SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Nova Scotia (Community Services) v. E.P.B., 2010 NSSC 292

Date: 20100723
Docket: SFHCFSA-063304
Registry: Halifax

Between:

Minister of Community Services

Applicant

v.

E.P.B. and J.R.M.

Respondents

Restriction on publication:

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

Section 94(1) provides:

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

Judge: The Honourable Justice Elizabeth Jollimore

Heard: July 5, 6, 7 and 8, 2010

Counsel: Amy Sakalauskas, for MCS
Heather McNeill, Amber Penney and Jessica D. Chapman, Senior Law Students, for E.P.B.
Colin Campbell, for J.R.M.

By the Court:

Introduction

[1] This is an application by the Minister of Community Services for permanent care and custody of seven year old J and two and one-half year old A. The Minister made its application on January 28, 2010. The deadline for determining the application is September 8, 2010.

[2] Ms. B is the mother of both J and A. J's father is Mr. H. Mr. H has played no part in this proceeding. He has never appeared and has never had counsel appear on his behalf. Ms. B says Mr. H has had no involvement with J since J's birth. Mr. M is A's father. Mr. M has been an active participant in this proceeding.

Procedure

[3] As the hearing dates approached, all counsel informed me that the parties had agreed on a number of matters:

(i) first, the hearing would be conducted on basis of affidavits;

(ii) second, both Ms. B and Mr. M were admitting all the historic matters in the affidavits filed by the Minister of Community Services;

(iii) third, the parties waived cross-examination on all affidavits (though all affiants would be available to answer any questions I had) and counsel would restrict themselves to making submissions; and

(iv) fourth, the only contest was as to whether the Minister of Community Services had made its case and whether the children should be placed in the permanent care and custody of the Minister of Community Services.

[4] I expressed concerns about this process, noting that it put me in the position of inquisitor where my questions would determine the direction of the oral testimony. Regardless, at two organizational pre-trial conferences prior to the hearing, counsel for all parties confirmed this was the approach their clients wished to adopt. At the first of these pre-trial conferences, Ms. B was present and she confirmed that she wanted to use this process. Mr. M was not present at either of the pre-trial conferences and Ms. B was not present at the second pre-trial conference. At the commencement of the hearing, each parent confirmed that this method of proceeding was what she or he wished. I have heard from both parents that they admit the contents of affidavits filed by the Minister of Community Services, with the exception of a number of matters explicitly addressed by Ms. B in her supplemental affidavit.

[5] Mr. M offered no plan for the children prior to the trial. On the first day of the trial, he said that he would reveal his position on disposition only after all the evidence was heard. I

cautioned him that, as a result of the waivers of cross-examination, he would hear very little information and what he would hear would be limited to my questions of some witnesses and the consequent examination by the parties' counsel.

History

[6] On March 18, 2009 the Minister of Community Services applied for an order for temporary care and custody of the two boys. At that time, J was five years old and A was fourteen months old. J had previously been in care for approximately one and one-half years starting in February 2006. J was returned to Ms. B after a ten day trial relating to his permanent care and custody. The decision in that trial is reported at 2007 NSSC 265. To put this history in the context of the children's lives, J is now seven years and one month old. The Agency has been an active and direct participant in his life (including foster placements) for two years and nine months. This is almost forty percent of his young life. For A, who was born after the conclusion of the earlier proceeding, more than half of his life has been spent in foster care.

[7] The basis of the Minister's application was the assertion that the children were in need of protective services pursuant to sections 22(2)(b), (g), (i), (j), (ja) and (k) of *Children and Family Services Act*, S.N.S. 1990, c. 5. The Minister became involved with this family when the police were called to the parents' home. Ms. B was there and under the influence of drugs and alcohol. Her behaviour was agitated and she was disoriented. She was taken into police custody and the children were left with neighbours until the Minister of Community Services decided to take the children into its temporary care. Very shortly thereafter, Ms. B provided the names of individuals who could care for the children. One of these names was Mr. M's. A police check showed Mr. M had, among other convictions, a conviction for breaking the arm of a three year old child. None of the individuals Ms. B identified was either suitable or available to care for the children. As a result, J and A remained with the Minister's staff.

[8] The matter first came before me on March 20, 2009. At that time, Mr. M explained that the children needed nothing: they had healthy food and a clean home. He said that he and Ms. B made a mistake one night [experimenting with the drug Ecstacy] and they shouldn't have done it. He said that they were healthy parents to be around and that there was no violence in their home. He described their home as a healthy environment. Ms. B agreed. While it appeared their use of Ecstacy was an isolated incident, the severity of the situation persuaded me that there were reasonable and probable grounds to find the children were in need of protective services and I granted the initial order.

[9] By late May 2009 the Minister of Community Services identified its concerns as:

1. Ms. B's drug use;

2. Ms. B's continued allowing Mr. M into her home, despite her expressed fear of him; and

3. the conflictual relationship between Ms. B and Mr. M.

[10] A finding that the children were in need of protective services based on section 22(2)(g) of the *Act* was made on June 11, 2009 with the parents' consent.

[11] The Minister first provided its plan of care on August 11, 2009. At that time, the plan was for the children to be in the Minister's temporary care and custody. The Minister outlined resources (both individuals and services) that would assist the parents so the children would no longer have need of protective services while in their parents' care. The Minister intended to measure the parents' commitment to and compliance with the plan against specific benchmarks, which were identified as:

- referring themselves for addictions assessments and, if recommended, participating in appropriate programmes;
- participating in random drug testing;
- abstaining from drug use;
- participating in relationship counselling;
- participating in a parenting assessment;
- living without violence and conflict;
- finding and maintaining a stable residence;
- attending access visits, demonstrating their ability to identify and meet the children's needs; and
- refraining from criminal behaviour.

[12] On September 8, 2009, I concluded the disposition hearing. The children continued their placement in the temporary care and custody of the Minister. The parents consented to this, too.

[13] At the time of a review hearing in November, it was apparent that Ms. B was at low risk for drug abuse. Ms. B and Mr. M had attended one-quarter of scheduled meetings with a relationship counsellor who had been provided to them. They wanted to work with a different counsellor. They were having two supervised visits with the children each week. Each visit was two hours long. Reports made by the access supervisors noted problems during the visits. They had taken part in a parenting assessment. Their residential situation hadn't stabilized. Ms. B continued to live with Mr. M, despite her expressed fear of him. Neither parent acknowledged that their relationship was a violent or abusive one.

[14] By the time of a review hearing in January 2010, the Minister's plan of care for the children had changed significantly. It was now a plan for the boys' permanent care and custody.

[15] At the end of a supervised visit on Remembrance Day 2009 the parents had a fight at a Tim Horton''s. The police were called and Mr. M was charged with uttering threats. Ms. B was taken to Bryony House where she stayed for one week. At that time, she revealed that she had been physically, sexually and emotionally abused by Mr. M and that he had physically and emotionally abused J, the older child. Ms. B was designated as being at high risk of lethality by a Victims' Services officer.

[16] In mid-November, both Ms. B and Mr. M said their relationship was over. By December they had reconciled: on December 22, 2009, Ms. B was advocating on behalf of Mr. M; she attended holiday access with him; she arranged to have the children call him; on January 11, 2010, Ms. B cancelled a visit with the children because Mr. M couldn't start his car.

[17] There was another violent incident in January 2010. Ms. B had again been assaulted by Mr. M: he had punched her and kicked her, he shaved the front of her head with an electric razor, he urinated on her while she was naked and he forced her to sit in his urine; he choked her to the point of unconsciousness. Ms. B immediately returned to Bryony House. She stayed there for five days and then moved into her sister's apartment, staying with her sister and her sister's daughter. Ms. B's sister says that she offered Ms. B a place to stay to be supportive and so that Ms. B would be safe. Ms. B said she moved out of Bryony House because she feared that Mr. M was watching the House.

[18] Mr. M threatened to shoot everyone living in the apartment where Ms. B was staying. He threatened to firebomb the apartment.

[19] On January 27, 2010, Ms. B again returned to Bryony House. Workers at Bryony House offered letters in support of Ms. B saying that during this, her fourth stay at Bryony House, Ms. B began to engage in the counselling and educational programs offered there. (To be clear, Ms. B's initial stay at Bryony House occurred a few years ago during a prior relationship. She took refuge at Bryony House three times since Remembrance Day 2009.) During this stay at Bryony House, she continued to have telephone contact with Mr. M and, on one occasion in February, she spent several hours with him. Despite Mr. M's public abuse of her, his humiliation of her, his violence toward her and his threats toward her and those who tried to shelter her, Ms. B still had not severed her relationship with Mr. M. It appears that Ms. B's contact with Mr. M ended only when he was taken into police custody.

[20] Ms. B remained at Bryony House for more than two months. She then moved to Adsum Centre, where she remains. Women normally do not stay at Adsum Centre for more than twelve months. Ms. B may stay at Adsum Centre until April 5, 2011. I was told that "it has happened" that someone has stayed more than twelve months. Kellie McLeod, a social worker at Adsum Centre, testified that Ms. B's departure from Adsum Centre would be assessed at the conclusion of this trial. Ms. McLeod explained that if the children were returned to her, Ms. B would

remain, but if the children were not returned, Ms. B would decide whether she wanted to stay or to have the support of Adsum Centre staff in "exit planning".

The Children

[21] J has made different remarks to his foster parents about living with Ms. B and Mr. M. According to J, if he wet himself he was forced to stand in his urine and if he soiled his bed he had to remain in the bed. He said he was put in the shower and the water turned hotter. J described physical fights (punching, kicking and hitting) between Ms. B and Mr. M. He said that he stayed in his room with A when this happened. When Ms. B described Mr. M's abuse of J, her descriptions were consistent with J's.

[22] At school and at his foster home, J has demonstrated highly sexualized behaviour (such as exposing his genitals and, on another occasion, asking a three year old girl to kiss his penis) and aggressive behaviour. Both boys were very concerned about having enough to eat.

[23] As A approached his second birthday, he was still not speaking. A's speech is severely delayed and he has been referred to the Nova Scotia Hearing and Speech Clinic. A has experienced less dislocation in his life than J has. A has only once been removed from his parents and he has had J's support. J pays an inordinate amount of attention to his younger brother and J provides a level of care and soothing for A that is unusual for a seven year old child to provide. Circumstances have compelled J to act as his brother's parent.

[24] J began therapy with Sara Lamb, a clinical therapist, in May 2009. He has continued weekly counselling with her since then. I was provided with three reports from Ms. Lamb and an assessment by David Cox, a psychologist. Initially, Ms. Lamb reported that J was very sensitive to the emotional states of the adults around him and less sensitive to his own emotions. Her later report said that J showed symptoms that are consistent with attachment difficulties. J continued to deny those emotions related to weakness (fear or shame, for example). J's defence mechanisms were heightened and Ms. Lamb said that this means J will progress more slowly through therapy. Most recently, Ms. Lamb reports that J still exhibits "avoidant, dysregulated, controlling and defensive behaviours". She says that J needs "an extraordinary level of safety and support to even begin to process his past experiences and to heal from the violence he has been exposed to". She says J needs a lot of structure and a consistent figure parenting him.

[25] J took part in a psychological assessment by David Cox who said that J would benefit from a home where his needs can be met consistently and that J "almost certainly presents with an Attention Deficit/Hyperactivity Disorder, Combined Type", noting "very marked inattention and hyperactivity". Mr. Cox described J as showing an "alarming" lack of development in "basic language arts and math skills, including letter recognition and elementary number concepts". When this assessment was done in January 2010, J was in grade one.

[26] Both J and A have suffered physical or emotional harm caused by being exposed to repeated domestic violence. The boys are in need of protective services.

Analysis

[27] There is a preliminary matter to be noted in proceedings pursuant to the *Children and Family Services Act* and that is the paramountcy of children's best interests. In various regards, the *Act* directs me to make an order or a determination "in the best interests of a child". When that is the case, section 3(2) of the *Act* directs that I consider those of enumerated circumstances which are relevant. Ms. B groups the enumerated circumstances into five different general areas of consideration: the children's existing relationships; the children's present needs; the children's preferences, if they are reasonably ascertained; future risk; and other relevant circumstances.

[28] Ms. B reminds me that the purposes of the *Children and Family Services Act* are to protect children from harm, to promote the family's integrity and to assure children's best interests. These purposes are expressed in the *Act*'s preamble and they are also echoed in the articulation of "best interests" found in section 3(2).

[29] I am mindful of the statutory provisions governing the duration of disposition orders relating to J and A. Section 45(1)(b) says that where I have made an order for temporary care and custody, the total period of duration of all disposition orders, including any supervision orders, shall not exceed twelve months, where a child was under six years of age at the time of the application commencing the proceedings. For J and A, the twelve month period for the total duration of all disposition orders expires on September 8, 2010.

[30] Both the Minister and Ms. B have referred me to section 46 of the *Children and Family Services Act*, which outlines the process for an application to review a prior order for temporary care and custody. In an application for review, before I make an order, I must consider whether the circumstances have changed since the previous disposition order was made; whether the plan for the children's care applied in my decision is being executed; the least intrusive alternative that's in the children's best interests; and whether the requirements of section 46(6) have been met. Section 46(6) deals with temporary care and custody orders and says that I may make a further temporary care and custody order unless I am satisfied that the circumstances which justified the earlier order are unlikely to change within a reasonably foreseeable time that doesn't exceed the September 8, 2010 deadline.

[31] With regard to section 46(4), there was no contest from Ms. B whether the circumstances have changed since the previous disposition order was made and whether the plan for the children's care applied in my decision was being executed. She does take issue with whether there is a less intrusive alternative that is in J and A's best interests. I note that a disposition order is one that engages consideration of the children's best interests.

[32] In a review application, the options open to me under section 42(1) are:

- dismissing the Minister's application and returning the children to their parent;

- returning the children to the parent, subject to supervision for a specified period;

- placing the children in the care of a third party, subject to supervision for a specified period;

- placing the children in the temporary care and custody of the agency for a specified period;

- placing the children in the temporary care and custody of the agency for a specified period after which they would be returned to the parent or another person for a specified period; or

- placing the children in the permanent care and custody of the agency.

[33] As directed by Justice Saunders in *Children's Aid Society of Halifax v. B.(T.)*, 2001 NSCA 99 at paragraph 19, I am to consider each of these possible dispositions. His Lordship's reasons in *Children's Aid Society of Halifax v. B.(T.)*, 2001 NSCA 99 do limit my considerations. At paragraph 23, Justice Saunders explained:

> As the proceeding nears a conclusion, the opportunity to grant disposition orders under s. 42(1)(c) diminishes until the maximum time is reached at which point the court is left with only two choices: one or the other of the two "terminal orders". That is to say, either a dismissal order pursuant to s. 42(1)(a) or an order for permanent care and custody pursuant to s. 42(1)(f).

[34] As well, at paragraph 25 of *Children's Aid Society of Halifax v. B.(T.)*, 2001 NSCA 99, His Lordship noted that "temporary placement with a relative, neighbours or other extended family is no longer available" once the maximum time limit is reached, so this cannot be considered. In any event, no such placement is proposed here.

[35] Before beginning this analysis, I want to address Ms. B's urging that I should hold the Minister to a standard of proof "at a high level". In argument, she described the civil burden on the Minister as "a heavy one" which "should not be taken lightly". I reject this position. In *F.H. v. McDougall*, 2008 SCC 53, a civil action arising from a historic sexual assault, Justice Rothstein wrote at paragraph 49:

> I would reaffirm that **in civil cases there is only one standard of proof and that is proof on a balance of probabilities**. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred. [emphasis added]

[36] While I reject Ms. B's statement of the law, I accept the sentiment she expresses. Every parent responding to an application for permanent care and custody needs to know that the

relevant evidence has been scrutinized with care and the *Children and Family Services Act*, with regard to its purposes and its mandatory considerations, has been followed assiduously.

[37] The Minister asks that I order the children be placed in its permanent care and custody. At the conclusion of the hearing once all the evidence was heard from the Minister's witnesses and Ms. B's, Mr. M said that he supported the Minister's request for a permanent care and custody order. Ms. B asks that I dismiss the application and return the children to her. Alternately, she asks that I make a supervision order. In making these submissions, Ms. B referred me to sections 42(2) and 42(4) of the *Act*. The former section mandates that I do not make an order that removes children from their parent unless I am satisfied that less intrusive alternatives have been tried and have failed, have been refused, or would be inadequate to protect the children. The latter section instructs that I shall not make a permanent care and custody order unless I am satisfied that the circumstances which justify the order are unlikely to change within a reasonably foreseeable time, not exceeding the maximum time limits.

[38] I will address section 42(2) first. It requires that I do not make an order that removes children from their parent unless I am satisfied that less intrusive alternatives have been tried and have failed, have been refused or would be inadequate to protect the children. When the Minister's involvement began, it began with less intrusive measures, particularly counselling for Ms. B and Mr. M. As the children came into care Ms. B and Mr. M maintained their relationship, despite horrific acts of violence and degradation. For example, prior to November 2009, on more than one occasion Mr. M choked Ms. B until she blacked out and he threatened to kill her and chop her head off. Until November 2009, Ms. B denied there was abuse and violence in her relationship with Mr. M. While she did participate in individual counselling, since she denied what was happening in her relationship, she was not receiving counselling to address the domestic violence. In this, Ms. B refused less intrusive measures.

[39] External forces intervened in November 2009 when a Tim Horton's employee called the police about the fight that occurred at the end of a supervised access visit. This resulted in Ms. B going to Bryony House for a brief period of time and breaking up with Mr. M – also for a brief period of time. Ms. B spent about one week at Bryony House before moving to Mr. M's mother's home and reconciling with Mr. M. She agreed to vary the Provincial Court undertaking that restricted Mr. M's contact with her and she advocated on his behalf so he could have contact with the children, though she had disclosed that Mr. M had bloodied the older child's nose, bruised him and caused him rug burns and she had also described how the boy was afraid of Mr. M, would not eat and would wet himself because he was so scared of Mr. M. She said that, on occasion, she would punish J to pre-empt his punishment by Mr. M.

[40] Repeated police intervention and periods of residence at Bryony House continued to stress the relationship between Ms. B and Mr. M, though they were in contact by telephone and in person right up until Mr. M was taken into police custody in February 2010. In November 2009, the children were still exposed to the relationship between Ms. B and Mr. M: Ms. B was not taking steps to protect the children from exposure to the relationship. Ms. B's decision to take up residence with her sister and niece in January 2010 demonstrates that she was either

oblivious to the risk her presence imposed on others or she was willing to impose that risk on them, in the mistaken and dangerous belief that she could predict and control Mr. M's moods and his actions. From November 2009 to February 2010, Ms. B had glancing involvement with services at Bryony House. To the extent that she continued to expose her children (and others) to the repeated domestic violence that characterized her relationship with Mr. M, the services she did receive failed to protect the children.

[41] It wasn't until after Mr. M was taken into police custody in February 2010 that Ms. B began to commit herself to participating in programs relating to the violence in her life. While Ms. B has committed herself to these programs as she never did in the past, I cannot say her commitment is unequivocal. Her residence at both Bryony House and at Adsum Centre strongly mandated, if not required, her attendance at certain programs. Her attendance at these programs is not voluntary. The Bryony House programs include a program dealing with partner abuse. The focus at Adsum Centre is providing support for those who are homeless or at risk of homelessness. This focus means the programming is more varied. It does not include programming specifically related to domestic abuse. Kellie MacLeod, and Adsum Centre social worker, testified that a lot of the counselling Ms. B was receiving at Adsum Centre was about supporting her through this trial and they "haven't talked a whole lot about independent living yet".

[42] Initially, Ms. B refused the less intrusive services that would promote the family's integrity. From November 2009 until Mr. M was taken into custody in February 2010, Ms. B began to take part in services. These services failed: during this period, the children (and Ms. B's niece) were exposed to the abusive relationship between Ms. B and Mr. M.

[43] The evidence from the Minister's witness, Courtney Maloney, was that Ms. B only superficially acknowledged the children's need for services. Ms. B gave her evidence through two affidavits and through cross-examination. After she filed her first affidavit, at an organizational pre-trial conference I expressed my desire that Ms. B file a more detailed plan for the return of her children. The initial affidavit did not tell me where the older child would attend school, what programs the school might offer for the boy's academic needs, or his other needs. Even her later affidavit was devoid of detail, but spoke only in very general terms: she planned to complete her high school education, to find an appropriate place for the children to live, to pursue an education suitable for employment, to secure suitable daycare, to locate a doctor for the children and so on. These general comments were not developed with any degree of specificity. As general as her plans were, they did not identify or address the children's needs. For example, Ms. B's plans for housing didn't recognize the children's need for stability. Her plan to remain at Adsum Centre, for example, offers the children housing for nine months. After that, their housing is vulnerable. Similarly, A's delayed speech must be addressed. Ms. B has not acknowledged this at all.

[44] The affidavits and evidence of workers at Bryony House and Adsum Centre inventoried the different courses that Ms. B attended and in which she participated. At Bryony House she took part in the Mother's Education and Support Group sessions on renegotiating parental

boundaries (discipline within the shelter and beyond), how witnessing abuse affects children of different ages, how to talk to children about abuse and how living with an abuser affects parenting. Ms. B explains that the programs are psycho-educational and focus on exploring the nature of partner abuse and the challenges that she will face in building a life free from violence and abuse. She says the programs are about educating her about the dynamics of abuse and developing her skills to break free from the cycle of abuse. At Adsum Centre, Ms. B participated in parenting skills training, life skills training, a walking program (focused on healthy living), a program on communal living, a program on substance abuse and a program on healthy coping and healthy relationships. These courses have their focus on Ms. B, not the children.

[45] I directly asked Ms. B what she had done to prepare herself to meet the children's needs. Her answer is important: she described how she was working on herself and making herself stronger. There is no question that working on herself and becoming stronger is critical to preparing herself to meet the children's needs. As Ms. B argued "her safety and security are inherently linked to the best interests of her children". Her vulnerability has left her the victim in abusive and violent relationships. She needs the strength and independence to avoid these relationships. She does not yet have that strength or independence and, even if she did, the children's needs are such that avoiding violent and abusive relationships is not enough. The less intrusive measures executed so far are inadequate to protect the children.

[46] In the context of section 42(2), I am referred to section 13 of the *Act* which enumerates services which promote the integrity of the family. Many of these services are relevant: for example, improving the family's housing situation; counselling and assessment; and self-help and empowerment of parents whose children are in need of protective services. This is a situation where the relevant services have been refused or have been attempted and have failed or would be inadequate to protect the children, having regard to section 42(4) which I will address next. I conclude that the provisions of section 42(2) are not effective so as to bar me from making an order for the permanent care and custody of J and A.

[47] Section 42(4) instructs me that I shall not make a permanent care and custody order unless I am satisfied that the circumstances which justify the order are unlikely to change within a reasonably foreseeable time, not exceeding the maximum time limits. The maximum time limits are less than seven weeks from now. The total duration for all disposition orders is September 8, 2010. I am satisfied on the balance of probabilities that the circumstances which justify my order are unlikely to change within the brief time available. I do want to address this specifically.

[48] There are less than seven weeks before this matter must be finally resolved. Ms. B argues that she has "taken the first – and most difficult – step toward providing herself and her children a safe and secure life" and that she "has broken the cycle of abuse and control that she has experienced as a battered woman". I agree that Ms. B has taken the first step. I acknowledge the difficulty of that step. I do not agree that she has broken the cycle of abuse and control that she has experienced. Ms. B has only recently begun to address the abuse and

violence that has characterized so many of her adult relationships. It is too early to say that the cycle has been anything other than interrupted. Her commitment to breaking the cycle of violence is uncertain. She has barely begun her GED program and is unemployed, yet there is still the prospect that she will leave Adsum Centre, despite the vulnerability of her circumstances. This suggests that she does not yet truly understand that she must be "strong" (as she says) to live free of abuse and control.

[49] Ms. B is currently unemployed. She has just begun a GED program so she can complete her high school education. Her housing lacks long-term stability. The counsellor who was working with her (Ellice Daniels) moved from Nova Scotia after two sessions with Ms. B and the replacement counsellor (Cheryl Joyce) has had just two sessions with Ms. B. Their counselling is "to improve parenting skills and insights as well as to help to [sic] cope with the emotional loss of having her children placed with the Agency." As Ms. B describes her counselling, it is not specifically directed to ensuring she protects the children from domestic violence.

[50] Without employment, education or long-term stable housing, Ms. B is extremely vulnerable. During her relationship with Mr. M, she turned to him or to his mother for support. Ms. B says that she is getting stronger emotionally and learning to use her own voice. While she develops her personal strength, the fundamental sources of her vulnerability remain. Her circumstances may compel her to find "security" with another violent partner as they have so often in her past.

[51] I am satisfied that the circumstances which justify a permanent care and custody order are unlikely to change within the next seven weeks. I conclude that the provisions of section 42(4) are not effective so as to bar me from making an order for the permanent care and custody of J and A.

[52] Ms. B has referred me to section 42(1)(b), asking that the children be returned to her subject to agency supervision. She says that she would accept an order that she and the children remain at Adsum Centre and she acknowledges that the period of supervision would be limited.

[53] Three plans are available for my consideration: dismissing the Minister's application; returning the children under supervision subject to review and final decision by September 8, 2010; and placing the children in the Minister's permanent care and custody. This decision is to be based on the children's best interests, so I turn to consideration of section 3(2) of the *Act*. I am particularly mindful of the importance of continuity in the children's care, and their family relations. The children have experienced unstable housing and J, in particular, has experienced unstable parenting relationships by virtue of this and his prior foster placement. Given my concerns about the instability and vulnerability of Ms. B's circumstances, returning the children to her is not in their best interests. My conclusions that – at this late date – Ms. B has not sufficiently broken the cycle of violence in her life and that she is not aware of the children's needs, mean that returning the children to Ms. B under supervision is an untenable option. It is far too likely that the children would be subject to a permanent care and custody order in early

September and returning the children for a temporary period places them in exactly the unstable situation I am to avoid.

[54] Further, both boys have particular needs (A's speech development, J's emotional and educational difficulties as described by Sara Lamb and David Cox). Neither option proposed by Ms. B addresses these satisfactorily. I am also concerned by delay. The time lines in this case are the briefest. I am mindful that J has been in care twice. He has twice been removed from his mother. It is not in his best interests that this occur a third time.

[55] I conclude that it is in the best interests of both children that I grant the Minister's application for their permanent care and custody.

Access by Ms. B to the children

[56] In the event I reached this conclusion, Ms. B asked that I order access with both children. This is governed by section 47(2) of the *Act*. In *New Brunswick (Minister of Health and Community Services) v. L.(M.)*, 1998 CanLII 800 (S.C.C.), Justice Gonthier stated that once permanent care is ordered, the burden is on the parent to show an order for access should be made.

[57] According to section 47(2), I should not make an order for access unless I am satisfied that permanent placement in a family setting hasn't been planned or isn't possible and access won't impair the children's opportunities for such a placement. Alternately, I should not make an order for access where the children are or will be placed with someone who doesn't wish to adopt the child. As a third alternative, there may be some other special circumstance which justifies making an access order. (There is a fourth alternative which relates to children at least twelve years old. It does not apply to these young boys.)

[58] This is a situation where a permanent placement in a family setting is planned for J and A. The Minister plans to place the children for adoption. The children have not been placed with someone who does not wish to adopt them nor is there a plan for such a placement. Accordingly, Ms. B's request for access can only be premised on section 47(2)(d) which requires there be some other special circumstance which justifies an access order. She has offered no evidence of any circumstance which justifies making an access order. I dismiss her request for an access order.

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J.S.C. (F.D.)

Halifax, Nova Scotia