SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Nova Scotia (Community Services) v. T.M.C.*, 2015 NSSC 198

Date: 2015-07-10
Docket: *Sydney* No. 88531
Registry: Sydney

Between:

Minister of Community Services

Applicant

v.

T.M.C. and E.J.D.

Respondents

Judge:	The Honourable Justice Kenneth C. Haley
Heard:	April 28th, 29th, and 30th, 2015 in Sydney, Nova Scotia,
Written Release:	July 7, 2015
Counsel:	Adam Neal, for the Applicant Peter Forgeron, for the Respondent T.M.C. Jessie Denny, for the Respondent E.J.D.
Editorial Notice:	Identifying information has been removed from this electronic version of the judgment.

To the Publishers 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:

Prohibition on publication
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 he 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] This is the application of the Minister of Community Services, hereinafter called the Minister", seeking an Order pursuant to s. 42(1)(f) of the *Children and Family Services Act of Nova Scotia* (CFSA), that the children:

(i) S.D. born January, 2000;
(ii) A.D. born November, 2004;
(iii) S.A.D. born April, 2008; and
(iv) E.D. born May 2012

be placed in the permanent care of the Minister, with no provision for access for the three younger children only.

[2] With regard to the oldest child, S.D., there is no plan to place her for adoption in the event permanent care is awarded. Thus, in these circumstances the Minister supports a provision for access for this child only.

[3] The Respondent, T.M.C. has not put forth a plan of care for her four children, but supports her estranged partner, E.J.D., in opposition to the Minister's application, and return of the children to E.J.D.'s sole care.

[4] The history of the file is as follows:

<u>July 31, 2013</u>

- Referral made to the Minister by Mr. Stewart Matheson of the Housing Authority, whereupon the Minister commenced its investigation.

- Pursuant to s. 110 of the Affidavit of Natasha Wall, sworn to October 21, 2013 (Exhibit 1, Tab 1), Mr. Matheson advised:

- The condition of the home was deplorable.

- There was clothing and clutter everywhere.

- There were flies everywhere, spilled food and drink, dirty dishes in the sink.

- The floors were filthy.
- The youngest child was crawling around on the dirty floor.
- The basement was so cluttered one could barely see the floor.
- On a previous visit Mr. Matheson noted that the bathroom was disgusting, and that there was clothing everywhere, including dirty diapers.
- That the children had lice, and T.M.C. admitted to having had a nervous breakdown.
- That it had been reported to the Housing Authority that E.J.D. was drinking and using drugs.
- That in Mr. Matheson's opinion, the home was unfit.

September 6, 2013 (as per Exhibit 1, Tab 1)

[5] The Protection Worker, Mr. Doug Thorn attended at the Respondents' residence:

- Upon entry he noted that the flooring throughout the home was tired and worn, with some holes in the wood.
- The walls throughout the home were marked with everything from paint to crayons to stains.
- The bottom part of the home had been recently cleaned.
- The upstairs rooms were in rough shape.
- The girls' bedroom floor was torn up and dirty, and the beds required clean sheets.
- The bathroom was in rough shape.

- There were bags of clothing in the upstairs hallway.

October 7, 2013

[6] Further home visit but Mr. Thorn was unable to enter the premises.

October 22, 2013 (as per Exhibit 1, Tab 1)

- Mr. Thorn attended the Respondents' residence along with Protection Workers.
- Upon entering the home it was noted to be very dirty, every room was very cluttered and filthy. The kitchen counter was covered in pots with rotting food, as well the fridge was filled with rotting food.
- The baby, E.D., was asleep in the crib with clothes piled around.
- There was mold all around the sink, tub, and toilet.
- There were at least eight cases of twenty-four beer bottles on the porch, and the doorway was blocked with garbage bags.
- The porch ceiling had water damage that was leaking from upstairs.
- There was chocolate milk spilled in the floor which appeared to be there for a very long time.
- Due to the unsafe and unsanitary condition of the home, the children were removed and placed with family members.

October 23, 2013 (as per Exhibit 1, Tab 1)

- Mr. Thorn attended the Respondents' home.
- Two children, E.D. and S.A.D. were present, contrary to the direction of the Minister.

- Upon entry into the home there were still a number of serious concerns.
- E.J.D. became upset with T.M.C. when there was discussion of her plan to go to M. to marry "some other guy".

- E.J.D. yelled and screamed at T.M.C.

- The police were called to avert a potential incident of domestic violence.

- The eldest daughter, S.D. made some concerning disclosures about her parents, which put into serious question the stability of the Respondents' relationship, such as: her father kicks things when he is angry; she had been hit by her father; her father drinks regularly; her parents fight on a regular basis about money; and that the father had hit her mother two months earlier.

October 24, 2013

- The Minister conducted a Risk Management Conference.

- Upon review of the history of the file; the seriousness of the condition of the house; drinking on the part of E.J.D.; mental health concerns on the part of T.M.C.; neglect with respect to the children; the decision was made to take all four of the Respondents' children into the care of the Minister.

- The children were placed in foster care.

October 31, 2013 – Interim Hearing.

- An Interim Hearing (5 day) was held pursuant to s. 39 of the *Children and Family Services Act*.

- The children were placed in the interim care of the Minister, with supervised access to the Respondents.

November 18, 2013 – Completion of the Interim Hearing

- The Court ordered that the children remain in the temporary care of the Minister, with supervised access to the Respondents.

January 21, 2014 – Protection Hearing

- The children were found to be in need of protective services pursuant to s. 22(2)(b) of the *Children and Family Services Act.*
- The status quo was to continue with supervised access to the Respondents.

April 15, 2014 – Disposition Hearing

- Status quo to continue with supervised access to the Respondents.
- Minister filed its Plan of Care dated March 26, 2014.

July 7, 2014 – Disposition Review Hearing

- Status quo to continue with supervised access to the Respondents.

October 6, 2014 – Disposition Review Hearing

- Status quo to continue with supervised access to the Respondents.

December 2, 2014 – Disposition Review Hearing

- Status quo to continue with supervised access to the Respondents.

February 23, 2015 – Disposition Review Hearing

- Status quo to continue with supervised access to the Respondents.
- Minister advised of its intention to seek permanent care.
- Amended Plan of Care filed, dated February 18, 2015.

March 11, 2015 – Disposition Review Hearing

- Status quo to continue.

- Statutory deadline April 15, 2015.

- Contested hearing dates scheduled for April 28, 29, and 30, 2015.

- Counsel consented to extend the statutory deadline in the best interests of the children.

[7] On April 28, 2015 counsel made agreements in an effort to reduce the number of witnesses to be called, and shorten the trial time. The Court endorsed this approach, which the Court found to be a more efficient use of court time and resources, by focusing on the plan of the Respondents. As a result Exhibit 1 and Exhibit 2 were tendered by the Minister as evidence, with consent of counsel.

[8] Exhibit 1 includes the following:

- Tab 1 – Notice of Child Protection Application dated October 29, 2013, with Affidavit of Natasha Wall sworn to October 29, 2013, attached thereto.

- Tab 2 – Affidavit of Paul Mugford sworn to January 15, 2014.

- Tab 3 – Agency Plan for the Child's Care signed on March 26, 2014.

- Tab 4 – Notice of Motion for Disposition Order dated April 11, 2014, with Affidavit of Paul Mugford sworn to April 11, 2014, attached thereto.

- Tab 5 – Notice of Motion dated July 2, 2014, with Affidavit of Paul Mugford sworn July 2, 2014, attached thereto.

- Tab 6 – Notice of Motion dated October 3, 2014, with Affidavit of Paul Mugford sworn on October 3, 2014, attached thereto.

- Tab 7 – Notice of Motion dated November 28, 2014, with Affidavit of Paul Mugford sworn to November 28, 2014, attached thereto.

- Tab 8 – Notice of Motion dated February 19, 2015, with Agency's Plan for the Children's Care signed on February 18, 2015, and Affidavit of Paul Mugford sworn to February 19, 2015, attached thereto.

[9] Exhibit 2 includes case aid notes for the following, namely:

- Tab 1 – Edward Gillis.
- Tab 2 – Danielle Brauen.
- Tab 3 – Helen Neil
- Tab 4 – Coleen Petite

[10] It was also agreed that, at this time, Ms. Lisa Fraser-Hill would put on the record the wishes of the child, the eldest child S.D. The child's wishes are that she be returned to the care of her father, and other three siblings.

[11] Ms. Fraser-Hill was thus excused from participating further in the trial proceedings.

[12] On April 29 and 30, 2015 the Court then heard evidence from the following witnesses:

1. Respondent, T.M.C.
2. Respondent, E.J.D.
3. Donna MacDonald, Family Support Worker.
4. J.C.D. – father of the Respondent, E.J.D.
5. M.D. – sister of the Respondent, E.J.D.
6. Ryan Ellis, Child and Care Worker.
7. Paul Mugford, Child Protection Worker.

[13] The evidence was thus concluded with written submissions to be submitted by counsel to the Court.

EVIDENCE REVIEW

[14] As mentioned earlier the **Respondent, T.M.C.** supports the return of all four children to her estranged partner, E.J.D. She testified:

- He is a really good father.

- He is an amazing father.

[15] T.M.C. described how E.J.D. engages the children in activities by taking them to the playground. He was home to care for the children while T.M.C. worked.

[16] T.M.C. testified that E.J.D. was an "fair" disciplinarian, and would talk to the children when they needed direction and/or discipline.

[17] T.M.C. admitted to being a "hoarder", and that she was slack in maintaining a clean home. She testified that she is doing much better now, and has her depression and anxiety issues under control with medication.

[18] T.M.C. tendered three Certificates she obtained in an effort to address her parenting issues, which include:

- Exhibit 3(a) – a 9 week Domestic Abuse and Healthy Relationships Program completed December 2, 2014.

- Exhibit 3(b) – Strengthening Families Program completed on March 8, 2011.

- Exhibit 3 (c) – Anger Awareness Program completed April 22, 2015.

[19] T.M.C. testified that she learned a lot from these programs, and now wants to move on with her life and be a better person. She acknowledges she is not in a position to care for her four children presently, but that in no way affects the love she has for her children.

[20] T.M.C. moved to [...] in February, 2015 to live with her new partner J., whom she met through a friend on the internet. She testified:

> I would see the children regularly, if I am allowed.

[21] T.M.C. also testified about an earlier relationship with another man she met on the internet who lived in M.. Her plan was to travel to M. to get married to this man, and then return to Nova Scotia. The Minister questioned the appropriateness of this relationship, and the impact it may have on the children. T.M.C. testified:

> So, I dropped it. My kids are number one.

[22] T.M.C. testified that it was never her intention to abandon her children.

[23] During cross-examination T.M.C. testified that she had no issue with E.J.D.'s parenting skills. She did not agree that E.J.D.'s marijuana use would affect his ability to parent.

[24] **Respondent E.J.D.** testified that he has an excellent relationship with his four children, and is capable of being a good parent to them. He testified he keeps active with the children, and disciplines them fairly.

[25] E.J.D. testified that he would help the children with their schoolwork, and was capable of looking after their daily needs.

[26] E.J.D. testified that he has family support from his 77 year old father, and his sister. He testified:

> They are only a phone call away.

[27] Regarding the condition of the house E.J.D. testified that he has "de-cluttered, painted the walls, and cleaned up". He tendered pictures of his home which was marked as Exhibit 4. He plans to keep the home in the manner represented in the photographs.

[28] E.J.D. expects the flooring will be repaired by the landlord soon. He testified he is no longer in arrears with the rent.

[29] E.J.D. expects to be getting new mattresses for the girls through Social Assistance.

[30] E.J.D. acknowledged that he and T.M.C. would argue in front of the children. He testified that they have worked through these issues and communicate much better now.

[31] E.J.D. denied having an issue with alcohol and testified he has had nothing to drink for the last year and a half.

[32] E.J.D. acknowledged he smokes marijuana two to three times per week to address chronic back pain. He testified he has never smoked in front of the children, and would never smoke while the children were in his care.

[33] E.J.D. acknowledged he purchases his marijuana illegally, and does not participate in an approved medical marijuana program.

[34] E.J.D. takes prescription medication for anxiety.

[35] E.J.D. did not complete or follow through with Addiction Services as requested by the Minister. He acknowledged he still has work to do in this regard.

[36] During cross-examination, E.J.D. acknowledged that he and T.M.C. were the subject of investigation by the Minister in 2006, 2009 and 2012 before the formal apprehension of his children in October 2013. He agreed that the present concerns by the Minister were the same issues of concern in the past.

[37] **Donna MacDonald** is a Family Support Worker who has been working with the Respondents since February 2014 on parent education.

[38] A case plan was prepared for the Respondents, and Ms. MacDonald had 27 sessions up to February 2015 until the file was closed.

[39] Ms. MacDonald testified that cleanliness was an ongoing issue, and the Respondents were not consistent with cleaning. She testified:

> It was up and down.

[40] As of February 2015 Ms. MacDonald found the house still to be very cluttered and dirty.

[41] **J.C.D.** is the father of the Respondent E.J.D., and the grandfather of the four children who are the subject of this application.

[42] Mr. D. is 77 years old, and lives in a senior's facility. He "thinks the world" of his grandchildren, and sees them one to two times per week.

[43] Mr. D. fully supports his son's plan to care for the children. Mr. D. testified:

> I would be there for him.
>
> I will give it my best.

[44] Under cross-examination Mr. D. acknowledged he was not pleased with how the Respondents kept the house. He expressed concern about the lack of flooring. He testified:

> The house is like a barn.

[45] Mr. D. was also surprised to learn about his son's use of marijuana. He testified:

> He should not be using it.

[46] **M.G.** is Respondent E.J.D.'s sister. She has spent a lot of time with the Respondents' family, and fully supports her brother in his bid to have the children returned to his care.

[47] M.G. testified she never saw a problem with the condition of the house, although she acknowledged she went back to school in 2013, and did not attend her brother's home very much that year.

[48] M.G. testified she was aware of her brother's marijuana use:

> I know he does it…yes.

[49] She testified that she is personally against marijuana use but, "what he does he does".

[50] M.G. testified that she would have no difficulty in leaving her own children in her brother's care.

[51] **Ryan Ellis** is a Child and Care Worker for the Minister. He has been involved with the eldest child, S.D., and testified she is now doing "very well" in foster care.

[52] Initially S.D. was struggling with some mental issues such as cutting, sexual identity and relationships, skipping school, high risk internet behavior of a sexual nature (copying mother's behavior), and boundary issues.

[53] The structure of the foster home has been of great assistance to S.D., and since August 2014 she has progressed in addressing these issues.

[54] Mr. Ellis now sees a happy teenager who is doing well academically. With mental health support in place there is no issue with cutting or inappropriate internet behavior.

[55] Mr. Ellis testified that the Minister is seeking permanent care for S.D. with a provision for access, since S.D. has requested that she not be placed for adoption. S.D. is welcome to remain in her current foster placement as long as she wishes.

[56] **Melissa Nearing** is also a child care worker. She was responsible for the file as it relates to the children A.D., S.A.D., and E..D., who all are currently in foster care.

[57] Ms. Nearing described A.D. as doing very well. She is a "happy, cooperative little girl".

[58] A.D. has some development delays, and is below most of her peer group.

[59] S.A.D. is also happy, but has some developmental issues. She is below her peers in some areas, but is meeting milestones in others.

[60] S.A.D. is doing well in school, but will need some support and monitoring.

[61] E.D. is a healthy young boy. There are concerns regarding his developmental milestones. An assessment will be done. He is progressing well in his foster home, and there have been no concerns the last six months.

[62] The long term plan for these three children is permanent care with no provision for access.

[63] **Mr. Paul Mugford** is the Child Protection Worker. He was assigned to the file in November 2013. He testified regarding the history of the file dating back to 2006, when there was a third party complaint regarding sexual abuse. The allegation was not substantiated.

[64] In 2007 the Minister received referrals regarding domestic violence; home cleanliness; drug use by E.J.D., and emotional health concerns regarding T.M.C. In 2009 and 2012 the Minister received numerous referrals for the same concerns.

[65] Finally in October 2013 the Minister acted on the concerns, and commenced an investigation.

[66] The concerns about the clutter in the home; damage to the home going unrepaired; T.M.C.'s mental health, and E.J.D's substance abuse were substantiated. As a result the four children were taken into care.

[67] The major presenting problems outlined in the case plan were unfit living conditions, mental health, and substance abuse, which are still concerns to the Minister presently.

[68] In the Minister's opinion the Respondents have not followed through with services, and there has been no longstanding improvement in the condition of the home last visited by Mr. Mugford in January, 2015. The decision was made to seek permanent care as evidenced by the Amended Plan of Care dated February 18, 2015 (Exhibit 1, Tab 8).

[69] Mr. Mugford testified it is not safe to return the children to the care of E.J. D. There still remains risk of harm in his opinion. The recent changes in the condition of the home as noted in Exhibit 4 do not change his opinion in this regard. He is concerned the home will relapse to its previous state.

MINISTER'S SUBMISSIONS

[70] The Minister submits the following by way of written submission dated May 15, 2015:

- That the Minister has proven its case on a balance of probabilities as defined by the Supreme Court of Canada in **C.(R.) v. McDougall** [2008] SCC 53.

- That the *Children and Family Services Act* defines "substantial risk" to mean a real chance of danger that is apparent on the evidence.

- That in reaching a decision regarding the future care of children, the Court must be guided by the child's best interests.

- That factors to be considered when making a decision in a child's best interests are enumerated in s. 3(2) of the *Children and Family Services Act*.

- That it is the function of the Court to determine whether or not the children, who are the subject of this proceeding, continue to be in need of protective services, pursuant to s. 22(2)(b) of the *Children and Family Services Act*.

- That if the children are still in need of protective services, the matter cannot be dismissed.

- That the obligation of the Minister to provide services to the Respondent(s) is not without limit.

- That the Court shall not make an Order for Permanent Care and Custody unless it is satisfied that the circumstances justifying the Order are unlikely to change within a reasonably foreseeable time, not exceeding the maximum statutory time limit of April 15, 2015.

- That circumstances which have been identified as important in determining if a change can be made in a reasonably foreseeable time are enumerated at paragraph 29 in ***Children and Family Services* v. K.Do, G.Je, and P.Jo** [2012] NSSC 379 as follows:

> (a) Whether other children have been placed in the permanent care and custody of the Agency, or in the permanent care of other adults.

(b) Whether the children have a lengthy history of being in the temporary care of the Agency.

(c) Whether the parent lacked meaningful insight into the issues that gave rise to the protection finding.

(d) Whether the parent exercised access.

(e) Whether the parent lacked basic parenting and housekeeping skills.

(f) Whether an expert provided opinion evidence confirming an inability to parent.

(g) Whether the parent was effecting positive changes that resulted in lifestyle improvements.

- That evidence of past parenting dating back to 2006 is a relevant consideration in determining the probability of an event(s) reoccurring.

- That in the event permanent care is awarded to the Minister, the onus to show that access should be granted is upon the person requesting the right of access.

- That in considering the issue of access the Court must satisfy itself that the awarding of access will not impair permanent placement opportunities for the children.

- That in the case at bar, the children remain in need of protective services, and therefore the matter cannot be dismissed.

- That E.J.D.'s alcohol use is a concern, along with his regular marijuana use occurring often when he had been in a child caring role.

- That E.J.D. did not follow up and/or complete his referral to Addiction Services, and that his continued illegal marijuana use poses an ongoing risk to the children.

- That E.J.D. acknowledged that he smokes marijuana two to three times a week to deal with pain related issues.

- That E.J.D. did not have a prescription for the legal use of marijuana.

- That E.J.D. buys his marijuana illegally from a "guy down the street".

- That E.J.D. does not recognize the concern associated with the fact that he was not only using an illegal substance which caused him to be impaired, but that he also purchased this drug illegally.

- That E.J.D. does not recognize the risk his behavior posed to his children, nor does he recognize the seriousness of the fact that he had breached a number of conditions of the Court Order.

- That E.J.D. testified that he never smoked in the house, but instead went for a walk or waited for the children to fall asleep, and then went outside to smoke his marijuana, which demonstrates his lack of insight about the importance of his child caring role.

- That ongoing drug use on the part of E.J.D., coupled with the complete lack of recognition that such use poses a risk to the children, results in an ongoing finding of risk to the children.

- That throughout the Minister's involvement the Respondents tolerated unacceptable living conditions. For periods of time a positive difference was noted; however progress was often short-lived, and the house returned to a disturbingly messy and dirty state.

- That recent photographs of E.J.D.'s home show it to be clean and uncluttered, but this is consistent with the cycle that has been apparent throughout the child protection proceeding, and the improvements can be expected to be short-lived.

- That there have been long standing concerns regarding domestic violence within the Respondents' home that remain unaddressed.

- That the Respondents minimize the concerns surrounding domestic violence that occurred in front of the children throughout their relationship.

- That concerns associated with the ability of the Respondents to parent the children have existed throughout the Minister's involvement, and still remain unaddressed.

- That Access Facilitators noted the Respondents, and especially E.J.D., did not follow through with effective forms of discipline to deal with the children's challenging behaviors.

- That the Respondents were unable to properly and consistently implement the skills that were learned during Family Support Worker sessions.

- That the children are now settled in their foster homes, and the children are not displaying the negative behaviors observed in access in the home, school, or daycare.

- That there is no more time available to the Respondents in this matter to reduce the risk such that the children can be returned to them.

- That less intrusive measures, including services to promote the integrity of the family have been attempted and failed.

- That the remedial services provided to the Respondents have failed to reduce the risk to the children.

- That there are no viable family placement options before the Court, and no family members have come forward to offer placement for the children.

- That the current circumstances are unlikely to change within a reasonably foreseeable time.

- That it is in the best interests of the children to be settled in a stable home.

- That the degree of risk that justified the children being found in need of protective services is high, given the Respondent, E.J.D.'s issue with substance abuse, the history of domestic violence, the concerns with parenting and the concerning condition of the home.

- That the Respondent, E.J.D.'s plan to assume primary care of the children is not a reasonable one in the circumstances, and is not in the best interests of the children.

- That it is in the best interests of the children to be placed in the permanent care of the Minister.

- That the Respondents have not met the onus on them to establish access with the three youngest children is in their best interests.

- That the Respondents have not met any of the requirements under s. 47(2) as it pertains to the awarding of access.

- That access to the three younger children must be denied, as it would impair any prospect of a permanent placement by way of adoption.

- That with respect to the oldest child, S.D., the Minister is not putting forth a plan for adoption due to her age.

- That S.D's current foster parents are willing to provide a home to S.D. as long as she wants, and the Minister supports this plan.

- That the Minister is in support of continued access for S.D. with the Respondents, as long as such access is appropriate, and in the best interests of S.D.

RESPONDENT T.M.C. SUBMISSION

[71] By way of written submission dated May 20, 2015, T.M.C. supports the Plan of Care put forth by E.J.D.

RESPONDENT E.J.D. SUBMISSIONS

[72] Counsel for E.J.D. filed her written submissions to the Court on June 22, 2015.

[73] Ms. Denny had initially sought an extension for one week from May 20th to May 27th, 2015. Submissions were not received at that time.

[74] The Court subsequently learned that Ms. Denny was required to attend to a family emergency. As a result the submissions were delayed.

[75] The late filing of the submissions, thus, has delayed the Court in rendering its decision. In the circumstances this was unavoidable.

[76] The Respondent submits as follows:

- That the Court must consider the best interests of the children.
- That the burden of proof upon the Minister is on a balance of probabilities.
- That it is in the best interests of the children to be returned to E.J.D.'s care.
- That E.J.D.'s plan is to continue to reside at his home in […] with the support of T.M.C., his father, and sister.
- That although E.J.D. is on Social Assistance, he has the financial means to care for his children.
- That E.J.D. has a close bond with the children, as do the extended family.
- That E.J.D. engages the children in many activities, and spends a lot of time with them.

- That it would be in the best interests of the children to live in an environment where they would continue to have close relationships with their parents and relatives.

- That should the children be placed in permanent care they will lose out on the bond they have with their father and extended family.

- That should the children be placed in permanent care they will lose out on the close bond they have with each other.

- That there is no guarantee that the children would continue to see one another post permanent care.

- That separation from their parents and siblings would be traumatic for the children.

- That E.J.D. can provide a stable home where the children can remain together, and have access to other family members.

- That E.J.D. is prepared to supervise access with the children's mother if required.

- That E.J.D. would prefer that T.M.C.'s boyfriend not be around the children until he got to know them better.

- That the above two submissions demonstrate insight on behalf of E.J.D.

- That the court should place great weight on the wishes of the 15 year old daughter, who wishes to remain with her father.

- That to E.J.D.'s credit he has acknowledged his use of marijuana, and is currently engaged with Addiction Services.

- That E.J.D. did not, and would not smoke marijuana in front of the children.

- That E.J.D. would not be under the influence of marijuana while caring for his children.

- That using marijuana in a responsible way would go a long way to mitigating any risks potentially posed to the children.

- That E.J.D.'s marijuana use does not pose risk to the children.

- That Exhibit 4, pictures of E.J.D.'s home, demonstrates that the home is now decluttered and clean.

- That E.J.D. is committed to ensuring the home continues to stay in the condition it is currently.

- That concerns about domestic violence no longer exist since T.M.C. is in another relationship, and she and E.J.D. get along great and communicate well.

- That E.J.D. has received services regarding skills from Donna MacDonald, and he has learned some valuable lessons from those sessions, especially in terms of disciplinary approach.

- That it would be detrimental to the family to have the children placed in permanent care.

- That E.J.D. is a loving father who is capable to meet the physical, emotional, and psychological needs of the children.

- That in the event permanent care is ordered, it should include a provision for access for all of the children.

- That the Agency has not put forth evidence that the parents having access would impair their future opportunities for adoption.

- That ordering permanent care with no access would only ensure that this family has been torn apart entirely.

THE LAW

Burden of Proof

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

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

[78] And further at paragraphs 45 and 46:

> 45. To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.
>
> 46. Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[79] The burden of proof is on the Minister to show that the Permanent Care and Custody Order is in the children's best interests.

Test on Statutory Review

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

> 35. It is clear that it is not the function of the status review hearing to retry the original need for protection order. That order is set in time and it must be assumed that it has been properly made at that time. In fact, it has been executed and the child has been taken into protective custody by the respondent society. The question to be evaluated by courts on status review is whether there is a need for a continued order for protection…
>
> 36. The question as to whether the grounds which prompted the original order still exist and whether the child continues to be in need of state protection must be canvassed at the status review hearing. Since the Act provides for such review, it cannot have been its intention that such a hearing simply be a rubber stamp of the original decision. Equal competition between parents and the Children's Aid Society is not supported by the construction of Ontario legislation. Essentially, the fact that the Act has as one of Its objectives the preservation of the autonomy and the integrity of the family unit and that the child protection services should operate in the least restrictive and disruptive manner, while at the same time recognizing the paramount objective of protecting the best interests of children, leads me to believe that consideration for the integrity of the family unit and the continuing need of protection of a child must be undertaken.
>
> 37. The examination that must be undertaken on a status review is a two-fold examination. The first one is concerned with whether the child continues to be in need of protection and, as a consequence, requires a court order for his or her protection. The second is a consideration of the best interests of the child, an important and, in the final analysis, a determining element of the decision as to the need of protection. The need for continued protection may arise from the existence or the absence of the circumstances that triggered the first order for protection or from circumstances which have arisen since that time.

Legislation

[81] The Court must consider the requirements of the *Children and Family Services Act*, S.N.S. 1990, c. 5 in reaching its conclusion. I have considered the preamble which states:

> AND WHEREAS children are entitled to protection from abuse and neglect;
>
> AND WHEREAS parents or guardians have responsibility for the care and supervision of their children and children should only be removed from that supervision, either partly or entirely, when all other measures are inappropriate;
>
> AND WHEREAS children have a sense of time that is different from that of adults and services provided pursuant to this Act and proceedings taken pursuant to it must respect the child's sense of time.

[82] I have also considered ss. 2(1) and 2(2) which provide:

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

[83] I have considered the relevant circumstances of s. 3(2), which provide:

> 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 of 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 relationship 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 needs, and the appropriate care or treatment to meet those needs;

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

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

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

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

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

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

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

(n) any other relevant circumstances.

[84] I have considered the relevant provisions of s. 22, and in particular s. 22(1) and s. 22(2)(b) of the *Children and Family Services Act*, which state:

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

(2) A child is in need of protective services where:
(b) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in (a).
Subsection (a) states as follows:

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

the child adequately.

[85] In addition, the Court has reviewed and considered s. 9 and s. 13 of the Act, which respectively state:

> Functions of Agency
>
> 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;
>
> (e) develop and provide services to families to promote the integrity of families, before and after intervention pursuant to this Act;
>
> (f) supervise children assigned to its supervision pursuant to this Act;
>
> (g) provide care for children in its care or care and custody pursuant to this Act;
>
> (h) provide adoption services and place children for adoption Pursuant to this Act;
>
> (i) provide services that respect and preserve the cultural, racial and linguistic heritage of children and their families;
>
> (j) take reasonable measures to make known in the community the services the agency provides; and
>
> (k) perform any other duties given to the agency by this Act or the regulations, 1990, c. 5, s. 9.
>
> Services to Promote Integrity of Family

> 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, the Minister and the agency shall take reasonable measures to provide services to families and children that promote the integrity of the family.
>
> (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:
>
> (a) improving the family's financial situation;
> (b) improving the family's housing situation;
> (c) improving parenting skills;
> (d) improving child-care and child-rearing capabilities;
> (e) improving homemaking skills;
> (f) counselling and assessment;
> (g) drug or alcohol treatment and rehabilitation;
> (h) childcare;
> (i) mediation of disputes;
> (j) self-help and empowerment of parents whose children have been, are or may be in need of protective services;
> (k) such matters prescribed by the regulations. 1990 c.5, s.13.

[86] Other relevant sections include ss. 42(1); 42(2); 42(3); 42(4) and 45, which provide as follows:

> 42(1) At the conclusion of the Disposition Hearing, the court shall make one of the following orders, in the child's best interest:
>
> (a) dismiss the matter;
> (b) the child shall remain in or be returned to the care and custody of a parent or guardian, subject to the supervision of the agency, for a specified period, in accordance with Section 43;
> (c) the child shall remain in or be placed in the care and custody of a person other than a parent or guardian, with the consent of that other person, subject to the supervision of the agency for a specified period, in accordance with Section 32;
> (d) the child shall be placed in the temporary care and custody of the agency for a specified period, in accordance with Sections 44 and 45;
> (e) the child shall be placed in the temporary care and custody of the agency pursuant to clause (d) for a specified period and then be returned to a parent or guardian or other person pursuant to clauses (b) or (c) for a specified period, in accordance with Sections 43 to 45;
> (f) the child shall be placed in the permanent care and custody of the

agency, in accordance with Section 47.

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

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

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

(4) The Court shall not make an order for permanent care and custody Pursuant to clause (f) of subsection (1), unless the Court is satisfied that the Circumstances justifying the order are likely to change within a reasonably Foreseeable time not exceeding the maximum time limits, based upon the age of the child, set out in Section 45, so that the child can be returned o the parent or guardian.

Duration of orders

45(1) Where the court has made an order for temporary care and custody, the total period of duration of all disposition orders, including any supervision orders, shall not exceed

(a) where the child was under six years of age at the time of the application commencing the proceedings, twelve months; or
(b) where the child was six years of age or more but under twelve years of age at the time of the application commencing the proceedings, eighteen months from the date of the initial disposition order.

(2) The period of duration of an order for temporary care and custody, made pursuant to clause (d) or (e) of subsection (1) of Section 42, shall not exceed

(a) where the child or youngest child that is the subject of the disposition hearing is under three years of age at the time of the application commencing the proceedings, three months;

> (b) where the child or youngest child that is the subject of the disposition hearing is three years of age or more but under the age of twelve years, six months; or
> (c) Where the child or youngest child that is the subject of the disposition hearing is twelve years of age or more, twelve months.

(3) Where a child that is the subject of an order for temporary care and custody becomes twelve years of age, the same time limits set out in subsection (1) no longer apply and clause (c) of subsection (2) applies to any further orders for temporary care and custody. 1990, c. 5, s. 45.

Analysis

Issue 1

[87] **Whether or not the Court has jurisdiction to extend the statutory timelines as prescribed in s. 45(1)?**

[88] In **Nova Scotia (Minister of Community Services) v. L.L.P.** [2003] N.S.C.A 1, at paragraphs 24 and 25, the Nova Scotia Court of Appeal has stated as follows with respect to the legislative time limits:

> 24. The maximum statutory time limits for a proceeding are set out in section 45 of the Act: twelve months for children under six years of age and eighteen months for those between six and twelve years. At the end of these periods a court must either dismiss the proceeding or order permanent care and custody. The time frames within which the proceeding must be resolved are necessarily short in deference to the "child's sense of time", as is recognized in the recitals to the Act:
>
> 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;
>
> 25. The goal of "services" is not to address the parents deficiencies in isolation, but to serve the children's needs by equipping the parents to fulfil their role in order that the family remain intact. Any service-based measure intended to preserve or reunite the family unit, must be one which can effect acceptable change within the limited time permitted by the Act. If a stable and safe level of parental functioning has not been achieved by the time of final disposition, before returning the children to the parents, the court should generally be satisfied that the parents will voluntarily continue with such services or other arrangements as are necessary for the continued protection of the children, beyond the end of the proceeding.

> Ultimately, parents must assume responsibility for parenting their children. The Act does not contemplate that the Agency shore up the family indefinitely.

[89] The statutory deadline in this matter was April 15, 2015. The Court was unable to schedule the three day proceeding until April 28, 2015, given the schedule of the Court and counsel.

[90] As a result, the Court found, with the consent of the parties, that it was in the best interests of the children to exceed the statutory time lines to afford the necessary time for all of the parties to present all relevant evidence so as to permit the Court to fairly and properly adjudicate upon the matter.

[91] In the case of **D.G. v. Family and Children Services of Lunenburg County and T.M.C. and C.L.G.** [2006] N.S.C.A. 118, Justice Oland stated at paragraph 17 as follows:

> 17. However, the law is clear that exceeding that time limit does not always constitute an error of law. In Children's Aid Society of Cape Breton-Victoria v. A.M. [2005] N.S.J. No. 132, 2005 NSCA 58, in seeking to overturn an order placing her children in permanent care, the appellant parent argued first, that the judge had no jurisdiction to make a permanent care order once the s. 45(1)(a) time limits had been reached, and second, if the judge had discretion to extend the time, he erred in doing so because he failed to consider whether the extension was in the best interests of the children. Cromwell, J.A. for this court stated:
>
> > [28] Turning to the first submission, there was no loss of jurisdiction here. The Court made this clear in Nova Scotia (Minister of Community Services) v. B.F. (2003), 219 N.S.R. (2d) 41 (C.A.); [2003] N.S.J. No. 405 (Q.L.) (C.A.) at paras. 57 and 58 and The Children's Aid Society and Family Services of Colchester County v. H.W. (1996), 155 N.S.R. (2d) 334 (C.A.). The Act contemplates that there will be a judicial determination of the child's best interests. If a time limit, which is a milestone toward that determination, caused the court to lose jurisdiction to determine the child's best interests it would contradict the purpose of the Act. Therefore, the court did not lose jurisdiction by reserving its decision as to disposition for longer than the time limits for temporary care orders under s. 45.

[92] In my view, it was necessary and appropriate for the Court to exceed the time lines in the best interests of the children. Not to do so would contradict the purpose of the *Act*.

Issue 2

[93] **What is the appropriate Disposition Order in the present circumstances, i.e., permanent care or dismissal?**

[94] I have reviewed and considered the evidence, together with the plans and submissions of the parties. Although I may not have specifically commented on all of the evidence in this decision, I have nonetheless considered the totality of the evidence in reaching this decision.

[95] I have applied the burden of proof to the Minister. There is only one standard of proof, and this proof is on a balance of probabilities, a burden which must be discharged by the Minister.

[96] I have considered the law and legislative provisions of the *Children and Family Services Act*.

[97] According to the legislation, which I must follow, the Court has only two stark options available at this time:

(1) order permanent care, or
(2) dismiss the proceeding and return the children to the Respondent, E.J.D.

[98] There is no middle ground. As noted by the Nova Scotia Court of Appeal in **G.S. v. Nova Scotia (Minister of Community Services)** [2006] N.S.C.A. 20 at paragraph 20:

> …If the children are still in need of protective services the matter cannot be dismissed.

[99] Also this case states that the need for protection may arise from the existence or absence of the circumstances that triggered the first order for protection, or from circumstances which have arisen since that time.

[100] The law is clear that should a trial judge conclude at a Disposition Hearing or Disposition Review Hearing in relation to a Temporary Care Order, that circumstances are unlikely to change, the judge has no option…but to order permanent care. **Nova Scotia (Minister of Community Services) v. L.L.P.** [2003] N.S.C.A.,1.

[101] It is not the Court's function to retry the original protection finding, but rather the Court must determine whether or not the child continues to be in need of protective services.

[102] I have scrutinized the evidence with care, and I am satisfied that the evidence of the Minister is sufficiently clear, convincing, and cogent to satisfy the balance of probabilities test. The contention that the Respondent, E.J.D. poses a substantial risk of harm or real chance of danger to the children has been proven on a balance of probabilities.

[103] I reject the Plan put forth by the Respondent, E.J.D.. Although some progress appears to have been made in terms of house cleanliness, I am not satisfied, on a balance of probabilities, that this change is a long lasting one. I fear E.J.D. will allow the home to lapse back to its earlier inhabitable condition, recognizing that his plan would result in him becoming a single parent in care of four children. The children cannot be subjected to such an environment ever again.

[104] I am equally concerned about E.J.D.'s continued drug use. The evidence is clear, convincing, and cogent that E.J.D. continues to use illicit and/or illegal drugs, and that he has not successfully completed an addictions program to address these issues.

[105] I am well aware E.J.D. uses marijuana to address pain issues, but his use of same nonetheless puts the children at risk while in his care. E.J.D. lacks total insight into this concern. The method by which E.J.D. purchases his drugs (i.e. from a guy down the street), clearly demonstrates that E.J.D. is not an appropriate role model for the children, and it is not in their best interests to be parented by him. E.J.D.'s plan remains uncertain and speculative, and has no long term substance. He has a long and documented history of poor parenting. This cannot be overlooked in assessing the merits of his plan.

[106] The support T.M.C. has for E.J.D. in no way assists his plan. T.M.C. has demonstrated that she acts impulsively and without regard to the safety and best interests of her children, as evidenced by her current and past internet relationships, her history of hoarding, and mental health issues.

[107] T.M.C. has not put forth a formal plan of care, and as such the Court need not comment further, suffice to say that the children will have far better long term care options in her absence.

[108] The evidence is clear, convincing, and cogent that E.J.D. is not capable of undertaking the important and challenging task of parenting his children. There are too many unresolved issues for him to address.

[109] E.J.D. expressed good intentions to improve his life and home environment are simply not a sufficient basis upon which the Court can conclude there has been a reduction or elimination of risk to the children. As a consequence, I am satisfied, on a balance of probabilities, that the children would not be free from substantial risk of harm if placed in the environment where E.J.D. lives.

[110] I find that the children would be placed at substantial risk of harm if returned to their father's care at this time. The children remain in need of protective services. This proceeding, thus, cannot be dismissed. It is not safe to return the children to E.J.D.'s care.

[111] The time limits in this proceeding have been both exceeded and exhausted. Nothing more can be done pursuant to the Legislation to realistically change the existing concerns about the Respondent(s).

[112] I find the Order requested by the Minister is the appropriate one having considered the totality of the evidence. I agree with, and accept, the Minister's submissions. It is in the best interests of the children to be placed in the permanent care of the Minister, pursuant to s. 42(1)(f).

[113] I further find that the circumstances justifying this conclusion are unlikely to change within a reasonable foreseeable time.

[114] Permanent care and custody of the children shall, thus, be placed with the Minister in accordance with s. 47, which states as follows:

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

Issue Three

[115] **Should access be provided to T.M.C. and E.J.D.?**

[116] In view of the above finding, I must now consider the issue of access under the pre-conditions enumerated under s. 47(2) of the *Children and Family Services Act* which states:

> 47(2) Where an order for permanent care and custody is made, the court may make an order for access by a parent or guardian or other person, but the court shall not make such an order unless the court is satisfied that:
>
> (a) Permanent placement in a family setting has not been planned or is not possible and the person's access will not impair the child's future opportunities for such placement;
> (a) The child is at least twelve (12) years of age and wishes to maintain contact with that person;
> (b) The child has been, or will be placed, with a person who does not wish to adopt the child; or
> (c) Some other special circumstance justifies making an order for access.

[117] The Nova Scotia Court of Appeal has held that the onus to show access be granted under an Order for Permanent Care and Custody is upon the person requesting the right of access. In **Children's Aid Society of Cape Breton-Victoria v. A.M.** [2005] N.S.C.A. 58, Justice Cromwell noted that the access decision contemplated in s. 47(2) of the Act is a "delicate exercise that required the Judge to weigh the various components of integrity of the child". Cromwell, J. further commented that the Court must consider the importance of adoption in the presented circumstances of the case and the benefits and risks of making an Order for access. At paragraph 36 he stated:

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

making an order for access." [emphasis added]

[118] The Nova Scotia Court of Appeal has considered s. 47(2) of the *Act* in **Children and Family Services of Colchester County v. K.T.** [2010] N.S.C.A. 72, (Application for Leave to Appeal to SCC dismissed) at paragraphs 39-41 as follows:

> Therefore, from my reading of s. 47, three conclusions relevant to this Appeal are clear. First, the Agency effectively replaces the natural parents. This puts the onus on the natural parents (or guardian) to establish a special circumstance that would justify continued access. Second, by virtue of ss. 47(2)(a) and (b), an access order must not impair permanent placement opportunities for children under 12. Section 47(2)(c) is consistent with this. It provides that if no adoption is planned then access will be available. This highlights the importance of adoption as the new goal and the risk that access may pose on adoption. Third, for children under 12, the some other special circumstance" contemplated in Section 47(2)(d), must be one that will not impair permanent placement opportunities.
>
> Therefore, to rely on s. 47(2)(d) as the judge did in this appeal, the (special) circumstances must be such that would not impair a future permanent placement. When then would s. 47(2)(d) apply? Consider for example a permanent placement with a family member which will involve contact with the natural parent. Presuming that the adopting parents would be content with that arrangement, the adoption would not be deterred. See Children's Aid Society of Cape Breton Victoria v. M.H. 2008 (NSSC 242 at para. 34.
>
> In short, access which would impair a future permanent placement is, by virtue of s. 47(2), deemed not to be in the child's best interest. This presents a clear legislative choice to which the judiciary must defer" [Emphasis added]

[119] This position is further highlighted by the comment of Chief Justice Michael MacDonald in **K.T.,** *supra,* at paragraphs 37 and 38 as follows:

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

> 47(1) Where the court makes an order for permanent care and custody pursuant to clause (f) of subsection (1) of Section 42, the agency is the legal guardian of the child and as such has all the rights, powers and responsibilities of a parent or guardian for the child's care and custody.
>
> This provision suggests the termination of the natural parents' relationship with the children. However, in special circumstances, post-permanent care access is possible although given the stark change in focus, such circumstances are rare and limited to those that would not jeopardize the new focus, namely an alternate stable placement. Thus, it is not surprising that the provision allowing for such access is highly restrictive.

[120] Justice Fichaud in **Nova Scotia (Community Services) v. T.H.** 2010 NSCA 63 also comments at paragraph 46 therein that after a Permanent Care Order has been issued, there is de-emphasis on family contact and instead priority is assigned to long term stable placement.

[121] In the recent decision of **P.H. v. Minister of Community Services and R.W.** [2013] N.S.C.A. 83, the Court reaffirmed its earlier decision in **Children and Family Services of Colchester County v. K.T., supra and Nova Scotia (Minister of Community Services) v. T.H., supra**, with respect to the shift that occurs once a decision for permanent care and custody has been made. Starting at paragraph 98, Farrar. J. stated as follows:

> [98] T.H. affirms that the disposition judge always considers the best interests of at the permanent care hearing, yet recognizes that a shift in focus occurs post-permanent care (43), when the court is no longer responsible for overseeing every step of the child's permanent care plan. That is because the Minister has then become the child's legal guardian. As Fichard, J.A. explained in T.H.:
>
> > Normally the permanent care and custody order ends the disposition hearing. Section 47(1) of the CFSA says that the Agency (i.e. the Minister) is then the child's legal guardian, and the CFSA directs how the Minister may then proceed with adoption. (12)
>
> [99] The following CFSA provisions demonstrate that the disposition judge can only make an order for permanent care if it is in the child's best interests, and then, once that happens, the statue entrusts oversight of the child's best interests to the Minister.

- Section 42(1)(f) ensures that a decision to place the child in permanent care will be made in the child's best interests.

- Once the judge orders permanent care under section 42(1)(f), section 47(1) shifts responsibility for the child to the Agency.

[100] It is important to remember the facts in T.H. The trial judge's decision in T.H. was unusual because he had added conditions to the permanent care order for two brothers. "The conditions' bottom line was that the boys would remain in foster care and not be adopted" (T.H. 13).

[101] The Minister appealed, arguing that the Family Court had no jurisdiction to restrict the Minister's authority over children in the Minister's permanent care and custody. The appeal was allowed because the trial judge had erred in law by failing to consider the particular provisions in the CFSA related to what happens after permanent care. (T.H. 27). **By imposing conditions on permanent care, the trial judge in T.H. had tried to dictate what would happen after his permanent care order came into effect – and that was an improper intrusion into the Minister's territory.**

…

[111] This Court's decision in K.T. also recognizes that the Agency is obliged under the Act to place the child's best interests front and centre post-permanent care, and that judges cannot intervene where the statute does not permit it reiterating what Fichaud J.A. outline in T.H., Chief Justice MacDonald stated in his introductory comments in K.T:

> …according to our *Children and Family Services Act*, S.N.S. 1990, c.5 (CFSA), once a permanent care order is made, it is up to the Minister and not the disposition hearing judge to decide if and when the children should be placed for adoption. Further, it would be up to another judge in a later process to decide if a proposed adoption should be granted. Both the Minister and the adoption judge are to make those decisions in accordance with the child's best interests.

[112] As MacDonald. C.J. recognized, "a trial judge is one of the key decision-makers mandated to promote a child's best interests", (26) but not the only decision-maker mandated to do so. His comments on the proper role of the trial judge apply equally to the judge's erroneous obiter efforts in L.I. to revamp the law:

> Yes when considering a child's best interests, a trial judge must work within the operative statute. In other words, a judge in a child protection matter does not write his or her own standards that

> are inconsistent with the statutory standards governing the child's best interests (29).
>
> And further:
>
> > In summary, while a consideration of a child's best interests is fundamental and important to a judge's role, specific statutory prerequisites cannot be sacrificed in attainment of this goal. It is, after all, within the province of the Legislature, if it so chooses, to prescribe how a child's best interests will be met. This is not the exclusive bailiwick of the judiciary (34).

[122] In P.H., supra, Farrar, J. further stated at paragraphs 117 to 119:

> [117] This Court's interpretation of s. 47(2) in no way ignores the child's best interests. Instead, it respects the Legislature's clear intention to promote a stable placement for children in permanent care, including adoptions, without the barriers that continued access can create.
>
> [118] The child's best interests are naturally in the mix when a trial judge is considering access, as the Minister acknowledged before us in argument, but by this point an entirely fresh balancing act is unnecessary. This is because the bulk of the best interests work has already been done with the permanent care decision, which would have been based on the Agency's plan under s. 41(3)(e). By the time the trial judge is considering access, the scope of the child's best interests will already be informed by the Agency's plan and must be considered within the context of that plan.
>
> [119] In other words, the trial judge considers the full panoply of factors related to the child's best interests when making a disposition order under s. 42(1)(f), the "changed focus" of the CFSA discussed in T.H. means that the child's best interests are now oriented away from her parents and towards the potential for a permanent placement with another family (assuming that is the Agency's plan). The access option under s. 47(2) can only be seen through this lens; it if is in the child's best interests to be placed in care leading to adoption or a similarly permanent placement, then it makes logical sense to ensure access is only ordered if it will not impair those plans.

[123] Justice Oland in **Mi'kmaw Family and Children's Services v. L. (B.)** [2011] NSCA 104 nonetheless reminds us as follows at paragraph 42:

> …Section 47(2) does not impose a blanket prohibition against access. Rather, a Judge must consider factors such as the likelihood of impairment of opportunities for permanent placement and whether there are special circumstances which would justify making an access order.

[124] In this regard, I find that in relation to the three youngest children, A.D., S.A.D., and E.D., there are no special circumstances which would justify the making of an access Order. The Respondent(s) have not discharged the onus in this regard.

[125] The Minister has confirmed its plan to seek permanent placement for A.D., S.A.D. and E.D. through the process of adoption, with no provision for access. In my view the awarding of access to the Respondent(s) would impair the contemplated long-term permanent placement, and thus, by virtue of s. 47(2), I find that access is not in the best interests of A.D., S.A.D., and E.D.

[126] A.D., S.A.D and E.D. are entitled to continuity and stability in their lives. Permanent care with no provision for access will achieve this purpose.

[127] With regard to the oldest child, S.D., there is no plan for adoption due to both her age and her wishes. S.D. is free to stay with her current foster parents for as long as she wishes, and the court finds that this is a suitable arrangement for S.D., and addresses her best interests.

[128] I therefore find that this is a special circumstance as contemplated by the legislation, and therefore the Respondent(s) are awarded access to their eldest daughter.

Conclusion

[129] The requirements of ss. 42(2), (3) and (4) have been proven to the Court's satisfaction by the Minister.

[130] An Order for Permanent Care and Custody in favour of the Minister will issue, with no provision for access to the Respondent(s) in relation to the children, A.D., S.A.D., and E.D.

[131] An Order for Permanent Care and Custody in favour of the Minister will issue in relation to the child, S.D., with a provision for access to the Respondents.

[132] The Court has an obligation to ensure the children's best interests are protected, and that is best achieved by these Orders.

Order Accordingly

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Justice Kenneth C. Haley