SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Nova Scotia (Community Services) v J.M.*, 2016 NSSC 80

Date: 2016-04-01
Docket: Sydney No. 92724
Registry: Sydney

Between:

The Minister of Community Services

Applicant

v.

LM, MC, RB and JM

Respondents

Date: 2016-04-01
Docket: Sydney No. 68059
Registry: Sydney

RB

Applicant

v.

LM

Respondent

Date: 2016-04-01
Docket: Sydney No. 96600
Registry: Sydney

JM

Applicant

v.

LM and GV

Respondents

Judge:	The Honourable Justice Theresa Forgeron
Heard:	February 22, 23, 24, 29; March 1, 2, 3, and 4, 2016 in Sydney, Nova Scotia

Written Decision: April 1, 2016

Counsel: Jillian MacNeil for the Minister of Community Services
Coline Morrow for LM
Alan Stanwick for MC
RB on his own behalf
JM on her own behalf

Section 94(1) of the *Children and Family Services Act* applies; editing may be required of this judgment or its heading before publication. Section 94(1) provides as follows:

> 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:

Introduction

[1] LMs' four children were apprehended by the Department of Community Services after L and her partner, MC, were involved in a violent drug-related robbery. LM has not changed since her children were apprehended. Drugs and anti-social behaviour continue to dominate her life.

[2] How can the court protect J, L, A and K from the destructive lifestyle of their mother? I will do so by fashioning custody orders which will ensure that the children are no longer exposed to drugs and violence. I will create these orders by evaluating the competing plans that the Minister and family members presented for each of the children.

[3] The Minister's plan for J was based on a permanent care and custody order in the Department's favor. This plan was accepted, except on the issue of access. The Minister wants to terminate access. For her part, LM seeks supervised access. MC, J's father, supports LMs' bid to gain access.

[4] The Minister's plan for A and L also garnered acceptance, except on the issue of access. The parties agree that A and L should be placed in the sole custody of their father, RB. The Minister and RB want access terminated, while LM seeks supervised access.

[5] The last plan of care involves K; this plan was subject to intense debate. The Minister asks that K be placed in her permanent care, with no provision for access. This plan was primarily challenged by the maternal grandmother, JM. JM seeks sole custody of K.

[6] The Minister does not support JM for two reasons. First, the Minister is concerned that JM has an untreated alcohol addiction. Second, the Minister has no faith that JM can protect K from his mother.

[7] In contrast, JM strenuously disputes the Minister's allegations. She denies an alcohol addiction. In addition, she states that she will shield K from LMs' destructive lifestyle. To this end, JM wants the court to terminate all access between K and his mother. LM disagrees; she seeks supervised access.

Issues

[8] In order to resolve the protection and custody disputes, I will decide the following issues:

- Should LM be granted access to J after a permanent care finding has been entered?
- Should LM be granted access to A and L after being placed in the sole custody of RB?
- Should a permanent care order issue for K in the face of JMs' plan of care?
- Should LM be granted access to K?

Background

[9] Before analyzing the issues, I will detail relevant background information to provide context, through a chronological summary of the following:

- The informal interventions by child protection authorities between 2006 and 2014.
- The four separate child protection proceedings.
- The parenting arrangements which evolved when the children were not in the care of the Minister.
- The details of the violent drug-related robbery which led to the current protection proceeding.
- The procedural particulars of the 2016 hearing.

2006 Protection Intervention

[10] Child protection workers began their extensive involvement with LM in 2006 when K was an infant. K is the oldest child of LM and GV.

[11] Substantiated protection concerns centered around domestic violence, substance abuse, and criminal activity. Domestic violence was present in LMs' relationship with her father, as well as in her relationship with GV. In addition, LM admitted to being an intravenous drug user; cocaine was her drug of choice. GV also abused drugs. Both were hepatitis C positive. Further, GV had an extensive criminal record, which resulted in periods of incarceration.

First Child Protection Proceeding: August 2007 to March 2008

[12] Formal court proceedings were initiated in August 2007; K was placed in the temporary care of the agency until a supervision order issued in October 2007. JM did not seek placement at the time because she was assisting her husband, as he was diagnosed with terminal cancer.

[13] Once the court began its formal involvement, LM co-operated and participated in programming. LM and GV eventually separated; child protection concerns were eliminated. In March 2008, an order dismissing the protection proceedings was granted.

Parenting Arrangement After Dismissal Order:2008 to 2009

[14] After the dismissal order issued, K lived with LM. LM and GV did not reunite. After the separation, GV severed all ties with K. K has no relationship with his biological father to this day.

[15] While living with his mother, K spent considerable time with his grandmother, including frequent overnight visits on week-ends. JM also assisted financially by buying K food, clothing, and many of his other needs. JM worked two jobs so that she could ensure that K's needs were met.

2009 Protection Intervention

[16] Child protection authorities next became involved with LM in the spring of 2009. By that time, LM had given birth to another child, A, with her new partner, RB. RB was an employed divorced father, who had no prior involvement with either protection or police authorities.

[17] Initial protection concerns included alcohol abuse by LM and two confirmed episodes of domestic violence, with LM as the aggressor. The agency closed its file after it established that LM was engaging in voluntary services.

Second Child Protection Proceeding: January 2010 to January 2011

[18] Unfortunately, voluntary services did not eliminate the protection risks. The Minister therefore initiated court proceedings in January 2010, after learning of additional episodes of domestic violence and alcohol abuse on the part of LM. JM was present during one of the assaults. JM neither notified the police, nor protection workers of the assault because she did not want the children apprehended, nor did she want LM arrested.

[19] After holding a risk management conference, the Minister determined that the children could be protected through a supervision order. As a result, in January 2010, K and A were placed in the supervised care of both parents, on a rotating shared parenting schedule, and under strict conditions.

[20] This living arrangement was unfortunately short-lived. RB and LM did not honour the terms of the supervision order. Therefore, in March 2010, K and A were placed in the temporary care of the department. JM was not approved as a kinship foster placement because of concerns surrounding alcohol abuse and her failure to report the domestic violence she had observed.

[21] The temporary care order remained in place until September 2010 when the children were once again reunited with both RB and LM under a supervision order. This supervision order was reaffirmed at subsequent review hearings, until January 2011, when the second protection proceeding was terminated. By that time, the parties had successfully concluded couples counselling and drug testing, In addition, LM had successfully concluded individual counselling services, which focused on domestic violence, stress and anger management issues.

Parenting Arrangement After Dismissal Order: 2011

[22] After the protection proceeding was terminated, K and A continued to live with both RB and LM, whose relationship remained intact. Further, by the time that the second proceeding was terminated in January 2011, another child, L, was born to the couple.

[23] During this period, JM continued to have an ongoing presence in the lives of the children. She was generous with her time and financial assistance. In addition, K maintained his overnight visits with his grandmother. The bond between K and his grandmother was strengthened.

2011 Protection Intervention

[24] Regrettably, LM was unable to sustain the gains that she had made. Episodes of substance abuse, child neglect and domestic violence re-emerged. For example, in August 2011, LM drove an ATV while intoxicated and with two year old A as a passenger. A fell off and sustained injuries. LM did not take A to the hospital because she was intoxicated. RB discovered what happened after he returned from work; he immediately sought medical assistance for A.

[25] A few days later, after returning home from work, RB discovered LM passed out on the couch, while A was left unsupervised outside next to a shallow pool. LM assaulted RB once he woke her up. JM heard the assault while she was speaking to LM on the telephone; JM did not report the assault to the authorities.

Third Child Protection Proceeding: October 2011 to December 2012

[26] For the third time, the Minister initiated protection proceedings. In October 2011, an order placed the three children in the supervised care of RB. This supervision order was renewed until April 2012, when a temporary care and custody order issued. The children were apprehended because the respondents had breached the terms of the supervision order.

[27] The children were placed in foster care. JM was not approved as a kinship foster placement.

[28] Four months later, in August 2012, the temporary care order was replaced with another supervision order in favour of RB. LM was granted access, which access was to be expanded, and then unsupervised after LM completed services. LM had successfully completed a number of programs including the Women in Recovery from Addiction Program; the Elizabeth Fry – Women 4 Change Program; You're A Better Parent Than You Think Program; Stress Management Program; individual counselling; drug testing; and parenting courses through a parent aid worker.

[29] The supervision order was renewed until December 2012, when the child protection proceeding was terminated by consent.

Parenting Arrangement After the Dismissal Order: 2013 to 2014

[30] After the dismissal order, RB became the *defacto* primary care parent, and LM exercised access. RB and the children were living in his home. LM was now living in an apartment with MC, and their baby, J, who had been born in January 2013.

[31] MC had an extensive criminal record and substance abuse history. This history did not disturb LM. She gave no thought to the child protection risk that would inevitably envelop her life and place her children at a substantial risk of harm.

[32] RB ceased to be the primary care giver of L, A and K in July 2013 because of dramatic changes in his financial and personal circumstances. Financially, RB was ruined because LM removed money from his account, making it impossible for him to pay the mortgage and other bills. He eventually made an assignment in bankruptcy. He lost his home. Further, RB was not managing the many personal challenges that he faced, including the death of his mother and brother. RB began to exercise poor judgement. For example, he was charged and convicted of driving while intoxicated. He also was convicted of other driving related offences. RB's poor judgement negatively affected his ability to care for the children.

[33] By July 2013, RB agreed that K, A and L would live with LM, based on a shared parenting schedule. RB arranged to have the child tax credit placed in LMs' name. Soon thereafter, LM and MC moved the children's residence; they did not provide RB with a forwarding address.

[34] RB did not seek court intervention; he had no money; he was exhausted from prior court proceedings; and he was unable to miss any more time from work. RB did not have any contact with the children for a few months. After he located the children, RB was only able to exercise sporadic access. More frequent access was not possible given the commute and lack of available transportation.

[35] In contrast, JM maintained regular contact with the children, often exercising overnight visits with K and A. She also increased the amount of financial aid that she was providing LM to ensure that the children's needs were being met.

2013 and 2014 Protection Intervention

[36] By July 2013, LM had been drawn back into the world of addiction. Her drugs of choice were later self-reported to be opiates, morphine and

hydromorphone. At the time, however, LM became an expert at masking her addiction. For example, in July 2013, in response to a referral, a child protection worker met with LM and MC and investigated the referral. The worker was unable to substantiate any drug use.

[37] For her part, JM was aware that LM and MC were using marijuana. JM did not report this use to the authorities. Upon being questioned by her mother, LM denied using other drugs. JM believed her daughter, despite the fact that she was aware that LM and MC had stolen from her.

[38] By the summer of 2014, the disordered lifestyle adopted by LM and MC began to unravel. In late June 2014, MC was transported to the hospital for a mental health assessment after he sliced his wrist. The Agency was advised and began their investigation. The investigation was interrupted because of LM and MC's involvement in a violent drug-related robbery.

Violent Drug-Related Robbery

[39] On August 28, 2014, LM and MC were arrested for their involvement in a violent drug-related robbery. MC was later charged, while LM was released.

[40] The violent robbery was fueled by a quest for drugs. LM and MC were out of cash and pills. They therefore loaded up the four children in their van, stopped at a gas station, filled their tank and drove away. After stealing the gas, they travelled to a friend's home. While the children remained in the van, MC viciously struck his friend on the head with a piece of wood, left her unconscious in a pool of blood, and stole her prescription. To ensure his safe escape, MC broke the only visible telephone. Covered in his bloodied clothes, he returned to the van. The family then drove home, where LM and MC injected some of the stolen drugs. Later that night, MC took his bloodied clothes and burned them.

[41] The next morning, LM and MC once again loaded the children into their van and travelled to a secluded beach. The three older children were left unsupervised on the shoreline, while LM and MC were preparing to inject drugs. J was left in her car seat in the van; a fully loaded needle was placed next to her baby bottle, and within her arm's reach.

[42] Mercifully, the police arrived and arrested the adults before the children suffered further harm. The police immediately notified protection authorities.

Fourth Child Protection Proceeding: 2014 to 2016

[43] The children were apprehended on August 28, 2014. K and J were placed in the care of the Minister, while A and L were placed in the care of their father under a supervision order. On September 5 and 19, 2014, interim orders issued confirming these placements. LM was granted supervised access.

[44] The protection finding was entered by consent on November 24, 2014 pursuant to s. 22(2)(b) of the *Children and Family Services Act*. The first disposition review was held on February 25, 2015. The placement of the children remained unchanged at the protection hearing, disposition hearing, and subsequent review hearings held on June 3, 2015; August 5, 2015; November 9, 2015, and January 20, 2016.

RB's Circumstances During Current Proceeding

[45] In February 2015, RB formed a new relationship with KW. He, A and L eventually moved into KW's home. KW has three other children living with her. KW is a social worker who is currently on disability leave. The evidence indicates that the B W household is a happy, appropriately functioning family unit; there are no evident protection concerns.

[46] RB filed an application for custody of A and L on March 8, 2016 pursuant to the provisions of the *Maintenance and Custody Act*.

JMs' Circumstances During Current Proceeding

[47] Once she learned of the apprehension, JM asked to have K placed in her care. A home study was commenced to determine if the Minister could support JMs' request. The Minister asked JM to participate in hair strand testing given the department's concern over possible alcohol abuse. JM consented. The testing was arranged and conducted through the Motherisk Lab.

[48] In October 2014, while awaiting the test results, the Minister allowed JM to exercise unsupervised access, with drop-ins. JMs' access, however, quickly reverted back to supervised status because of the test results from the Motherisk Lab. Neither the Minister, nor JM, were aware that the Motherisk Lab would soon be discredited for being inadequate and unreliable: *Motherisk Hair Analysis Independent Review*, www.m-hair.ca.

[49] On October 31, 2014, the long term protection worker discussed the test results with JM. JM was shocked at the test results; she stated that she typically only drank beer one day a week, when she was not working, and never when she was caring for her grandchildren. The Minister could not support JMs' application to care for K given their concern that JM was an alcoholic and a binge drinker. The Minister had no reason to doubt the Motherisk test results.

[50] About 11 months later, on September 30, 2015, a risk management conference was convened by the Minister to reassess JMs' request for placement of K. It was determined that the long term protection worker should meet with JM to explore outstanding issues before a final decision would be made. The meeting was held; the Minister's position did not change. JMs' application for placement was not approved.

[51] On December 22, 2015, JM was added as a party to the protection proceedings. The application was not contested. JM had already commenced, on June 24, 2015, a *MCA* application for custody of K.

The 2016 CFSA Permanent Care Hearing and MCA Hearing

[52] The permanent care hearing was originally scheduled for five days in January 2016. This hearing had to be rescheduled after one of the lawyers discovered a professional conflict. New trial dates were eventually assigned in February and March, 2016.

[53] As is customary, and in an effort to better utilize scarce judicial resources, the evidence heard in the *CFSA* application was applied to the *MCA* applications.

[54] The hearing was held over eight days, on February 22, 23, 24, and 29, 2016; and March 1, 2, 3 and 4, 2016. The following witnesses testified: KW; Cst. Adam Campbell; Wendy Campbell; Krista Morrison; JL; Cst. Joshua Davidson; Patricia Bates MacDonald; Marilyn Hillier; Robert Newman; Edward Gillis; RB; Jennifer MacNeil; Nadine Marr; Jennifer March; HJ; and JM.

Agreements Entered and Accepted during the Current Proceeding

[55] At the outset of hearing, the following two agreements were entered and accepted by the court, after confirming that all legislative requirements had been met in compliance with **M.W. v. Nova Scotia (Community Services)**, 2014 NSCA 103:

- The four children would be in need of protective services, pursuant to sec. 22(2)(b) of the *CFSA*, if they were placed in the care of either LM or MC. As such, neither LM, nor MC, was putting forth a plan of care for any of the children.

- A and L are not in need of protective services while in the care of RB. As such, RB was vested with sole custody of A and L pursuant to his *MCA* application. The child protection proceeding involving A and L was dismissed by consent.

Permanent Care Order for J

[56] In the absence of a plan of care being presented by any respondent on behalf of J, and given the ongoing child protection risks associated with LM and MC, the court granted the uncontested application for permanent care filed by the Minister in respect of J. J is placed in the permanent care and custody of the Minister.

Absence of MC and LM from the Hearing

[57] Two of the respondents, although represented throughout, elected not to be present during the final hearing. MC did not attend any of the hearing; he was represented by Mr. Stanwick. Mr. Stanwick was satisfied that he had instructions to proceed in the absence of his client. Mr. Stanwick was further satisfied that MC understood the nature and consequences of his decisions, and that such decisions were voluntarily made. MC did not request an adjournment. He was incarcerated at the time and opted not to attend for personal reasons.

[58] LM was represented by Ms. Morrow. Although LM was present for some of the hearing, she eventually stormed out of the court room. Just before leaving, the court had admonished LM for an outburst and reminded her of appropriate court room decorum**: C.E.J.K. v. H.W.K.,** 2016 SKQB 24. LM left on her own accord and did not return.

[59] Ms. Morrow was satisfied as to her instructions; that LM understood the nature and consequences of her decisions, and that such decisions were voluntarily made. Ms. Morrow continued to participate in the proceeding. Ms. Morrow did not request an adjournment, indeed she had no instructions to do so.

[60] The hearing continued in the absence of MC and LM so the proceeding would be completed within the statutory time frame. Child protection proceedings

cannot come to a grinding halt because respondents refuse to participate. In the end, the court can only encourage, but is unable to force litigants to attend and participate respectfully in proceedings.

Submissions and Adjournment for Decision

[61] Final submissions were provided by all parties, including the self-representing litigants, RB and JM. The court adjourned for decision, in order to review the lengthy testimony and the volumes of paper exhibits.

Analysis

[62] **Should LM be granted access to J after a permanent care finding has been entered?**

Legislation and Case Law

[63] Section 47(1) of the *CFSA* states that once an order for permanent care and custody issues, the Minister becomes the legal guardian of the child, and assumes all rights, powers and responsibilities of a parent. Section 47(2) of the *CFSA* provides the court with limited authority to make an access order: **Children and Family Services of Colchester (County) v. T (K.)** 2010 NSCA 72 at paras. 40-42.

[64] In **Nova Scotia (Minister of Community Services) v. H. (T.)** 2010 NSCA 63, Fichaud, J.A. states that after a permanent care order issues, family contact is de-emphasized, and instead, priority is assigned to a long term stable placement. In **PH v. Minister of Community Services,** 2013 NSCA 83, Farrar, J.A. reaffirmed the court's earlier decisions, while underscoring the shift that occurs once a decision for permanent care and custody is made. He notes that the best interests principle is pivotal, but always in the context of permanency planning.

Position of the Parties

[65] Although not testifying, LM seeks access to J despite the permanent care order. MC supports LM.

[66] In contrast, the Minister states that an access order will impede permanency planning because an adoption application cannot be initiated in the face of an access order.

Decision on Access Issue

[67] I have determined that it is in J's best interests to be placed in the permanent care and custody of the Minister with no provision for access. Access will negatively impact on J's chances for adoption. J deserves an opportunity to live with a stable, safe and loving family. An access order will prevent such a placement. Access will not benefit J in any way. Access is terminated.

[68] **Should LM be granted access to A and L after being placed in the sole custody of RB?**

Legislation and Case Law

[69] Sections 18(2A) and 18(5) of the *MCA* provide the court with the authority to issue an access order based on the best interests principle. The statutory factors that compose the best interests test are detailed in secs.18(6), 18(7) and 18(8). These factors direct the court to consider the physical, emotional, social, educational and general welfare needs of the child in the context of parenting plans. In addition, the court is directed to examine the impact of violence on access and parental communication, together with the need to maximize contact if contact is in the child's best interests.

[70] Courts have confirmed that a complete denial of access is infrequently ordered; denial is restricted to those cases where the behaviours of the access parent are extreme, and where even supervised access would place the child at risk of emotional or physical harm: **Doncaster v. Field**, 2014 NSCA 39; **Werner v. Werner**, 2013 NSCA 6.

Position of the Parties

[71] LM advised that she is seeking supervised access to A and L. She did not testify; evidence supporting her position was not subject to cross-examination.

[72] RB does not support access for three reasons. First, he states that access would not be safe for the children because LM is still addicted to drugs. Second, he notes that access was inconsistent and chaotic. Third, he expressed concern about violence.

[73] The Minister supports the position of RB.

Decision on Access Issue

[74] I am refusing LMs' application for supervised access for the following reasons:

- Access would not be safe because LM is a drug addict. Despite her protestations, I find that LM is still using. I do not believe that LM is in recovery. Her conduct proves otherwise. For example, during a December court hearing, LM requested drug testing to confirm her sobriety. The court ordered hair strand testing from a forensic lab. The Minister arranged for testing on two separate occasions – December 23, 2015 and February 8, 2016. LM did not attend for either test, despite having notice. I infer that she did not attend because she knew the results would confirm drug use.

- LM has an extensive history of drug addiction, starting with marijuana when she was 15, and quickly sliding into intravenous drug use. By 2006 her drug of choice was cocaine. By 2014, she regularly used marijuana, opiates, morphine and hydromorphone.

- LMs' drug use creates a substantial risk of harm because she regularly engages in antisocial behaviour. For example, she has repeatedly stolen from her mother, shop lifted, stolen gas, and was involved in a violent robbery of a personal friend - all for the sake of feeding her addiction, and all in the presence of the children. In addition, LM was also the victim of a drug related beating and threats. Associating with drug users and traffickers is not a peaceful pursuit. Further, LM neglects her children when she is using as exemplified in the photo showing the loaded syringe lying next to the baby bottle, both of which were within reach of J.

- LMs' supervised access was inconsistent and chaotic. She often missed access, which caused significant disruption to the children. When present for access, LM was frequently unable to cope with the children. K and A were habitually misbehaving and upset. On occasion, LM was in tears. The access visits were far from ideal. The access facilitators had to regularly intervene to ensure the children's safety. Ongoing access of this nature will cause harm to A and L, and will impede their recovery from the neglect that they suffered while in their mother's care.

- LM was repeatedly violent and aggressive with RB during their past relationship. LM has not gained new insights. The court is not confident that LM has the capacity to conduct herself in a nonviolent manner. To the contrary, violence is a permanent feature in her life. LM is unable to act with restraint. She is impulsive and reactive. No benefit will flow from exposing the children and RB to LMs' continued violence and manipulation.

[75] In the circumstances, I find that even supervised access between LM and A and L would be contrary to their best interests given the extreme behaviours of LM. The granting of even supervised access would place A and L at risk of emotional or physical harm. As such, all access is terminated forthwith.

Terms of MCA Order

[76] The terms of the *MCA* order that are in the best interests of A and L are as follows:

- RB is granted sole custody of A and L.
- RB will have sole decision making authority in respect of all matters affecting the children.
- RB must not have any communication, direct or indirect, with LM.
- RB must ensure that the children have no communication, direct or indirect, with LM.
- RB must file a copy of this order with police authorities, babysitters, and all educational and health authorities who are charged with the children's care.
- In the event LM attempts contact with RB or the children, RB must immediately report such contact to policing and child protection authorities.
- The terms of this order will not be varied without further court order.
- A copy of this decision must be placed in the *MCA* file.
- The Minister must be served with any variation application or motion.
- RB must not drive the children unless he has a licence and the vehicle is insured.

[77] **Should a permanent care order issue for K in the face of JMs' plan of care?**

Legislation and Case Law

[78] The court has only two available options at this stage, given that the statutory time limit has expired - a permanent care order or a dismissal: **N.J.H. v. Nova Scotia (Minister of Community Services)** 2006 NSCA 20, at para. 20.

[79] A permanent care hearing is the last of the disposition reviews. When a disposition review is conducted, the court assumes that the orders previously made were correct, based on the circumstances existing at the time. At a review hearing, the court must determine whether the circumstances, which resulted in the original order, still exist; or whether there have been positive or negative changes; or whether new factual circumstances have arisen, such that the child is no longer in need of protective services: sec. 46 of the *CFSA*; and **Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.),** [1994] 2 S.C.R. 165, at paras. 35 to 37.

[80] The Minister bears the burden of proof. It is a civil burden of proof based on a balance of probabilities. The Minister must present clear, convincing and cogent evidence: **C. (R.) v. McDougall,** 2008 SCC 53. The phrase "clear, convincing, and cogent" does not create an additional or heightened layer of proof. Rather, the Minister must prove why it is in the best interests of K to be placed in the Minister's permanent care and custody in accordance with the legislation.

[81] In making my decision, I am mindful of the threefold legislative purpose set out in sec. 2(1) of the *CFSA* - to promote the integrity of the family, to protect children from harm, and to ensure the best interests of children. The paramount consideration, however, is the best interests principle as stated in sec. 2(2) of the *Act*.

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

[83] As the Minister is seeking to permanently remove K, sec. 42(2) of the *CFSA* is invoked. This section confirms that the court must not remove a child

from parental care, unless less intrusive alternatives have been attempted and have failed, or have been refused by the parent, or would be inadequate to protect the child. The obligation to provide services is not without restrictions as noted by Flinn, J.A. in **Children's Aid Society of Shelburne (County) v. S.L.S,** 2001 NSCA 62 at para. 36.

[84] The Minister relies upon sec. 22(2)(b) of the *CFSA* in support of her position that K remains a child in need of protective services. The Minister states that there is a substantial risk that K will suffer physical harm inflicted or caused by JMs' alcohol addiction, or by her failure to adequately supervise and protect K from LMs' destructive lifestyle.

[85] Substantial risk is defined in sec. 22(1) of the *Act* as meaning a real chance of danger that is apparent on the evidence. In **M.J.B. v. Family and Children's Services of Kings County**, 2008 NSCA 64, Bateman, J.A. confirmed that in relying upon "substantial risk", the Minister need only prove that there is a real chance that the future abuse will occur, and not that future abuse will actually occur, at para. 77.

[86] The Minister also relies upon past parenting history. Although "[t]here is no legal principle that history is destiny", past parenting history is relevant as it may signal "the expectation of future risk": **D.(S.A.) v. Nova Scotia (Minister of Community Services)**, 2014 NSCA 77, para 82. The court is concerned with probabilities, not possibilities. Therefore, where past history aids in the determination of future probabilities, it is admissible, germane, and relevant. In **Nova Scotia (Minister of Community Services) v. Z. (S.)** (1999), 181 N.S.R. (2d) 99 (N.S. C.A.), Chipman, J.A. confirmed the relevance of past history at para 13 wherein he states as follows:

> [13] I am unable to conclude that the trial judge placed undue emphasis on the appellant's past parenting. It was, of course, the primary evidence on which he would be entitled to rely in judging the appellant's ability to parent B.Z. In **Children's Aid Society of Winnipeg (City) v. F.** (1978), 1 R.F.L. (2d) 46 (Man. Prov. Ct.) at p. 51, Carr, Prov. J., (as he then was), said at p. 51:
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> > ... In deciding whether a child's environment is injurious to himself, whether the parents are competent, whether a child's physical or mental health is endangered, surely evidence of past experience is invaluable to the court in assessing the present situation. But for the admissibility of this type of evidence children still in the custody of chronic child abusers may be beyond the protection of the court ...

[87] Past parenting history, however, does not necessarily determine current protection status. Caregivers have the capacity to effect positive and permanent lifestyle changes, regardless of their past. This is clearly evident, for example, in the life of RB. RB no longer poses a protection risk to his children, despite his past history. Therefore, in the context of this case, the questions that must be addressed are twofold: whether JM is capable of protecting K if she is an alcoholic; and, whether JM can protect K from LMs' destructive lifestyle, taking into account past history and the evidence presented during the hearing.

[88] In reaching my decision, I have considered the burden of proof, as well as the statutory scheme outlined, and the applicable case authorities. In making credibility findings, I have applied the law set out in **Baker-Warren v. Denault**, 2009 NSSC 59, as approved in **Gill v. Hurst,** 2011 NSCA 100. In addition, I have made inferences in keeping with the comments of Saunders, J.A. in **Jacques Home Town Dry Cleaners v. Nova Scotia (Attorney General)**, 2013 NSCA 4. My analysis has been conducted based upon the evidence. I have also reviewed and considered the submissions of the parties.

Position of the Minister

[89] The Minister states that K would be at a substantial risk of harm if he was placed in JMs' care for two reasons. First, she is an alcoholic. Second, JM will be unable to protect K from his mother's destructive lifestyle.

[90] The Minister states that JM is an alcoholic for a number of reasons, including the following:

- LM, RB and MC told protection authorities that JM is an alcoholic. This reporting was a consistent theme over a ten year period.
- LM also voiced her concern about her mother's drinking to addiction service personnel.
- JM appeared in court in December 2009 reeking of alcohol.
- JM gave inconsistent statements as to the amount and frequency of her alcohol consumption to protection workers; this negatively impacts on credibility.

[91] The Minister states that JM will be unable to protect K from his mother's destructive lifestyle for a number of reasons, including the following:

- JM has a significant history of failing to report child protection concerns; she cannot be trusted to change her ways.
- JMs' failure to report was based on misdirected priorities. JM always placed LM's needs above those of her grandchildren. She will do so in the future.
- JM does not have the personality to withstand LMs' manipulative demands and addiction issues.

[92] In addition to the concerns raised by the Minister, I note that RB stated that JM gave LM valium, that was prescribed for JM, when LM had a migraine. RB further stated that, on one occasion, JM informed him that she was going to sell her valium prescription. RB said that he observed and heard these events when he was living with LM.

Position of JM

[93] JM disputes all of the allegations. In response, JM testified to the following:

- She denies any substance abuse.
- She states that she never gave LM pills; she never sold her prescription.
- She did not, and does not, have an alcohol addiction. She used to drink alcohol about once a week, when she was not working, and never while caring for children.
- She has stopped drinking alcohol altogether. K is more important than alcohol.
- She is a valued employee, who owns her own home and vehicle. None of this could be accomplished if she was an alcoholic.
- Unlike all other respondents, she has no criminal record and has never been involved in illegal activities.

- She swore on the Bible that she will protect K from his mother and she will do just that.

- She learned many facts about which she had little prior knowledge during the course of this proceeding. She will not attempt to help LM again. LM is an adult; K is a child. She can, and will, ensure that LM is not a part of K's life.

- She will follow all terms of any court order that will issue. She has always been a law-abiding citizen.

Decision on the Addiction Issue

[94] Although JM likely consumed too much alcohol, usually once a week, on her scheduled day off, in the absence of children, until the fall of 2014, I nonetheless find that the Minister has not proven that JM has a substance abuse problem for the following reasons:

- There is no evidence of recent alcohol use by JM. To the contrary, on February 19, 2016, when the long term protection worker arrived at JMs' home, unannounced and at night, the worker found no evidence of alcohol use. JM did not present with symptoms of intoxication, such as slurred speech, unsteady gait, or alcohol odor. Further, the worker found no liquor bottles in the garbage or in the cupboards. JM did not try to prevent the worker from entering or searching her home.

- I believe JM when she states that she stopped drinking alcohol. On October 31, 2014, JM learned that the department would not allow K to live with her because of her alcohol use. JM made a choice. She chose K over her weekly beer consumption. JM no longer drinks alcohol and intends to abstain in the future. I accept JMs' evidence. I find JM credible.

- There is no credible evidence that JM ever consumed alcohol while in a child care-giving role. I accept JMs' testimony as true. I also accept the evidence of JMs' neighbour, who said that she and JM occasionally had a drink in the summer on her patio, but never while children were present.

- Unlike RB, JM did not drink in an irresponsible fashion. For example, on one occasion, when RB and LM asked, JM refused to drive over to their home to care for the children because she had just drank beer. JM has no

criminal record. She has not been charged or convicted of an alcohol-related offence.

- JM has an excellent work record as noted in the letter from her employer, which letter was admitted by consent. JM has worked as a dedicated and dependable employee for the same organization for the past 15 years. Her employer described JM in glowing terms, noting that she is a valued employee, who possesses a strong work ethic, and is compassionate and kind to others. The employer expressed no concerns with alcohol use or abuse.

- I accept JMs' evidence that she did not sell her prescription medication. JM is the only respondent who does not have a criminal record. I accept that JM tries to live her life in accordance with the law. I accept that JM does not engage in anti-social behaviour.

[95] The fact that JM appeared in court in December 2009 with alcohol on her breath is not significant to the current protection issue. JM was not in a child care-giving role at the time. Further, JM did not know that she would be called to attend court; the hearing had been scheduled quickly and with abbreviated notice. I find that if JM had known that she would be testifying in court, she would not have drank alcohol the night before.

[96] In summary, I find that alcohol is no longer a feature in JMs' life. Therefore K is not at a substantial risk of harm because of JMs' past alcohol consumption or for other reasons connected to substance abuse.

Decision on JMs' Ability to Protect K

[97] Despite JMs' past failure at reporting child protection concerns, I nevertheless find that the Minister did not prove there is a substantial risk that K will suffer physical harm because JM is unable to protect K from LMs' destructive lifestyle. I make this finding for the following reasons:

- JM has gained greater insight into the extent and breadth of the danger that LMs' lifestyle produced, and will produce in the future. JM lacked this insight in the past. JM is more vigilant now than she was in the past. K will be protected as a result.

- JM loves K. JM will not place K's health, security and happiness at risk again. JM no longer assigns priority to her daughter. JM finally understands

that LM is an adult who is responsible for her own actions and decisions. JM finally appreciates that K will suffer harm if LM has any involvement in K's life. JM will no longer allow LM the opportunity of harming K. K will be protected as a result.

- JM is responsible and law abiding. She has no criminal record. She follows the law. She understands that court orders are mandatory and must be respected. Unlike RB, JM has not breached a court order in the past. She will follow the terms of the *MCA* order that will be produced. K will be protected as a result.

- JM will not permit K to have any direct or indirect contact with LM. Any attempt by LM, will be reported to the police and child protection authorities. Further, JM will ensure that all babysitters and educators are aware of the prohibition of contact between LM and K. JM no longer will be hesitant to contact authorities. K will be protected as a result.

- JM will be armed with a court order vesting her with sole custody of K. The sole custody designation means that JM no longer has to be concerned that LM exercises legal control. K will be protected as a result.

- JM, although a slight woman, is far from frail. She has a determination of steel, a strength of spirit, and a strong will that will be exercised in conformity with the court order to ensure that K is safe at all times. K will be protected as a result.

[98] Notwithstanding the capable, logical and professional advocacy by Ms. MacNeil, the Minister did not prove that JM is unable to protect K from LM. The Minister did not prove a real chance of danger that is apparent on the evidence. The Minister did not prove that there is a real chance that future abuse could occur. The Minister did not prove that K would be in need of protection if he was placed in the care of his grandmother, JM, under the terms of a *MCA* order.

Terms of MCA Custody Order

[99] As noted in paras 69 to 70 of this decision, this custody order must be based on K's best interests. The terms of the *MCA* custody order that are in K's best interests are as follows:

- JM is granted sole custody of K.

- JM will have sole decision making authority in respect of all matters affecting K.
- JM must not consume alcohol.
- JM must not have any communication, direct or indirect, with LM.
- JM must ensure that LM has no communication, direct or indirect, with KM.
- JM must file a copy of this order with police authorities, K's babysitters, and all educational and health authorities who are charged with K's care.
- In the event LM attempts contact with JM or KM, JM must immediately report such contact to policing and child protection authorities.
- The terms of this order will not be varied without further court order. A copy of this decision must be placed in the *MCA* file.
- The Minister must be served with any variation application or motion.

[100] This order will issue on an interim basis only because GV, K's father, was not served with the custody application. Although GV has no relationship with K, nor has he paid any child support, GV is nonetheless a father for the purposes of the *MCA* application, and must be served as a result. The interim order will also specify the final hearing date is scheduled for July 22, 2016 at 10:00 a.m. This will provide sufficient time for service.

Dismissal of Child Protection Proceeding Involving K

[101] The child protection proceeding involving K is dismissed because K is not a child in need of protection in the face of the parenting plan put forth by JM. K is placed in the sole custody of JM.

[102] Should LM be granted access to K?

[103] For the reasons similar to those previously discussed in paras 69 to 75, I find that it is not in K's best interests to have supervised access to his mother. Even supervised access will place K's physical and emotional security at a substantial risk of harm. All access is terminated in K's best interests.

[104] Conclusion

[105] The following orders will issue in the best interests of each of the children:

- J is placed in the permanent care and custody of the Minister, with no provision for access.
- A and L are placed in the sole custody of RB. LM will have no access to the children.
- K is placed in the sole custody of JM. LM will have no access to K.

[106] A copy of this decision will be placed in the *CFSA* and *MCA* files.

[107] Ms. MacNeil is to draft the *CFSA* orders; the court will draft the *MCA* orders on behalf of the self-represented litigants.

[108] The court expresses its appreciation for all efforts put forth by counsel.

Forgeron, J.