FAMILY COURT OF NOVA SCOTIA

Citation: Nova Scotia (Community Services) v. L.R., 2013 NSFC 26

Date: 20130402
Docket: FAMCFSA-083639
Registry: Amherst

Between:

MINISTER OF COMMUNITY SERVICES

Applicant

v.

L.R.

Respondent

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

Restriction on publication:	Pursuant to Section 94(1) of the **Children and Family Services Act**
Judge:	The Honourable Judge S. Raymond Morse
Place Heard:	Amherst, Nova Scotia
Oral Decision:	April 2, 2013
Written Release of Decision:	December 19, 2013
Counsel:	Cory Roberts, for the Applicant Stephanie Hillson, for the Respondent

TO PUBLISHERS AND OTHER READERS OF THIS CASE:

PLEASE TAKE NOTE THAT SECTION 94(1) OF THE **CHILDREN AND FAMILY SERVICES ACT** APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADINGS BEFORE PUBLICATION

SECTION 94(1) PROVIDES:

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

By the Court:

[1] All right, this is the matter between Minister of Community Services and L.R. and this is an oral decision this afternoon and, therefore, is likely to be somewhat more disjointed and less coherent than if I had reserved and filed written reasons. However, I felt that, as with most child protection proceedings, time is of the essence in determining this matter and thus my decision to proceed this afternoon by way of an oral decision. I do, however, reserve the right to refine or revise my oral reasons if necessary.

[2] This is the child protection proceeding concerning the child, K.R., Date of Birth August [...], 2012, pursuant to protection application and notice of hearing dated November 20th, 2012. The respondent, L.R., is the mother of the child. The Minister maintains that the child is in need of protective services as per section 22(2)(b)(g)(ja) and (k). The child was taken into care on November 15th of last year. The initial or five-day hearing was held November 21st. The Court made the necessary finding as per section 39 of the **Children and Family Services Act** and confirmed an initial order for temporary care and custody, adjourning the matter for completion of interim hearing on December 5th.

[3] At the time of the initial hearing, the maternal grandparent was encouraged to discuss her interest in having contact with the child with the responsible case worker. The interim hearing was completed on December 5th. Again, the Court made the necessary findings and granted the Minister's request for extension of temporary care and custody on that date. The respondent consented to the child remaining in temporary care and custody subject to a reservation of rights. Counsel for the respondent advised the Court that the respondent would be likely submitting a placement proposal involving extended family in near future.

[4] The protection hearing was held February 13th before His Honour Judge Hubley in my absence. At the time of the protection hearing counsel for the Minister advised that the Minister was in the process of arranging for a kinship placement with the respondent's mother, J.R. However, also at the time of the protection hearing, counsel for the respondent confirmed a request for a placement hearing to be scheduled noting that by the time the placement hearing was to be held, if the child had been placed in the care of a family member, the placement

hearing would not be required, but if for some reason, the child had not been placed then the respondent would want the placement hearing to proceed.

[5] Counsel for the respondent also confirmed that the respondent was consenting to a protection finding as requested by the Minister, subject to a reservation of rights. His Honour Judge Hubley made the necessary protection finding and extended the existing order for temporary care and custody. The proceeding was adjourned to March 13th for a docket appearance to clarify whether or not a placement hearing would, in fact, be required and the actual placement hearing was tentatively scheduled for March 26th.

[6] Prior to the March 13th docket appearance a supplementary affidavit of the responsible case worker, Nadine Campbell, was filed with the court on March 8th. That affidavit confirmed that as of January 22nd it had been decided by the agency that the respondent's access would progress from supervised access to semi-supervised access because the access visits had been going well. The affidavit also confirmed that the respondent was co-operating with the agency and participating in services as requested by the agency.

[7] The affidavit also indicated that an application had been submitted for approval of a kinship foster placement with the respondent's mother, J.R. The affidavit also noted that J.R. had advised of concerns with respect to her ability to financially support the child if placed into her care.

[8] The docket review was held March 13th as scheduled. At that point in time counsel for the Minister advised that the maternal grandparent, J.R., was not financially capable of taking care of K.R. other than through a kinship foster placement. He confirmed that J.R. and her partner had provided all the documentation to the agency required for approval of the kinship foster placement. He confirmed that the application had been submitted to the Regional Foster Parent Resource Unit responsible for processing and determining such applications. Mr. Roberts advised that the agency had not as yet heard back from the unit. Counsel for the Minister also confirmed a request to maintain the March 26th court date as a further docket review.

[9] At the time of the March 13th appearance, counsel for the respondent advised that the maternal grandparent could not afford babysitting or day-care

expenses during the week. Day-care or babysitting would be necessary because of J.R.'s employment. Counsel for both parties confirmed that their respective clients were prepared to consent to my resumption of responsibility for the case despite the fact that His Honour Judge Hubley had made the necessary protection finding in my absence.

[10] At the conclusion of the March 13th review, the Court confirmed that the matter would remain scheduled for a further docket review on March 26th, given the expectation that the decision with respect to the kinship foster placement would be confirmed by that date. In addition the matter was scheduled for pre-hearing prior to disposition hearing on April 17th and a disposition hearing was scheduled for April 24th.

[11] At the time of the March 26th appearance, counsel for the Minister advised that the Regional Resource Unit had rejected J.R.'s kinship foster placement application. The rejection was apparently based upon J.R.'s prior history of agency involvement during the period 2000 to 2003. Counsel for the respondent advised that this turn of events caught the respondent, as well as her mother, by surprise. Counsel for the respondent confirmed a request that the court assign the earliest date possible for determination of the placement issue as the respondent still wished to proceed with her application for the child to be placed with her mother. Following discussion with counsel the matter was adjourned to today's date for a placement hearing prior to disposition, commencing at 9:30 a.m. The Court confirmed that the existing order would remain in force and effect pending the determination of the placement issue.

[12] A further supplementary affidavit was filed on behalf of the Minister on March 28th. The affidavit of Nadine Campbell, the responsible case worker, was also sworn March 28th. The affidavit provided a summary of the history of agency contact or involvement with the maternal grandparent during the period from June 21st, 2000 to April 23rd, 2004. The affidavit also confirmed that on March 25th, 2013, the agency case work supervisor had received a telephone call from the supervisor of the Regional Foster Parent Resource Unit confirming that in light of J.R.'s past history with the agency, her application for approval as a kinship foster placement had been rejected.

[13] Also on March 25th the agency held a risk management conference and, given the decision on the part of the Foster Parent Unit, concluded that J.R. was unable to financially support K.R. if placed in her care. The affidavit referred to, and I'm putting this in quotation marks, "policy dictating that when the child is placed in a third party supervision order child-care expenses cannot be covered by the Minister and, therefore, a third party supervision order was not viable in this case." The affidavit confirms the Minister's decision to seek an extension of the order for temporary care and custody.

[14] A further case conference was held March 26th, and again it was determined that the agency was not able to pay for child-care costs under a third party supervision order. On March 27th the worker and her supervisor met and discussed that the universal child tax credit and subsidized daycare might be resources available to J.R. to assist in payment of K.R.'s child-care expenses.

[15] The affidavit also referred to the fact that the involved assessor, Dianna Robichaud-Smith, had apparently advised the agency that J.R. would have to play a strong positive role and strong supportive role as part of any plan to return K.R. to the respondent's care. The affidavit suggested that given that the Minister may be deciding to return the child to the respondent's care in the future, it would be less confusing for the child to remain in foster care. The affidavit confirmed the Minister's decision to approve weekend visits with the maternal grandparent as an alternative to the proposed placement with J.R. Any weekend or overnight access with the maternal grandparent would be subject to the condition that L.R., the mother, not be present during any weekend access visits.

[16] The hearing proceeded on today's date as scheduled. There was some delay in commencement in order to allow counsel the opportunity to discuss the matter further. These discussions did not resolve the placement issue.

[17] Nadine Campbell, the responsible social worker, was the only witness to testify on behalf of the Minister. She's been a social worker for 11 years. She was assigned responsibility for this particular case in December of 2012 following the taking into care of the child, K.R., on November 15th, 2012.

[18] Ms. Campbell testified that the Minister has continuing concerns respecting the respondent's mental health. Dianna Robichaud-Smith, as the responsible

assessor, is working on a parenting capacity assessment to assist in determining the extent to which any mental health issues might impact upon the child or the parenting of the child and also to assist in addressing any concerns in the relationship between the respondent and her mother.

[19] Ms. Campbell confirmed that the responsible family support worker viewed J.R. as a great support for the respondent and K.R. Ms. Campbell confirmed that she and J.R. discussed the possibility of a placement with J.R. by way of a third party supervisory order. She confirmed that J.R. expressed concern about the cost of child-care associated with placement and confirmed that she and her partner's ability to cover the costs associated with this responsibility or the responsibility of child-care would be an issue. J.R. did not feel that they would be eligible for any significant child tax credit in light of their incomes.

[20] Ms. Campbell confirmed that the agency discussed the barriers to placement and she was advised that under a kinship foster placement such costs would be covered. However, she was also informed that an application for approval of such a placement had to be submitted to the resource unit. Ms. Campbell testified that she was aware of the prior Children's Aid Society history involving J.R. because she had actually had some involvement at that point in time. She said she knew that they were involved with the Department and there were issues, but she also recalled that J.R. was a regular participant in services and had tried to get appropriate help.

[21] Ms. Campbell confirmed that it was her supervisor who told her that the kinship application had been refused. Ms. Campbell said she was surprised and hadn't expected it to go that way. Again she confirmed she was surprised by the decision and that led to the agency starting to second guess its position and whether or not they might have overlooked something. She confirmed that the agency had another risk conference to look at the possibility of providing assistance. At this point in her evidence she commented that she felt that money shouldn't be a barrier to placement but noted that the Department's policy was not to pay the cost of child-care. She confirmed that she had a further conversation with her supervisor prior to attending court on today's date. She reported to her supervisor about her visit to the residence of J.R. She confirmed that J.R. was not opposed to having K.R. on weekends as a second best option to placement. She confirmed that the reality of the financial situation was that J.R. and her partner

needed some help financially in order to assume responsibility for day-to-day care of K.R.

[22] She indicated at the conclusion of this morning's conversation with her supervisor it was decided that the Department would be willing to pay for one month's child-care expense or supplies ... I guess child-care supplies might be the proper way to phrase that ... involving an expenditure of approximately 400 to $500.

[23] During cross examination Ms. Campbell was referred to a document entitled "Maintenance Expenditures for Children in Care". This document was introduced as Exhibit 2. Ms. Campbell confirmed she had seen the document before. She confirmed it included a listing of expenses associated with foster care, including the per diem rates for children, depending upon ages. She wasn't sure if all of the information in the document was up-to-date or accurate. She agreed with respondent's counsel suggestion, however, that the Department would actually be saving money if the child were placed in the care of J.R., based on all of the expenses authorized for foster care, even if the Department had to pick up expenses associated with daycare or babysitting.

[24] Ms. Campbell confirmed that the Department had approved a third party supervisory order for J.R. and that the only barrier was cost of child-care. She also confirmed that the child's current foster placement is not in Cumberland County and noted that the Department would have been prepared to approve extended access for J.R. Costs would not have been a barrier to that particular option. The proposal, however, was not approved, not because of the concerns relating to expense, but because of concerns as to how the proposal might impact upon the child.

[25] She agreed that the expense associated with facilitation of extended access for J.R. would have been more than the cost of what the Department is being asked to cover under the terms of the respondent's request for a third party supervisory order.

[26] Ms. Campbell confirmed that the respondent had been making very positive progress. She indicated that she's very pleased with her interaction with both the respondent and J.R.

[27] The affidavit of L.R. sworn April 2nd, 2013 was tendered by consent of the parties as Exhibit 3. Counsel for the Minister waived cross examination on the affidavit. J.R. testified on behalf of the respondent. Her affidavit was marked as Exhibit 4. She confirmed that K.R. would be approximately eight months old as of April 15th, 2013. J.R. confirmed that she works Monday to Friday from 8 a.m. to 4 p.m. each day in [...] in Amherst. She and her partner live in [...]. Her partner also works at [...]. They both commute back and forth to work. She confirmed that she has identified an individual who would be able to provide child-care on a weekly basis if K.R. were in her care. The cost or child-care with this individual, as referred to in paragraph 53 of her affidavit, would be $125 per week.

[28] She then went on to explain why she and her husband could not afford to cover all the expenses associated with care of K.R. During her testimony, J.R. confirmed that she believes that her daughter is willing to abide by any rules that might be set by she and her partner if K.R. were in their care. Again, she confirmed that she had no concerns about her daughter's ability to follow rules if the child were in her care. She also confirmed that they were willing ... I think, obviously meaning herself and her partner ... were willing to comply with any restrictions imposed by the Minister but hoped that her daughter would be allowed visitation with the child if the child were in her care.

[29] Exhibit 5 was tendered by consent of the parties. Exhibit 5 is a letter from Dianna Robichaud-Smith, the responsible assessor, dated March 28th, 2013. In that correspondence, Ms. Robichaud-Smith indicates as follows:

> In my opinion it [. . .](word missing) unfortunate that past experiences and behaviours are set as a benchmark for future and present behaviour. J.R. Sr. is an insightful, caring individual who is very confident in herself, she would be an able caregiver for her grandson. The divisive experiences with her daughter have been mediated but one of my recommendations will be that they engage in some family therapy work to ensure that all past unresolved issues be addressed and strategies be developed [. . .](word missing) solidify there (sic) relationship for the future.

[30] At this point in time there's an agreement between the parties that the child, K.R., remains a child in need of protective services. The respondent is not requesting the child be returned to her care under the terms of the supervisory order. The respondent is, however, asking that the child be placed in the care of

her mother, J.R., under the terms of an appropriate third party supervisory order. The respondent requests that this court grant an order directing the Minister to pay for the cost of day-care services in order to facilitate such a placement.

[31] The Minister agrees that the maternal grandparent, J.R., can provide appropriate care for the child and that she would be able to adequately ensure the child's safety and welfare if the child were placed in her day-to-day care. The Minister would not be opposed to a third party supervisory order if J.R. were able to cover the cost of necessary day-care services without assistance from the Minister.

[32] The Minister does not dispute that the placement with the maternal grandparent would be a less intrusive form of intervention than continued foster care under the auspices of an order for temporary care and custody. All parties agree that the only obstacle or impediment to placement with the maternal grandmother is her inability to cover the cost of day-care necessitated by the fact that she holds a full-time job during the week. Again, in all other respects, the parties agree that an interim plan, based upon a third party supervisory order subject to appropriate terms and conditions would be in the best interest of the child.

ISSUE FOR DETERMINATION

[33] Accordingly, based upon my review of the evidence and the submissions of counsel, I'm satisfied that at this point in time the only issue for determination is whether or not the court has the jurisdiction or ability to order the Minister to contribute to costs of daycare as a condition or term of a third party supervisory order or as a cost of taking into care. I do not consider this application as involving judicial review of the decision made by the Foster Parent Unit or the Resource Unit. This court has no jurisdiction to undertake a judicial review of such an administrative decision. A request for a judicial review must necessarily involve a separate application to the Nova Scotia Supreme Court. Accordingly, as indicated previously, I see the issue involved in this application as being a determination of whether or not this court can order the Minister to contribute costs of day-care under a third party supervisory order prior to disposition hearing.

[34] I believe that the following provisions of the **Children and Family Services Act** are relevant to the determination of this application: from the preamble the following:

> WHEREAS the family exists as the basic unit of society, and its well-being is inseparable from the common well-being;
>
> AND WHEREAS children are entitled to protection from abuse and neglect;
>
> . . . .
>
> 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;
>
> AND WHEREAS social services are essential to prevent or alleviate the social and related economic problems of individuals and families;
>
> . . . .

[35] And then section 2:

> 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.

[36] Section 3(1) of the **Act** in sub-paragraph (g) refers to "child-care services" and confirms that "child-care services" means "homemaker, day-care and similar services", per (iii).

[37] Under section 3(2), the following:

> 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 the 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;

[38] And to shorten this up I'm not going to read it all, but I've referred to all of section 3(2).

[39] All right. With respect to section 9:

9 The functions of an agency are to

(a) protect children from harm;

(b) work with other community and social services to prevent, alleviate and remedy the personal, social and economic conditions that might place children and families at risk;

(c) provide guidance, counselling and other services to families for the prevention of circumstances that might require intervention by an agency;

(d) investigate allegations or evidence that children may be in need of protective services;

[40] And in particular, sub-paragraph (e):

(e) develop and provide services to families to promote the integrity of families, before and after intervention pursuant to this Act;

[41] And then I have referred and taken note of the other sub-paragraphs under section 9, but I'm not going to read them this afternoon just to try to move this oral decision along.

[42] Section 13(1):

> 13(1) Where it appears to the Minister or an agency that services are necessary to promote the principle of using the least intrusive means of intervention and, in particular, to enable a child to remain with the child's parent or guardian or be returned to the care of the child's parent or guardian, the Minister and the agency shall take reasonable measures to provide services to families and children that promote the integrity of the family.

[43] And then in the same section 13, but it's sub-section (2):

> 13(2) Services to promote the integrity of the family include, but are not limited to, services provided by the agency or provided by others with the assistance of the agency for the following purposes: . . .

[44] And I note in particular ... while I would refer to all of the ... or have taken note of all of the sub-paragraphs I would refer in particular to sub-paragraph (a) improving the family's financial situation and sub-paragraph (h) child-care.

[45] And then I have noted all of the sub-paragraphs as listed under 39(4) but in particular, obviously relevant to this matter is sub-paragraph (d) which reads as follows:

> (d) the child shall 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 and on such reasonable terms and conditions as the court considers appropriate;

[46] I have also taken note of section 39(7) and 39(9). I'm going to read 39(9):

> 39(9) The court may, at any time prior to the making of a disposition order pursuant to Section 42, vary or terminate an order made pursuant to subsection (4).

[47] And then section 42(2):

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

[48] And then there's sub-paragraph (a):

> (a) have been attempted and have failed;

[49] The Minister opposes the respondent's request for a third party supervisory order in favour of the maternal grandparent, J.R. The Minister maintains that a placement option that contains no plan or provision for child-care while the custodian of the child is working is not a viable or serious plan and should not be endorsed or approved by the court. The Minister maintains that it would not be in the best interests of the child to be placed in such an environment. The Minister further maintains it is not the obligation of the Minister to make the plan viable by undertaking responsibility for payment of child-care expenses.

[50] The Minister, therefore, takes the position that the plan submitted on behalf of the respondent involving placement with the maternal grandparent, J.R., is not sound, sensible, workable, well conceived or reasonable. In the alternative, the Minister maintains that the Minister has no obligation to provide assistance for day-care under section 13. The Minister maintains that the court has no jurisdiction to order the Minister to pay such costs under section 13. The Minister also maintains that if the court did order the Minister to cover costs associated with day-care and babysitting such an order would effectively circumvent the decision of the Foster Parent Resource Unit and, therefore, usurp the discretionary decision-making authority of the Minister.

[51] Counsel for the Minister maintains that the Minister currently does not and cannot provide funding for a full-time babysitter or day-care to extended family members in circumstances such as this case.

[52] Not surprisingly, the respondent takes a contrary position. The respondent maintains that the Minister should provide financial assistance in order to permit the family placement since to do so would be consistent with the best interests of the child. The respondent suggests the cost of day-care should be authorized by the court as cost of taking into care under the Regulations to the **Act**, specifically section 49.

[53] Counsel for the respondent pointed out that under the definitions set forth in section 49 of the Regulations:

> (b) "costs of the maintenance of the child in care" means the costs of maintenance of a child in the care and custody of an agency or the cost of the services required to allow a child to remain in the care and custody of a parent, guardian or other person.

[54] Counsel for the respondent has also referred to section 50(1) of the Regulations and notes that the costs of taking into care include the direct costs of ... under sub-paragraph (d):

> (d) temporary care and custody of the child pending the final disposition of the proceeding;

[55] The respondent believes that the Minister's position is unreasonable given that the expenses associated with continued foster care under an order for temporary care and custody will likely exceed the cost of day-care or cost of contribution towards day-care in the amount of $125 per week.

[56] I've considered the case authorities as referred to by counsel. I've also asked counsel this morning or at least provided them with the opportunity to consider several other case authorities including: *Nova Scotia Minister of Community Services v. L.L.P.*, 2003 NSCA 1, *Children's Aid Society of Halifax v. L.A.G*, [2005] NSJ No. 290 (SCFD); *Children and Family Services of Colchester County v. K.T.,* 2010 NSCA 72*,* and *Nova Scotia Minister of Community Services v. T.H.,* 2010 NSCA 63 .

[57] I've reviewed the decision of the Nova Scotia Court of Appeal in *Children's Aid Society of Halifax v. T.B.*, 2001 NSCA 99, as referred to by the Minister. The factual situation before the Court of Appeal in that case is certainly distinguishable from the case at Bar, but I agree that the general principles as referred to by Justice Saunders in that case are noteworthy and instructive. In rendering the decision of the court His Lordship indicated as follows at paragraph 31:

> [31] Justice Cromwell's words should not be interpreted as imposing either upon the agency or the court a statutory burden to investigate and exhaust every conceivable alternative, however speculative or fanciful. He spoke of *reasonable* family or community options. Neither the agency nor the court is obliged to

> consider unreasonable alternatives. Their statutory obligation is nothing more than to assess the reasonableness of any family or community alternatives put forward seriously by their proponents. By "reasonable" I mean those proposals that are sound, sensible, workable, well conceived and have a basis in fact.
>
> [32] The onus of presenting such a reasonable alternative must surely be upon the person or party seeking to have it considered. It is hardly the responsibility of the Agency or the court to propose the alternative, provide the resources for its implementation, or shepherd the idea through to completion.

[58] Justice Saunders also commented as follows at paragraph 52:

> [52] The Agency has a statutory duty to take reasonable measures to provide services to families and children that promote the integrity of the family (s. 13 CFSA). The court has its own responsibility to take into account such measures and alternatives as are applicable in the circumstances of the case, before removing the child from the care of a parent or guardian (S.42(2)CFSA). Thus the court and the agency share responsibility to see that *reasonable* family or community options are considered. But the burden of establishing the merits of the alternative proposed are squarely upon the proponent. It is the proponent who must satisfy what I would term the burden of persuasion. Only when specific arrangements have been conceived and put in place by the proponent can the viability of that proposal be assessed.

[59] I believe it is clear from that decision that the Minister has a duty under section 13, which arises naturally from its function or mandate as prescribed by section 9 of the **Act**. Broadly speaking, the Minister's duty is to take reasonable measures to provide services as referred to in section 13 where reasonable, necessary and consistent with the best interests of the child and in furtherance of the objective that the least intrusive means of intervention, sufficient to ensure the safety and welfare of the child, is to be utilized in child protection proceedings.

[60] The Court of Appeal's decision in T.B. clearly confirmed that the Minister's duty is not to be undertaken in isolation but that the court and the agency have a shared or joint responsibility to see that reasonable family options are considered and utilized when reasonable and appropriate.

[61] In this particular case there is no dispute that the proposed placement with maternal grandparent would constitute a reasonable family placement, adequate to

ensure the safety and welfare of the child absent the concern, regarding the ability to cover costs of child-care.

[62] Similarly, there is no contest that such a placement would be a less intrusive form of intervention than continuing to maintain the child in foster care by way of an extension of the existing order for temporary care and custody.

[63] Clearly child-care is one of the enumerated services intended to promote the integrity of the family listed in section 13(2) as per sub-paragraph (h).

[64] The definition section of the **Act** contains a definition of "child-care services" as per section 3(g), which confirmed that such services mean "homemaker, day-care and similar services" under paragraph 3(g)(iii).

[65] As per section 9(e), the functions of the agency include to develop and provide services to families to promote the integrity of families before and after intervention pursuant to this **Act**.

[66] I also note that services to promote the integrity of the family as listed and referred to in section 13(2) also include under sub-paragraph (a), improving the family's financial situation and child-care pursuant to sub-paragraph (h).

[67] Given the evidence before me, I believe it is clear that the respondent and the maternal grandparent, to the extent that there is any burden or persuasion falling upon her, have adequately established that the placement proposal involving placement of the child in the day-to-day care of J.R., under an appropriate third party supervisory order, would be consistent with the best interests of the child. This conclusion is supported by the fact that the agency itself reached a similar conclusion with respect to the proposed placement prior to the rejection of the kinship foster placement application. Indeed, this was one of the reasons why the agency submitted an application for approval of the placement, as a kinship foster placement. A secondary reason was the agency's understanding that if the application were granted funding would be available to assist with day-care. The agency was satisfied that J.R. needed assistance with costs of day-care. Had the agency concluded in first instance the proposal was not appropriate, reasonable, sensible, sound or consistent with the best interest of the

child, the agency presumably would never have submitted the application to the Resource Unit.

[68] Unfortunately, the criteria for approval of kinship foster placement are different than those the agency applied to consideration of the placement proposal. Application of the more stringent criteria led to the rejection of that application. The difference in criteria is predicated upon recognizing that there are different standards applicable to approval of a foster placement as opposed to approval of a family placement, undoubtedly premised upon the high standard of care required from foster parents.

[69] I have reviewed the other case authorities as referred to by the Minister. *L.D. versus Children's Aid Society of Cape Breton Victoria,* 2010 NSCA 64 is of limited assistance because the factual circumstances are quite different. However, once again, I accept that the general principles as identified in that case authority are applicable including the principle that services provided by an agency intended to preserve or reunite the child with the family must be ones which can effect acceptable change within the time permitted in the **Act**.

[70] This case, however, is not a case, at least at this point in time, where there is an issue as to whether or not adequate services have been provided to the respondent. Rather the issue for determination is whether cost of child-care should be court authorized as services intended to permit a less intrusive means of intervention and promote the integrity of the family by facilitating a family placement with the maternal grandparent. *Dassonville-Trudel, Halifax Regional School Board,* 2004 NSCA 82 is distinguishable because its focus is with respect to section 18 and consideration of special needs agreements. However, I do note that the wording of section 18 is different than the wording of section 13 insofar as section 18 utilizes permissive wording and does not contain the mandatory language utilized in section 13. In addition, section 18 does not delineate or detail specific services to be provided as is done in section 13(2).

[71] The Court of Appeal decision in *D.A.B. v. Family and Children Services of Kings County,* 2000 NSCA 38 confirms that the agency's obligation under section 13 to provide services, is to be assessed in the context of the circumstances of the parties. This is taken from the decision of Justice Bateman at paragraph 41. However, once again, the circumstances of that case are distinguishable from the

case at Bar. Indeed, I note that the Court of Appeal in that case specifically rejected the appellant's assertion that the trial judge had found that there'd been a failure to provide services, and found, that the trial judge had reached the very opposite conclusion.

[72] I believe the following case authorities are also noteworthy.

[73] In *Nova Scotia Minister of Community Services v. L.L.P.*, 2003 NSCA 1, Justice Bateman offered the following comments commencing at paragraph 37:

> [37] Similarly, as to the "obligation" to provide services, in this case, services were not requested by the parents yet denied by the Agency. The judge did not find the Agency's service provision wanting. The issue of the "duty" of the Agency, if any, to provide services should be decided in a factual context which is absent here. The same comment applies to the Agency's invitation to give guidance on the appropriate level of deference to be accorded the Agency's decision on service provision.
>
> [38] With the above caution, I would endorse as applicable to the case here under appeal, the comments of Niedermayer, J.F.C, in the Nova Scotia (Minister of Community Services) v. L.S. . . .

[74] And then she goes on to set forth a rather lengthy excerpt from Justice Niedermayer's decision which reads as follows:

> [15] I interpret the phrase "provided by the agency or provided by others with the assistance of the agency" as follows. An agency is required to directly provide only those services it is capable of providing. With respect to all of the services, the agency is to render assistance to the parent in having the service provided by others. This would include giving the parent the names and locations of these "out of house" services, payment for the cost of transportation to and from the services, if such was necessary; making referrals and setting up initial appointments where appropriate; advising the parent of alternatives, when needed. The agency is not expected to step by step "walk the parent through" all the stages of the service. There is a responsibility on the part of the parent to engage the "out of house" services. Not only does this indicate a willingness by the parent to improve, but it also demonstrates to others that the parent is capable of improvement as well as the degree to which the positive change can be prognosticated.
>
> . . .

> [17] Before any meaningful consideration can be given to the duty of an agency to be found wanting with respect to the services as enumerated in section 13(2) the client has to be willing or be able to engage in such services. The offers for services can be presented. In order for them to be looked at they must be accepted and acted upon by the client.
>
> [18] As counsel for the Minister pointed out it is not mandatory for the Minister to provide all the services enumerated in Section 13 but "shall take reasonable measures" to provide services. "Reasonable measures", in the context, means the agency must identify, provide or refer to the services and there has to be a reasonable probability of success in the provision of service . . .
>
> [19] Notwithstanding the failings and the provision of services, the important issue to remember is that the person who is most affected by L.S.'s lack of engagement is her son, who requires a parent who is capable of parenting.

[75] And then he ... the quote from Judge Neidermayer concludes with this:

> The test is not the hopelessness of the mother or the failure of the public agency to place all its resources at the disposition of the mother. This court, as well as others, has often repeated that the only test is what is in the best interests of the children.

[76] Justice Bateman then went on to comment as follows:

> [39] There is an apparent tension between s. 13(1) which leaves to the discretion of the Minister the identification of "necessary" services and other sections of the statute which, on a superficial reading at least, seem to assume that some level of services will be appropriate in every case. I refer, for example, to ss. 41(3)(a), 14(1), 42(2), 43(1) and 44(1). In s. 9 the Act identifies, among the functions of the Agency, the provision of various types of services. The interplay of these sections of the Act and the obligations or rights imposed by them is best interpreted in a factual framework. . . .

[77] This case, I believe, has provided me with an appropriate factual framework for determination of the agency's obligation to provide a contribution towards costs of day-care services under section 13.

[78] In the *Children's Aid Society of Halifax v. L.A.G.*, [2005] NSJ No. 290 (SCFD), Justice Williams considered a case in which the respondent parent argued

that she'd not been provided with adequate services. In dealing with this issue Justice Williams commented as follows commencing at paragraph 63:

> [63] The Act creates an expectation, a duty on an Agency to provide services within a context - that context is the desire, the goal of keeping children with or returning them to, their parents - provided it is in the best interests of the child as defined by the Act to do so. The provision of services by the Agency within a proceeding such as this must be reality based:

[79] And then he goes on to list the factors and starts with number 1.

> 1. The services must address the problems, the issues as seen from the child's perspective. Put another way, they should, where a finding in need of protective services has been made, address either directly or indirectly the circumstances that have led to that finding.
>
> 2. The services must serve the child's best interests as defined by the Act. For example, the Act embraces the idea that the passage of time has more impact on children than adults - and creates statutory time lines for decisions to be made within. A service that addresses a parent's problem over two, three or five years may be potentially effective for the parent but, simply put, take too long for the child to wait.
>
> 3. The Agency has the responsibility to identify and/or provide services to enable a child to remain or return to a parent's care.
>
> 4. If a parent disputes the existence or continued existence of a problem or issue, the Agency bears the onus of proof, the Agency must prove it. Once proven, or admitted to, the "problem" needs to be addressed. Where services are an issue a problem will have been admitted to, identified and/or proven. To identify and use a service a parent must be prepared to act responsibly in acquiring and utilizing a service to address the problem.
>
> 5. The Court has the duty and/or authority to deal with services:
>
> a. The Court may in making an interim order (prior to a finding in need of protective services) make an order pursuant to s.39(4)(g) for the referral of the child or guardian for psychiatric, medical or other examination or assessment.
>
> . . .

> b. If a finding in need or protective services is made, the Court must consider services at the disposition stage . . .

[80] This is in the sub-paragraph c, still quoting from Justice Williams.

> c. If the Court is making a Supervision (Disposition) Order, it may impose "reasonable terms and conditions" relating to the child's care and supervision including:
>
> 43(1)(f) the assessment, treatment or services to be obtained for the child by a parent or guardian or other person having the care and custody of the child;
>
> (g) the assessment, treatment or services to be obtained by a parent or guardian or other person residing with the child; and
>
> (h) any other terms the court considers necessary.

[81] And then he goes on to indicate as follows:

> The Court has the authority to "refer" before a finding in need of protective services, to order services to be obtained after such a "finding".
>
> If an agency fails to identify or provide services "reasonably" the Court may on its own motion or that of a party make orders dealing with services as these sections authorize.

[82] In the *Nova Scotia Minister of Community Services v. T.H.* 2010 NSCA 63 the Nova Scotia Court of Appeal undertook a detailed review of the provisions of the **Children and Family Services Act**. In commenting upon section 2(2) Justice Fichaud indicated as follows at paragraph 57:

> [57] Section 2(2) is not abrogative like s.52(1) of the Constitution Act, 1982. It does not invalidate other sections in the CFSA. Rather s. 2(2) is to be construed consistently with other provisions in the CFSA. That is the interpretive exercise directed by J.J.

[83] And J.J., as referred to by Justice Fichaud is a decision of the Supreme Court of Canada.

[84] His Lordship continues indicating as follows:

> In my respectful view, the judge erred in law by contravening the Legislature's expressed intent respecting the process and standards according to which the best interests of children in the Minister's permanent care and custody are considered for adoption.

[85] I would confirm that in attempting to determine the issue that has been placed before me in this case, I have attempted to consider and apply section 2(2) consistently with the other applicable provisions of the CFSA.

[86] In the sister decision of the *Children and Family Services of Colchester County v. K.T.* 2010 NSCA 72, Chief Justice MacDonald of the Nova Scotia Court of Appeal indicated as follows in paragraph 29:

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

[87] Later His Lordship indicated as follows at paragraph 56:

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

[88] Again, in attempting to determine this particular application I have attempted to consider all of the relevant provisions of the **Children and Family Services Act** applicable to determination of the child's best interests. In particular, I've concluded that at this stage of the protection proceeding, as indicated by Chief Justice MacDonald in *K.T.*, supra, the applicable legislative provisions clearly focus on the need to ensure the safety and welfare of the child, but as well, the provision of services intended to not only assist in addressing protection concerns but also to promote the integrity of the family through utilization of non-intrusive options where reasonable and appropriate having regards to the best interests of the child.

[89] Section 13(2) in particular provides very clear guidance as to the type of services that the legislators obviously concluded would be consistent with the best interests of the child, children and their families.

FINDINGS

[90] Based upon my review of the evidence in this particular case, I am satisfied firstly that the child remains a child in need of protective services at this point in the proceeding despite the respondent's participation in services. Again, at this stage in the proceeding I'm satisfied that there is still a substantial risk to the child's health and welfare such that placement with the respondent mother would not be consistent with the best interests of the child and is not yet possible.

[91] I do acknowledge that the evidence confirms the respondent has been co-operative, has participated in services as requested by the agency and, apparently, has made progress in addressing the Agency's protection concerns. I also note that the Minister is seriously considering returning the child to the respondent's care but has not yet made a final decision or determined if and when this will happen.

[92] I am satisfied that placement with the maternal grandparent, J.R., under the auspices of a third party supervisory order, subject to appropriate terms and conditions, would be consistent with the best interests of the child at this point in the proceeding and would also constitute the least intrusive form of intervention adequate to ensure the safety and welfare of the child.

[93] I also believe and find that such a placement would be consistent with the purpose of the legislation insofar as it would promote the integrity of the family by permitting the child to be placed with a member of the child's extended family rather than being maintained in a foster placement. Indeed, such an order would obviously recognize, just as the involved assessor apparently has, that the maternal grandmother will have a significant ongoing supportive role to play in this case.

[94] I'm also satisfied that such a placement can be authorized by way of a third party supervisory order and that I have jurisdiction to vary the existing order at this point in the proceeding pursuant to section 39(9) of the **Children and Family**

Services Act. I'm satisfied on the balance of probabilities that such a variation order would be appropriate.

[95] I also believe that the terms and conditions of the order should include a condition that the respondent mother is not to have any contact with the child or the maternal grandparent except as authorized by the Minister. Violation of this condition by either the respondent or the maternal grandparent may result in termination of the placement. The degree of supervision required should be adequate, as assessed by the Minister, to address any concerns arising from the maternal grandparent's past history of agency involvement.

[96] I find that a third party supervisory order in favour of J.R. would be consistent with the best interests of the child. In reaching this conclusion I would confirm that I have considered those circumstances that I believe to be relevant as set forth in section 3(2) of the **Act**, which include sub-paragraphs (a), (b), (c), (e), (h), (i), (m) and (n).

[97] In particular, I find the merits of the Minister's proposed interim plan based upon continued temporary care and custody and an associated foster placement has less merit than the potential placement with the maternal grandparent at this point in the proceeding.

[98] In relation to other circumstances, I believe the somewhat unusual or unique history of this matter does constitute an applicable other circumstance. The Minister had actually supported the proposed placement with the maternal grandparent and concluded that such a placement would be consistent with the best interests of the child. The Minister recognized the need to address the issue of the maternal grandparent's inability to fully cover the cost of day-care by proceeding with an application for approval of the placement as a kinship foster placement, based on the belief that if the application were approved financial assistance would be forthcoming with respect to cost of day-care or babysitting.

[99] Unfortunately, the maternal grandparent's past history, albeit dated, of prior child welfare authority involvement, became a problem or obstacle. This history, involving incidents 9 to 13 years in the past, resulted in non-approval of the kinship application. The criteria applicable to such a placement is understandably more rigid or strict. There is a considerable distinction between a foster placement

with the associated expectation of a higher standard of parental care than that associated with approval of a third party supervisory placement with a member of the child's extended family, which is court authorized and can include appropriate terms and conditions intended to ensure the safety and welfare of the child.

[100] The fact that the proposed placement was in first instance acceptable to and approved by the Minister is a relevant other circumstance in my opinion, supportive of the conclusion that a third party supervisory order would be consistent with the best interests of the child, K.R., at this point in time.

[101] As I noted previously, the court has jurisdiction to vary the existing order pursuant to section 39(9). In accordance with section 39(4)(d), a third party supervisory order can be granted subject to such reasonable terms and conditions as the court considers appropriate. I've already identified certain specific conditions which I believe are appropriate and should be ... and shall be incorporated within the order ... and the order would confirm that the Minister is also authorized to request any other terms or conditions which the Minister believes to be necessary or appropriate.

[102] I find the position taken by the Minister in this case to be somewhat inconsistent and problematic. Inconsistencies stems from the fact that the Minister in the first instance was entirely supportive of the placement with the maternal grandparent. It was only after the kinship foster placement application was rejected that the Minister then concluded a placement by way of a third party supervisory order was not feasible or appropriate.

[103] This conclusion, however, was not premised upon any concerns relating to J.R.'s ability to provide appropriate care or ensure the safety or welfare of the child but premised upon her inability to full cover the costs of day-care or babysitting services, because of her limited financial resources.

[104] I believe the Minister's resistance to the court ordering a contribution towards costs of day-care services may possibly be premised upon the concern that such an order may open the flood gates and lead to similar orders in other cases on a regular basis. I certainly appreciate and understand this concern and the fact that there are serious limitations on the Minister's ability to fund services, however, in this particular case I believe it is also important to consider that the Minister's

position is premised upon maintaining an existing foster placement for the child. There are expenses associated with foster care. There is a per diem or daily rate paid to foster parents in relation to the child that they are fostering and there are other expenses that are covered so long as the child remains in foster care. Such expenses would, obviously, come to an end if the child, K.R., were placed in the care of the maternal grandparent under a third party supervisory order. However, in this case it is clear that the Minister would prefer to continue to pay the costs associated with provision of continued foster care rather than contribute towards cost of day-care or babysitting services in order to facilitate placement with the maternal grandparent. The evidence indicates costs associated with foster care would potentially exceed the costs of day-care. The Minister takes this position despite the provisions of section 9 and section 13 of the **Children and Family Services Act**.

[105] I'm going to direct that the Minister make a contribution towards day-care in accordance with section 13. I find in these circumstances the ordering of such a contribution to be a reasonable measure within the meaning of section 13, necessary to promote and facilitate a less intrusive form of intervention, namely, placement with extended family. In the circumstances of this case, I find that the Minister/agency has an obligation under section 13 to provide such a contribution, which is specifically included in the listing of specific services under section 13(2).

[106] However, I also find that this condition will only remain in force and effect until the disposition hearing on April 24th of this year at which time a need for contribution will be reassessed. In reaching this conclusion I do not believe that the court has usurped the function or the decision on the part of the Foster Unit. That decision was based on very different criteria particular to that process as I have already indicated. The application was for approval of the kinship foster placement. My decision does not challenge the decision on the part of the Unit in any respect. I have no authority to designate the proposed placement with the maternal grandparent as a foster placement and I have not done so. I have exercised my jurisdiction to vary an existing order to a third party supervisory order based on the conclusions I have reached and based upon my review of the evidence, applicable legislation and relevant case authorities.

[107] I'm ordering that the existing order be varied to a third party supervisory order in favour of the maternal grandparent, J.R. I've concluded that the best interests of the child require that a contribution to child-care expenses be included as a term or condition of the order.

[108] The following wording would be appropriate. The Minister shall be responsible for costs of child-care at a rate of $125 a week pending the disposition hearing on April 24th, 2013, payable on a weekly basis unless the parties agree otherwise. I believe, in the circumstances of this case, where the Minister has declined to provide such service on a voluntary basis, the court in the exercise of its shared responsibility to ensure necessary services required to promote a less intrusive form of intervention consistent with the best interests of the child, can authorize the services as a condition of a third party supervisory order.

[109] I'm also going to require that the respondent make every effort to contribute towards cost of child-care as long as the child remains in the day-to-day care of her mother. I acknowledge she has limited financial resources but I believe it is only reasonable in the circumstances that she be reminded of her obligation to contribute to the best of her ability. The respondent's contribution might include, if permissible, assistance in facilitation of the transfer of the child tax credit to the maternal grandparent so that those monies would be available to assist in covering costs of day-care. I'm not going to make any further comment on that issue. I don't have enough specifics to really deal with it very clearly. I just simply make the comment that if there's something that she can do to assist and if the grandmother qualifies then perhaps whatever she's required to do she can do.

[110] I'm also directing that the maternal grandparent shall, having regards to her family budget, reassess her ability to cover or contribute towards costs of day-care on an ongoing basis. If circumstances permit she and her partner to assume responsibility for this expense without payment or contribution from the Minister they are to immediately notify the Minister. The maternal grandparent should also, of course, explore other option that may exist in eliminating or reducing the cost of child-care such as subsidized child-care.

[111] I want to reiterate that I have concluded that requiring the Minister to make a contribution to costs of day-care in this particular case is consistent with the best interests of the child. To accede to the Minister's position that I have no

jurisdiction to exercise or cannot make such an order would effectively produce a result that would be patently inconsistent or incongruent with the purpose of the legislation and the child's best interest. In essence, acceptance of the Minister's position in this particular case would relegate the child to continued foster care and deny the child of the opportunity of placement with a family member when that placement has, in fact, met with the approval and support of the agency and is ready to proceed or be implemented.

[112] To permit the best interests of the child to be negated by not ordering or authorizing the service would produce a result, in my opinion, not only contrary to the philosophy and purpose of the legislation but also effectively constitute a failure on the part of this court to discharge its duty under the legislation to ensure that the least intrusive options, which are reasonable, appropriate and adequate to ensure the safety and well being of the child are utilized.

[113] It is clear that the court has jurisdiction and is, in fact, obligated to consider the issue of adequacy of services at the disposition stage of the proceeding. The legislation confirms that an order cannot be made under section 43(1)(f) until the court has made an expressed finding regarding services as required under section 42(2).

[114] I believe it would be unreasonable having regards to the wording of section 9 and section 13 to conclude that the court could not also deal with the issue of services when necessary and appropriate prior to disposition. In this case an opposite conclusion again would mean that the child would have to remain in foster care until the disposition hearing has been determined despite the availability of an acceptable family placement. While an initial disposition hearing is presently scheduled for April 24th, approximately three weeks away, there's no way of predicting at this point what the position of the parties will be at disposition or if a contested disposition hearing will be required.

[115] For an infant such as K.R., even an additional three weeks in foster care on top of the several months that have already passed is a significant time period in the life of such a child and therefore a factor that I have taken into account in my decision.

[116] I will also confirm that I've made my decision within the factual context of this particular case, which as I have already indicated in many respects, is somewhat unique. Because of the special circumstances of this particular case I do not see this decision as having significant precedent value. Each case must obviously be decided based upon its unique circumstances. I do, however, believe that I have adopted the necessary child centric approach to the determination of this application in order to arrive at a result which I believe to be consistent with the best interests of the child and at the same time accords with reason and common sense.

[117] I would like to take this opportunity to thank counsel for their assistance in regards to this matter and I would ask that Ms. Hillson prepare the appropriate order.

[118] MR. ROBERTS: Your Honour, just with regards to that order in terms of having that condition reviewed at disposition, I guess I would see it ... need to get more information about how much child tax credit ...

[119] THE COURT: I'm hoping that things may unfold. There are a number of things that may happen here ...

[120] MR. ROBERTS: Yeah.

[121] THE COURT: ... for one thing, my understanding is that the agency is in the process of trying to really identify clearly when it might be willing to return the child to the mother under supervisory order.

[122] MR. ROBERTS: Yes.

[123] THE COURT: So that could impact upon what happens at disposition. There may well be developments with respect to child tax credit. It may well be that the grandmother may find that the burden of covering costs is not as significant as perhaps she felt or that when she gets into the actual responsibility part of it ...

[124] MR. ROBERTS: Sure.

[125] THE COURT: ... and the expenditures are there, she may find that perhaps the impact is not as extreme. So there's a number of things that can happen.

[126] MR. ROBERTS: And just with respect to the child tax credit, we will certainly do some investigating to find out how much it would actually ...

[127] THE COURT: Yeah, and there's no clear evidence before me. She said she didn't think it would be much based upon her income situation.

[128] MR. ROBERTS: Sure ...

[129] THE COURT: But ...

[130] MR. ROBERTS: ... and just in terms of if information is required from J.R., income information or income tax information to get those numbers before the court ...

[131] THE COURT: Look it, I think the order should include something that J.R. should be under an ongoing obligation to provide appropriate financial disclosure to the Minister ...

[132] MR. ROBERTS: Okay.

[133] THE COURT: ... as necessary and appropriate ...

[134] MR. ROBERTS: And that's fine, yes, thank you.

[135] THE COURT: ... including disclosure information with respect to her eligibility for the child tax credit and if eligible how much she will be receiving.

[136] MR. ROBERTS: Yes, thank you, Your Honour.

[137] THE COURT: All right. Anything else then, counsel?

[138] MR. ROBERTS: And Your Honour I can ... I'll ... I can prepare the order if ... I know it's not usually customary for Ms. Hillson to prepare the order and certainly I have all the precedents on my computer so I don't mind ...

[139] MS. HILLSON: Well, I wouldn't want to mess with his precedents.

[140] MR. ROBERTS: No, and I can certainly ... I'll provide that, that to my friend then.

[141] THE COURT: That's fine. All right. Thank you very much counsel.

[142] MR. ROBERTS: Thank you, Your Honour.

Morse, J.F.C.