" with physiotherapy.

[40] **Donna Raxler**, social worker, assessed U. for the CHOICES Mental Health program in Digby, near his foster home. She recommended a Developmental Assessment for U.

Social Workers

[41] **Jessica Flemming** was the initial social worker assigned to Mr. T., Ms. W. and the children between 2016 and early 2017. She submitted five Affidavits and the initial Agency Plan of Care dated November 30, 2016. She was cross-examined.

[42] Ms. Flemming recounted the file history of previous involvement with the family. Agency involvement with the family began in 2008, shortly after the oldest child's birth, as a result of concerns relating to intravenous drug use. A Supervision Order was issued and the matter was discontinued on December 1, 2009.

[43] The next Agency involvement was in 2012 as a result of parental substance abuse. Mr. T. was arrested for production of marijuana in the family home. The four children (at that time) were taken into care. Various assessments and services were completed by the parties, including addictions assessments and a parental capacity assessment. At that time, both Respondents were involved in the methadone treatment program. The parties were noted to have made progress in services and the proceeding was discontinued in November 2013.

[44] In August 2014, another proceeding commenced and a Supervision Order was issued due to concerns regarding inadequate supervision of the children and sexualized behaviour by the children. The parties participated in counselling and appeared to progress.

[45] Ms. Flemming reported that social workers at that time had noted that the family had a good attachment with each other, and the children appeared clean and content. Mr. T. was noted to be verbally inappropriate and threatening to Ms. Flemming on occasion in front of the children.

[46] On May 3, 2016, the children's school advised the Agency that Ms. W. had told them she was going to a local women's shelter. The oldest child advised that they had left the home for one night.

[47] The current proceeding originated on June 18, 2016 when the Agency received a report of RCMP intervention after an assault on A.W. by R.T. A.W. and the children were taken to the Millbrook Healing Center. The Agency sought and received a Supervision Order on July 7, 2016. A.W. later moved with the children to Kingston, Nova Scotia while R.T. remained in the home on the Annapolis Valley First Nation in Cambridge. Mr. T. was charged criminally and entered into a "No Contact" Order with respect to Ms. W. Mr. T.'s access was to be supervised. Various services were put in place by consent.

[48] Ms. Flemming and subsequent social workers, **Anneliese MacPherson** and **Jennifer McKelvie**, as well as case work supervisor, **Lee Ann Higgins** submitted Affidavits and were cross-examined. They detailed various interactions between the Agency and the Respondents, the progression of services for the children and the Respondents, and various challenges and issues around access.

[49] In the summer of 2016, the Agency received several referrals to the effect that Mr. T. and Ms. W. were still in a relationship and were breaching the "No Contact" Order. As a result, on September 30, 2016, the Agency took the children into care.

[50] Agency workers, **Kim Gariepy** and **Deanna Rafuse-Poole** who assisted Ms. Flemming with the taking into care, provided Affidavits, and noted that M. appeared to feel a sense of responsibility towards U.

[51] The children could not be placed together. There were ultimately placed in four foster homes at various locations in Nova Scotia. This made access logistically challenging.

[52] Separate access for Mr. T. and Ms. W. has been partially or fully supervised since September 2016. Some visits included all of the children and other visits were with some of the children.

[53] Social workers noted reports that both Respondents were vigilant in inspecting and cleaning the children during access. The Respondents voiced multiple concerns as to the care the children, in particular U., were receiving. These complaints regarding U. involved a strong smell of urine, very severe diaper rash and eczema, being dirty and on one occasion, being sent with spoiled milk in a bottle. They also complained as to the number of children in U.'s foster home, and the lack of attention he was receiving.

[54] The workers testified that these complaints were passed on to the children's worker, **Nicole Baldwin**, who noted a "musty" smell on U. The workers described the Agency's efforts to address the care issues which the Respondents raised, as well as the foster parents' explanations and responses.

[55] **Lee Ann Higgins**, case work supervisor, described the Agency's communication with the Respondents as "minimal". She testified that telephone and home contacts were initiated without success and messages were not returned. Ms. W. gave the Agency her email address for communication purposes, but there was rarely a response to many attempted contacts. Neither parent ever asked for indigenous content, supports or services. Ms. Higgins also testified that because the parents would not engage, it was difficult to provide information regarding the children to the parents.

[56] Ms. Higgins testified that the Respondents were invited to a family group conference which occurred on August 30, 2018 to discuss family placement possibilities. The Respondents refused to participate without their lawyers and left. Ms. W. told Ms. Higgins "I hope you fucking die".

[57] Ms. Higgins also testified that the Respondents continued to be seen together on a regular basis and they looked like they were a couple.

[58] **Jennifer McKelvie** testified extensively about U.'s needs. She noted that he currently receives regular occupational therapy, speech therapy and early intervention, and has ophthalmology and pediatrician appointments. He now wears glasses. He has been in the same foster home since October 2016, but has had regular respite placements.

[59] She described U. as "high needs", and indicated that he is doing well with a very specific and regimented routine. He attends day care five days a week. As of August, he was having trouble settling during nap time, and when upset, he would bite his arm, hide under a table and scream "Daddy". She testified that the Agency did not feel that it was best for U. to have the

Respondents present with the foster parents during medical appointments as it was evident that the Respondents did not like the foster parents.

[60] Ms. McKelvie provided a report from **Dr. Joseph Dooley**, a neurologist at the IWK Hospital, which was admitted by consent. Dr. Dooley noted that U. was below the second percentile for head circumference, but growing appropriately. He described U. as having "central hypotonia with developmental delay".

[61] U. participated in a Developmental Assessment in October 2018. He also saw an ophthalmologist and was prescribed glasses.

[62] Ms. McKelvie described a weekend visit for U. in August 2018 at the home of the caregivers of some of the other children. She indicated he cried most of the night, took his clothes off in his crib and was up at 4 a.m. for the day. On cross-examination, she agreed that U. was able to stay at a respite home on alternate weekends.

[63] Ms. McKelvie also reported conflict between Mr. T. and one of the children's placements in September 2018 when, without the caregiver's approval, he shaved a child's head and cut branches during an access visit at the child's home, and then yelled at the caregiver in front of the children.

[64] Ms. McKelvie noted in November 2018 that Ms. W. had alleged that U. had cigarette burn marks on his body. When he was taken to a doctor, the marks in question were determined to be impetigo.

Access Supervisors

[65] The Agency submitted four volumes of access reports prepared by several access supervisors, two of whom provided affidavits, and were cross-examined, and another four of whom testified on their reports. The rest of the reports were admitted by consent.

[66] The access reports note affection and positive interactions between the parents and the children and amongst the children themselves. However, supervisors regularly commented on the chaotic atmosphere when all six children were present and on the use of phones/tablets by the older children. There were also concerns about inappropriate comments by the Respondents in front of the children.

[67] **David Hazlewood** supervised more access visits than any other supervisor. He also acted as a youth support worker for K. and I.

[68] He noted that U. presented as dirty, smelled "musty" and had a bad diaper rash.

[69] He noted that both parents raised concerns as to the children's care. They made positive comments when the children did well. He noted that K. and I. challenged or ignored Mr. T.'s attempts at discipline at times.

[70] **Tammy Calverley** supervised numerous access visits from September 2016 – January 2018. She noted that U. often smelled, was dirty and had a severe diaper rash and that the parents bathed him on many visits. She noted that U. in particular followed his Mom around, and that both parents praised the children. She indicated that the children could be well behaved. She noted one incident when K. was acting up and Mr. T. became aggressive with him.

[71] **Fallon Peter-Paul** provided access supervision and youth support work to M. and N. She noted that the children were always excited to see their parents and that the Respondents encouraged, praised and redirected the children when necessary. The children were sometimes reluctant to leave and the parents encouraged them to go. She also observed Mr. T. and Ms. W. holding hands crossing a street in May 2017.

[72] **Paula Digout**, who also supervised visits, testified that visits at Ms. W.'s house were often chaotic, but the children were always happy to see their mother and each other. She also expressed concern about U.'s diaper rash and the condition of a bottle he brought with him on May 28, 2017.

[73] **Megan Grant** supervised separate visits with Mr. T. and Ms. W. on December 26, 2017. She described Ms. W. as "labile" on that day and reported that she used threatening language against Ms. Grant while the children were present, resulting in Ms. Grant ending the visit and calling the R.C.M.P.

[74] **Mark MacIsaac** testified regarding his supervision of access, and an incident on November 22, 2017 when Ms. W. became verbally aggressive with him in front of the children. He also noted U.'s smell and diaper rash.

Access Reports

[75] More recent access reports (e.g., April 22, 2018; May 6, 2018; April 8, 2018; May 11, 2018; October 29, 2018) noted that Ms. W. carried U., was constantly with him, talked to him and played with him. Both parents were affectionate and attentive, and complimented him. U.

would seek out his parents and siblings and appeared comfortable and happy with them. He and A. (a year older) engaged in some sibling conflict which was managed appropriately by the parents. The parents had no difficulty changing, feeding and supervising U., and the children were noted to be content, happy and calm.

Other Workers

[76] **Ruby Rafuse**, adoption worker, submitted an affidavit in which she indicates that the Agency opposes any order for access under a permanent care and custody arrangement when adoption is planned because it limits or restricts the number of potential adoptive candidates.

[77] **Annie Knockwood** provided family support work programming to Ms. W. and Mr. T. She testified that initially Ms. W. was engaged and participated well. However, after a communication issue, Ms. W. became very upset, accused Ms. Knockwood of lying and ended her participation. Mr. T. was described as pleasant, respectful and engaged. However, he stopped participating without completing the program.

Response to E.T.'s Plan

[78] **Ann Higgins** expressed concerns about the proposal to place U. with E.T. She based these concerns on E.T.'s 20-year child protection involvement. This included a one-month voluntary care agreement for Mr. T.'s younger brother and on/off involvement regarding Mr. T. and his sister, arising out of concerns with respect to Mr. T.'s father who was described as abusive to E.T. There were also concerns as to E.T.'s ability to parent and protect her children.

[79] On cross-examination, Ms. Higgins agreed that it appeared E.T. had been co-operative and participated in services during her historical involvement with the Agency.

[80] Ms. Higgins said she and Ms. McKelvie met with E.T. on June 11, 2018 when E.T. initially proposed that she and her partner, D.O., become K. and I.'s placement. When she was told that K. and I. had placements, E.T. indicated she would be willing to take U.

[81] Ms. Higgins testified that D.O.'s criminal records check was not "clear", and that they expected E.T. to provide further assurances. Ms. McKelvie testified that the records relating to E.T. indicated that E.T. has placed one child in temporary care for a short time when she was not able to maintain stable housing. She also said that the Agency had had concerns with behavioural issues for all four of E.T.'s children, and with E.T. being unable to set limits.

[82] **Jennifer McKelvie** noted no concerns about E.T.'s home which she described as clean and tidy with a lot of space outside, and an appropriate bedroom for U.

[83] E.T. relayed to Ms. McKelvie her understanding that Jordan's Principle would pay for her to travel to U.'s health appointments. She also that U. was not "that behind", and that his delays were as a result of him being confined to his playpen in the foster home. She indicated her information was not just from Mr. T.

[84] Ms. McKelvie informed E.T. that her information was not correct with respect to Jordan's Principle funding for travel, and U.'s circumstances.

[85] Ms. McKelvie found E.T. to be evasive in her disclosure of past child protection involvement and D.O's criminal record.

[86] E.T. told Ms. McKelvie and Ms. Higgins that she did not have a good relationship with R.T. or A.W. and that R.T. had a temper. She had been prevented from seeing the children by R.T. and had never met U. as a result. She had only reconnected with R.T. since he had asked her to take the children in June 2018. She said if she had custody of U., she would never keep him away from his parents and planned to take U. to see the Respondents.

[87] Ms. McKelvie and Ms. Higgins also expressed concerns regarding care and supervision of R.T.'s sibling, A.T., when she resided with E.T. after a serious motor vehicle accident at age 14. Ms. McKelvie testified that E.T. had also had "transportation and financial issues in the past with regards to attending appointments and education for her children". (Ex. 22, para 32).

RESPONDENTS' EVIDENCE

[88] **Lana MacLean** was retained by the Respondents to prepare a cultural assessment, "to provide the Court with additional context (race and cultural needs of the children) to inform its decision on what is in the best interest of the children's cultural lens", with a "specific focus on the issues of parent-child attachment from a cultural lens".

[89] Ms. MacLean was qualified by consent as a clinical social worker able to provide opinion evidence in the area of cultural assessment, in particular with respect to parent-child attachment.

[90] She described Ms. W.'s interaction with the children as engaged, and caring. She noted that Ms. W. often "packed" or carried U. and checked on the children regularly. She was noted to speak to them in Innu. The children were described as very receptive to her "wellness checks", sought her physical attentions and found transitions to be difficult.

[91] Ms. MacLean described Mr. T. as an engaged and responsive parent, who encouraged A. to toilet and U. to vocalize. The children were excited to see him.

[92] She observed the children to be respectful, caring and responsive to discipline.

[93] With respect to U., Ms. MacLean noted that Ms. W. appeared to understand his need for physical comfort and care. Ms. W. engaged well in "serve and return" activities, reading to U. and pointing out things, and U. was very responsive, and looked for Ms. W's attention.

[94] Both parents responded appropriately to U.'s non-verbal communication, e.g., eye contact, smiles and quizzical sounds. Ms. W. encouraged U.'s "wall walking".

[95] Ms. MacLean expressed her opinion that U. had an authentic attachment to his parents which was disrupted by being in foster care. She also expressed her opinion that kinship placements can allow children to be connected to their family of origin and provide the ability for children to learn who they are. She stated that if racialized children were placed outside their culture, in a non-kinship placement, this can create "cultural dissidence" when a child does not fit into his adoptive home or his biological home should he return as an adult. She testified that a kinship placement often allows these children to have a sense of connection and better cultural identity development.

[96] On cross-examination, Ms. MacLean agreed that she was not assessing overall parenting, had not conducted testing or interviews with the Respondents, and had not spoken to collateral contacts or reviewed the full Agency materials.

[97] **Catherine MacEachern** had been the Jordan's Principle Coordinator for the Annapolis Valley First Nation in January 2018. She had assisted the Respondents in developing their Plan of Care. She testified that Jordan's Principle assistance provides mileage, meals and parking costs for health appointments, but will not provide drives or compensate for time off work.

[98] **Clarissa States** had been the daycare worker at Three Wishes Daycare in Cambridge. She had assisted in the preparation of the Respondent's Plan of Care, and had observed the Respondents while the children had been present at the daycare.

[99] Ms. States testified that Ms. W. had helped out at the daycare when some of the children had been enrolled there, and that she had often brought A. and U. with her.

[100] She noted that prior to the children coming into care, the Respondents (usually Ms. W.) dropped off and picked up the children at the daycare. Ms. W. would attend to the children, and was noted to be nice to them when she helped out.

[101] Ms. States described the cultural programming offered at the daycare which included exposure to the Mi'Kmaw language, smudging and cultural guests. The daycare also operates a before and after school program, and had a waiting list for September 2018 when Ms. States left their employment.

[102] She noted that U. sometimes came to the daycare when staying with A.'s caregiver for respite. He was described as delayed in walking and having a small vocabulary.

[103] Ms. States estimated that she saw Ms. W. on the Annapolis Valley First Nation Reserve in Cambridge two to three times a week in 2017 to 2018 in the day time.

E.T.'s Plan

[104] **E.T.** is U.'s paternal grandmother. She has never met U. She testified that in the past she had been actively involved with his older four siblings, but a dispute with R.T. had caused him to cut off all contact with her approximately three years ago.

[105] E.T. indicated she has been in a stable, supportive relationship with D.O. for approximately 10 years. He is self-employed. She is employed part-time as a Continuing Care Assistant, but works full-time hours. She said that both she and D.O. have flexible work schedules which could accommodate U.'s needs.

[106] E.T. denied being evasive with Ms. McKelvie regarding D.O.'s criminal record, the number of children she had, or her involvement with the Agency. She said she was nervous and shy. To her knowledge, D.O. had a mischief charge approximately 20 years ago, and no criminal convictions since that time.

[107] She said that she married R.T.'s father when she was young and that he was very abusive to her and to R.T. She testified that R.T.'s father undermined her parenting, and that R.T. had problems with authority and would run to his father when she attempted to set limits. She sought parenting help to cope with R.T.'s behaviours.

[108] R.T.'s younger sibling, A.T., was also rebellious and used alcohol and drugs. E.T. admitted that she allowed A.T to have sex with an older boyfriend in her home after a car accident in which suffered brain damage and was confined to a wheelchair. She also testified that

she placed her second youngest child (R.T.'s half sibling) in temporary care for approximately one month when she was facing housing issues.

[109] E.T. testified that her two younger children are now independent, productive children, with her youngest graduating from high school with Honours.

[110] She was unaware of the circumstances leading to R.T. and A.W.'s children coming into care in this proceeding.

[111] She indicated she had checked with Three Wishes Daycare on the Annapolis Valley First Nation in Cambridge and that U. would be able to attend, but admitted that she had not submitted an application. She intended to have him attend daycare full-time while she works.

[112] On cross-examination, she could not recall several referrals made to the Agency regarding her care of her children in the 1990's. She explained that she had experienced conflict in the trailer court where she lived.

[113] Although E.T. had researched "global delays" on the internet, she was not able to provide specifics. She had no idea about the availability of physiotherapy, occupational therapy, speech therapy and early intervention in her area. She also admitted that she did not know any specifics as to Jordan's Principle and was unaware of changes to the program coming in March 2019.

[114] E.T. is not of First Nations heritage. She lives near the Annapolis Valley First Nation in Cambridge where some of U.'s siblings have been placed. She testified that she is committed to supporting the sibling relationship and enhancing U.'s cultural identity.

[115] E.T. has cared for her disabled daughter and other disabled adults as a Continuing Care worker.

[116] E.T. testified that she has learned from the past, and now has the necessary financial and transportation resources, as well as the support of a loving partner so as to allow her to provide appropriate care to U.

[117] **D.O.** is E.T.'s partner. He testified that he has no criminal record except for a mischief charge from 1993. He is currently almost 46 years old. He and E.T. provided a criminal records check which he thought was sufficient. He has two children who experienced educational challenges and needed special assistance in school.

LAW

[118] The law in this matter is pursuant to the *Act* prior to its recent amendments.

[119] The Court is required to make a disposition that is in the child's "best interest": s.42(l). The factors which the Court must address in reaching this determination are set out in s. 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 the 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 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 care;
(l) the risk that the child may suffer harm through being removed, 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 circumstance.

[120] S. 42(2) provides:

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 failed;
(b) have been refused by the parent or guardian; (c) would be inadequate to protect the child.

[121] S. 42(3) states that:

Where the court determines that it is necessary to remove the child from the care of a parent or guardian, the court shall, before asking 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.

[122] S. 42(4) provides that:

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 unforeseeable time not exceeding the maximum time limits based on 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, s42.**

[123] Past parenting history is relevant to the present circumstances: *N.S. Minister of Community Services v. L (S.E.)* (2002 NSCA 55).

[124] The Minister must prove on the balance of probabilities that there continues to be a substantial risk that the children will suffer harm pursuant to Section 22(2) of the *Act*.

[125] The test which is applied is not whether other plans for the child will provide the best parenting, but rather whether the parents can provide "good enough" parenting without subjecting the children to a substantial risk of harm.

[126] In this case, the statutory maximum time lines have expired. The Court must place the child according to a Plan of Care placed before the Court, and in this case a kinship placement with E.T., or permanent care and custody.

Analysis and Consideration of E.T.'s Plan

[127] The overall purpose and intent of the *Act* is to keep families together while protecting children from harm: s. 2 (1). S. 42 (2)(c) provides that a Court shall not remove a child from his parents unless the Court is satisfied that less intrusive alternatives would be inadequate to protect the child. These provisions are subject to s. 2(2) which provides that the paramount consideration must the best interest of a child.

[128] In *Children's Aid Society of Inverness Richmond* v. *C.S.L., D.R. and E.R.*, 2009 NSSC 207, Justice Legere Sers considered a request by a grandmother to assume care of her two-year old grandchild.

[129] The grandmother, whose first language was French, had indicated her wish to put forward a Plan of Care. She had been unable to obtain Legal Aid and had not followed through with filing a written plan as a result. The grandmother testified at the hearing and the Court concluded that she ought to be considered as a realistic potential placement option. The Agency had refused to investigate placement of the child with the grandmother. The Court ordered a supplementary assessment of the grandmother, and ultimately accepted her plan as being in the child's best interest.

[130] This Court must be satisfied that less intrusive alternatives have been examined before moving to a permanent placement. As Justice Legere Sers stated in *C.S.L.:*

> In my view it would be a miscarriage of justice and it would be contrary to the spirit and intent of the legislation, to arbitrarily accept a limitation imposed when there has been a failure to adequately review the possibility of placement with the related family. (para 245)

[131] And at para 345:

> The ultimate authority to reject a plan of care which requires assessment and evaluation of available appropriate family members rests with the Court, not the agency. If the agency is determined to move away from a consideration of least intrusive, the agency must provide proof that the principles of the *Children & Family Services Act* have been addressed and bring to the Court the only remaining option of third party placement.

[132] This does not mean that an Agency must consider all potential family placements at all times. As Justice Jollimore recently noted in *Nova Scotia* (*Community Services) v. M.R.,* 2019 NSSC 9, what constitutes a child's best interests involves a balancing of … "each child's individual circumstances; each child's relationship needs (involving their immediate and extended family and their siblings); the identified risk; and the impact of delay on the children" (para. 7). It also requires that a proposal be viable. (para. 8)

[133] E.T. attempted to come forward as a placement for U. in June 2018. She was not represented. Other possible placements were being explored. In hindsight, it would have been appropriate for her to apply for party status or at least make a *P.S.A.* application. She could have applied for access or an assessment as to her current parenting abilities. She could have sought full disclosure of her historical Agency records. Had she done so, considering the evidence I now have before me, it would have been appropriate to grant such an application.

[134] The Agency's concerns regarding E.T.'s ability to care for the child are significant, but are based for the most part on information that is 10 to 20 years old.

[135] Understandably, the Agency did not fully investigate E.T.'s plan, given the Respondents' change of position on December 18, 2018, and the lack of follow-through by E.T. E.T.'s lack of follow-through is also understandable given the uncertainty as to other placements, the Respondents' position and her lack of counsel.

[136] E.T. attached a Plan of Care to her *P.S.A.* application. Some aspects of this Plan are not viable.

[137] There can be no "phase in" gradual transfer of care, as proposed by E.T., unless voluntarily agreed upon by the Agency. This Court must either transfer U. to E.T.'s care or place him in the permanent care of the Minister.

[138] E.T. has indicated that she seeks "Adoption" and indicates that this will provide "financial support for (U.'s) healthcare needs and extracurricular activities as they arise". However, this Court cannot grant adoption of U. and the Agency has indicated it does not support this outcome. Therefore, funding would not be available to E.T. through a subsidized adoption process.

[139] However, this Court is satisfied that these aspects of E.T.'s plan do not significantly impair the overall viability of the plan. It is a reasonable alternative which should be considered.

[140] Therefore, the questions the Court must address are:

1. Can E.T. provide adequate care to U.?

2. If so, will contact by R.T. and A.W. be beneficial to U., and can E.T. manage access in U.'s best interests?

Care

[141] U. is a child with high needs. He requires consistency and continuity of care, (Dr. Nash), and a caregiver with better parenting skills (Boyd-Wilcox), and an enhanced ability to communicate and collaborate with service providers (Boyd-Wilcox and Dr. Nash).

[142] He will need patience and flexibility from his caregivers (Forster-Raymond) He is engaged with numerous service providers, which must be maintained. He does not transition easily and attaches to a primary caregiver.

[143] E.T. has no relationship with U. She has not had an opportunity to observe and interact with him during access. She has not met his service providers or doctors or reviewed his medical information. She was provided with inaccurate information by the Respondents.

[144] E.T. presents as a relatively young (age 49), but mature and energetic woman who sincerely wishes to provide U. with a stable, loving home. She also wants to help R.T. and keep U. connected with his siblings.

[145] E.T. has had a close relationship with U.'s four older siblings in the past. She knows and communicates with their kinship placements, the majority of whom are in the Cambridge area. She lives in close proximity to Cambridge.

[146] I accept that E.T. has a history of parenting struggles with all four of her children. She was critically undermined by R.T.'s father who was an abusive alcoholic. She also struggled with poverty, having to place one child in voluntary care for a short period of time due to income insecurity. She did not protect R.T. and A.T. from the harms they experienced, and was not able to set and enforce limits on their behaviour. She sought and accepted help, but did not follow through on all recommended opportunities for the children.

[147] E.T. was a young mother with few resources and an abusive, uncooperative former partner. She removed herself from an abusive relationship and sought assistance. She was cooperative with the Agency for the most part and completed services to improve her parenting.

She now has stable, appropriate housing, reliable transportation and flexible employment. She has no other dependents. Her current partner is supportive. I accept the evidence of E.T. and D.O. that he has no relevant, recent criminal law involvement.

[148] E.T. was uninformed as to U.'s needs, but appeared capable and motived to learn. Her current lack of insight is understandable give her limited access to information regarding U.

[149] E.T. has training as a continuing care worker and has worked with persons who have disabilities. She has experience in dealing with medical care providers through her work and her albeit short term care of A.T. She will be able to provide U. with one-on-one attention as there will be no other children in her home, and is willing to continue his attendance at daycare.

[150] While E.T. holds some mistrust of the Agency, she did not present as hostile. She has asked for help from the Agency in the past, and I have no reason to expect that she would not do so with respect to U.'s care in the future.

[151] U.'s needs have been identified and services are in place and ongoing, which would only need to be transferred. E.T. has the ability to seek and accept services in the future when U.'s need change.

[152] There would be a potential service gap for U., should he transfer to E.T.'s care in Kings County from his foster home in the Annapolis/Digby area. However, Jordan's Principle funding for U. can be sought for private services as needed. This could be of assistance to E.T. during his transition.

[153] I am therefore satisfied that E.T. has the ability to provide U. with adequate care in her current circumstances.

Contact with Respondents

[154] The Respondents have experienced intergenerational trauma. As Tay Landry explained, this colours a person's view of the world and interactions with others. The Respondents' trust issues have affected their insight and their ability to parent effectively. Mr. T. views the world with suspicion and blames others for his problems. Ms. W. takes offence easily and can turn on others in anger with very little provocation.

[155] The Court cannot fault the Agency workers for their responses to the Respondents who were uncooperative, unresponsive, angry and without insight for much of the period of involvement.

[156] However, these parents are generally loving, attentive and devoted to their children. Their interactions are positive and benefit the children. The children love their parents and have a close, caring relationship with them as described by such witnesses as Ms. Raxler, Ms. Robichaud-Smith and various access workers. Access workers, Ms. MacLean and Ms. Boyd-Wilcox have noted that U. is accepted, loved, complimented and given appropriate attention by both his parents. He has a bond with them. In particular, he seeks out physical contact with Ms. W. who consistently meets his need in this respect.

[157] Mr. T. and Ms. W. do not have the ability to meet U.'s needs as primary caregivers at this time, and they are not putting forth a Plan to have U. returned to their care. The risk of exposure

to domestic violence still exists. Even if Ms. W. and Mr. T. are not a couple, it appears they continue to rely on each other and spend time together. I do not expect they would have the necessary insight and self control to avoid contact in front of the children, and this could lead to conflict as has happened in the past. Therefore, their access with U. would have to be supervised, and this is what E.T. is proposing.

[158] The Respondents do not recognize or accept the extent of U.'s documented medical delays and would not necessarily support his participation in services to address those delays. The Court is concerned that they would attempt to pressure E.T. into accepting their views and sabotage U.'s involvement in services by their behaviours. Therefore, it is important that E.T. and the Respondents understand their respective roles and obligations.

[159] R.T. and A.W. can be difficult and antagonistic as was evident in R.T.'s recent alienating, aggressive and inappropriate behaviour towards the other children's caregivers in September 2018, and A.W.'s reaction to U.'s impetigo in November 2018.

[160] U. needs a long-term, stable placement. R.T. and A.W. must accept the fact that they will not have any parental rights with respect to U. They must support E.T. and D.O. to become U.'s parents. Any contributions by them to care and decisions regarding him must be at E.T.'s request, and in a way which would not impair her parental authority.

[161] While E.T. lives near to the Respondents, she is not in the same community. R.T. and A.W. do not have a vehicle or easy access to transportation. This will allow E.T. to control access significantly. The Court can also impose conditions on the Respondents and E.T. pursuant to a *P.S.A.* Order, so as to reduce the potential for conflict.

Summary and Decision

[162] E.T.'s plan meets U.'s needs for continuity and consistency in terms of being part of the same family, continuing contact with his parents, and easy access to siblings. It also allows him to remain near his home community, so as to access cultural programming and services. This child is part of a family who loves and accepts him. He shares a bond with them. E.T. can maintain and develop this bond by facilitating contact with his parents, siblings and extended family. She has a relationship with his four older siblings and their caregivers which will encourage regular contact.

[163] E.T.'s circumstances have changed considerably in the past 10 years. She has stable housing, income and transportation. She is more mature, confident and experienced. Her partner is a positive support to her. I am satisfied she will continue U.'s services and attend to his identified medical and developmental needs.

[164] Although aspects of her plan are not viable, these aspects do not outweigh the overall benefits of the plan.

[165] A kinship placement provides U. with the benefits of knowing his family. E.T.'s plan includes elements which will promote development of his cultural identity.

[166] The Court finds that by placing U. with E.T., he will no longer continue to be a child in need of protective services, and he will no longer be at risk of significant harm as defined by the *Act*.

[167] This Court, having considered the totality of the evidence, orders that U. be placed in the care of E.T. on the following conditions pursuant to the *P.S.A.*

1. U. will be in E.T.'s sole custody. The Respondents will have no decision-making authority and or input with respect in his care, services and health;

2. U. will attend day care full-time after a reasonable transition time;

3. U. will continue with early intervention, occupational therapy, physiotherapy, speech therapy. E.T. will seek private providers if a gap in current providers results from changing his residence;

4. U. and E.T. will attend therapy to assist with attachment and bonding;

5. The Respondents may have supervised visits with U. in their respective homes or at E.T.'s home, as determined by E.T. E.T., D.O. or another mutually acceptable adult may supervise. R.T. and A.W. shall not be together in U.'s presence. Access can be reviewed by either the Respondents or E.T. no earlier than in six months' time. If unsupervised access is proposed, the agency shall be notified. E.T. may curtail or suspend access if she feels it is in U.'s best interests;

6. There will be no conflict in the presence of U;

7. E.T. shall meet with U.'s service providers and Dr. Nash and shall obtain all relevant health information from the Respondents or the Agency;

8. E.T. and the Respondents are to prepare a Memorandum of Understanding setting out an access routine and their respective roles and boundaries regarding contact and communication;

9. E.T. shall not delegate U.'s care to either Respondent.

[168] This Court therefore dismisses the Agency's application for permanent care.

Jean Dewolfe, JFC