IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Mi'kmaw Family and Children's Services v. C.I., 2011 NSSC 37

Date: January 26, 2011
Docket: SFSNCFSA 64474
Registry: Sydney

Between:

Mi'kmaw Family and Children's Services

Applicant

v.

C. I.

Respondent

Editorial Notice

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

Judge: The Honourable Justice Kenneth C. Haley

Heard: November 15, 24 and 25, 2010, in Sydney, Nova Scotia

Counsel: Mr. Robert Crosby, for the Applicant
Mr. Alan Stanwick, for the Respondent

By the Court:

[1] This is the application of Mi'kmaw Family & Children's Services of Nova Scotia seeking an Order pursuant to Section 42(1)(f) of the *Children and Family Services Act* that the children E.I., born August *, 2003; X.I., born September *, 2004, and S.I., born December *, 2006 be placed in the permanent care of the Applicant, with no provision for access.

[2] The history of this file is as follows:

> May 28/09 - Five day Section 39 hearing wherein the children were placed in the temporary care of the Applicant. Matter adjourned for completion of the Section 39 interim hearing.
>
> June 8/09 - Section 39 hearing completed with an Order issued placing the children in the temporary care of the Applicant. Adjourned for Protection Hearing.
>
> September 10/09 - The Respondent, Ms. I., consented to a protection finding, and the court found the children were in need of protective services, pursuant to Section 22(2)(k), and to remain in the temporary care of the Applicant. Adjourned for Disposition Hearing.
>
> November 18/09 - At the Disposition Hearing the Respondent consented to continuation of the status quo, and an Order was issued pursuant to Section 42(1)(d) of the *Children & Family Services Act*. Adjourned for Disposition Review Hearing.

February 15/10 - At the first Disposition Review Hearing the Respondent again consented to the continuation of the status quo, and an Order was issued pursuant to Section 42(1)(d) of the *Children & Family Services Act*. Adjourned for Disposition Review.

May 11/10 - Status quo continued with the consent of the Respondent. Adjourned for Disposition Review.

July 7/10 - Status quo continued with the Respondent to contest permanent care of the children. Adjourned for permanent care hearing.

October 25/10 - Counsel for Mi'kmaw Family & Children's Services of Nova Scotia was ill, and unable to attend court. Adjourned hearing to November 15, 2010.

[3] The Permanent Care Hearing was head by this Court on November 15, 24, and 25, 2010. The Applicant called five witnesses, namely:

- Corporal Beverly Ann Andrews

- Constable Colin Stanley

- Ms. Laurie Coffin

- Mr. A.T.

- Ms. Stephanie Gould

[4] The Respondent was the sole witness to testify on behalf of the Defence in opposition to the Applicant's application.

[5] From a historical perspective it should be noted that the children had been previously apprehended and taken into care on two previous occasions, namely: July 15, 2005 and July 27, 2007.

APPLICANT'S EVIDENCE AND POSITION

[6] **Corporal Beverly Ann Andrews** testified she attended at the Respondent's residence in response to a complaint of assault on August 10, 2010.

[7] Ms. I.'s boyfriend, A.T., complained that he had been hit in the face by Ms. I. As a result Ms. I. was arrested, charged, and Corporal Andrews testified that Ms. I.'s mood was "up and down", and that she appeared "angry and agitated".

[8] Corporal Andrews said she was familiar with the Respondent due to having responded previously to the residence for complaints of impairment, parties, and underage drinking.

[9] **Constable Colin Stanley** testified he had 15 to 20 contacts with Ms. I. regarding complaints of her mental health, domestic violence, and assaults.

[10] The Constable testified Ms. I. attempted suicide on at least five or six occasions since he joined the Baddeck R.C.M.P. in March, 2008.

[11] He further testified he had taken Ms. I. to the Sydney Crisis Centre on two occasions at which times she appeared to be in a "saddened state" due to her children having been taken from her.

[12] **Ms. Laurie Coffin** works with Mi'kmaw Family & Children's Services as an access worker, and has done so for 5 ½ years. She has worked with Ms. I. for the last 3 years.

[13] After the children were apprehended by the Applicant, Ms. I. was provided supervised access one day a week for 2 to 3 hours.

[14] Ms. Coffin described the access visits with all three children as positive, stating that Ms. I. and the children had a “strong, loving, and positive bond”.

[15] Ms. Coffin also testified that Ms. I.’s home was clean and appropriate , and that the children were always excited going to the visits, and disappointed when they came to an end.

[16] **A. T.**- is the ex-boyfriend of Ms. I. and they are the parents of one child which is not a party to this proceeding.

[17] He testified about his past relationship with Ms. I. and her three children, E.I., X.I. and S. I. and that he took care of the children, with his mother, from November 2008 to May 2009.

[18] Mr. T. testified he was already caring for their infant daughter and found looking after the four children was “too much for me to handle”.

[19] He called the Mi'kmaw Family and Children's Services of Nova Scotia to take the children into care as Ms. I. was in hospital recovering from a suicide attempt at the time.

[20] When questioned about the events of August 10, 2010 regarding the alleged assault on him by Ms. I., Mr. T. testified he "lied" about the assault stating that he was in a bad mood and simply wanted Ms. I. out of the house.

[21] He testified Ms. I. is "really good with the kids" and that the children love and adore their mother. He stated that placing the children into permanent care would not be the right thing to.

[22] Mr. T. has not seen the children since May 2009 stating that Mi'Kmaw Family and Children Services want him "out of the picture altogether"

[23] **STEPHANIE GOULD -** is the Protection Worker on this file and has been since September 2008.

[24] She confirmed that the children were apprehended in May 2009 as Mr. T. advised the agency he could no longer handle the situation and that Ms. I. remained in the hospital recovering from a suicide attempt.

[25] She contradicted Mr. T. in testifying that Mr. T. did not request to see the children or request that the youngest, S.I., remain in his care.

[26] Ms. Gould testified that Ms. I. attempts to access services "just stopped", that she had three consecutive missed random drug tests in February 2010 and that Ms. I. had no current contact with doctors and counsellors engaged to assist her. In this regard no reports or opinions from service providers or experts were provided to the agency to which Ms. Gould testified she would have deferred if such opinion mandated same.

[27] She further testified that Ms. I. was continually moving around and that during the summer of 2010 she had no idea as to the whereabouts of Ms. I.

[28] Ms. Gould identified the events of concerns in support of the Agency's request for permanent care, with no access, as follows:

- historical child care concerns since 2000 and general pattern of behaviour;
- Ms. I. not engaging in services;
- Mental health issues and hospitalizations (ie. suicide attempts in May, 2009 (overdose) August 2009 and to Fall 2009 (cutting arms) (hanging) April 2010 (depression)

[29] Ms. Gould testified Ms. I. suicide attempts and hospitalizations were the result of Ms. I.'s stress issues; self esteem issues and her depressed state.

[30] Also of concern to the witness were reports of domestic violence on April 28, 2010 and August 10, 2010, although A. T. has testified he lied to police about the events of August 10, 2010.

[31] Ms. Gould did not dispute that access visits with Ms. I. and the children went very well and that Ms. I.'s home is well cared for and maintained.

[32] Ms. Gould was challenged on cross examination about the decision to seek permanent care as early as November 2009 with the suggestion that the agency had no intention to change it's position regardless of what Ms. I. did to improve.

[33] Ms. Gould denied this suggestion and referenced the case plan at page three as follows:

> The Applicant does not consider it reasonably foreseeable that the Respondent will be able to resolve the Child Welfare Risk Factors sufficiently to provide adequate parenting to the children within the time limits of the legislation.
>
> Not withstanding this position, the Applicant will provide and promote services identified prior to Final Disposition. (Emphasis added)

RESPONDENT'S EVIDENCE AND POSITION

[34] C.I. testified on her own behalf. She testified that she loved her children, and that she had a "special bond" with them. She stated, "they are my life", but acknowledged having done "foolish and selfish" things. Ms. I. disagrees with the Agency's position, and stated very emphatically, "I can take care of my kids".

[35] Ms. I. testified candidly about the abusive relationship she had with the father of her 3 children (E.P.). In spite of their abusive situation Ms. I. testified she ensured the children went to school every day; they were well fed, well dressed, and that she would read to them every night at bedtime.

[36] She testified that her subsequent relationship with A.T. was “rocky”, however there was never any domestic violence in the presence of the children.

[37] Ms. I. was very open about her mental health issues, and did not dispute any of the evidence presented in court previously by the Applicant’s witnesses, although appeared to blame others, and her medication for the attempts on her life.

[38] She testified she is now on proper medication for her depression and high anxiety disorder, and feels she is now well enough to care for her children.

[39] She confirmed that she was hospitalized for her depression in January 2010, and stated that she has had no issues since that 3 day hospitalization.

[40] She blamed the prescription “mood stabilizer” she was taking in 2009 for causing her to feel stressed and being overwhelmed which, in her view, resulted in the suicide attempts. Ms. I. testified she feels her anxiety and depression is under control presently, but finds it hard at night and first thing in the morning.

[41] Ms. I. blamed police and protection services for not coming to her assistance. She stated:

> "... I asked for help, I don't know how many times.
>
> ... no one listened
>
> ... not one worker
>
> ... not one police officer."

[42] Ms. I. was critical of the protection worker, Ms. Gould, whom she stated did not assist in increasing access visits with her children. She testified:

> "It is like they are trying to break a bond between me and my kids."

[43] Ms. I. testified she was told by Ms. Gould that no matter what program she took, "detox, counselling plus more", that she would still never get her children back.

[44] Ms. I. testified in terms of her relationship with Ms. Gould:

"No matter how hard I tried I felt it was hopeless".

[45] Ms. I. has had no contact with either Ms. Gould or Ms. Coffin since September 2010, at which point access was put on hold, and there had been no contact with her children since that time.

[46] During cross examination the Court heard of the Respondent's past experience with the Agency in 2005. Ms. I. testified that at the time she had a nervous breakdown. Ms. I. thereafter engaged in services with the Agency, and was successful in having E.I. and X.I. returned to her care, at which time she was pregnant with the child, S.I.

[47] The children E.I., X.I., and S.I. were subsequently apprehended and taken into care by the Agency on July 29, 2007, at which time Ms. I. was hospitalized for an attempted suicide by overdosing. As she stated in her evidence:

"I wanted to be at peace".

[48] The Court learned that at the time of this attempt on her life, Ms. I. was not seeing her psychiatrist or her counsellor. She testified that she was very isolated at the time because no one would help her.

[49] Ms. I., when questioned about what she thought would happen to her children in the event of her suicide attempt being successful, she responded:

> "I was not thinking...I did not think about it until after."

[50] Ms. I.'s plan was to again access services to have her children returned to her care, however as she testified:

> "But it did not work out, and although encouraged by the agency, I stopped seeing the doctors, counsellors, and encountered difficulties with the prescription medications".

[51] Ms. I. further acknowledged she has not had any professional counselling assistance throughout the last year, but that she now feels much better since she has been taken off the "mood stabilizer" drug, and that she is now capable of caring for her three children.

APPLICANT SUBMISSION

[52] Counsel for the Applicant submitted it is important to note Ms. I. successfully accessed services in 2005 and had the children returned to her care before they were again apprehended in August 2007.

[53] In contrast, counsel submits Ms. I. has done very little to access services currently in an effort to reduce the risk of harm to the children.

[54] Counsel states Ms. I. was not motivated and failed to take responsibility for the reasons why the children were taken into care and that she failed to address these reasons or concerns. Blaming others for not assisting her in engaging services is unacceptable and it is submitted Ms. I. should have made more of an effort in this regard.

[55] In terms of the Respondent's position, counsel submits there is no expert report from any of Ms. I.'s doctors or counsellors confirming her testimony as to her current mental stability.

[56] It is submitted by the Applicant that the risk to the children has not been reduced or eliminated and therefore it is in the best interests of the children to be placed in the permanent care of the Applicant with no provision for access.

RESPONDENT'S SUBMISSIONS

[57] Counsel for the Respondent submits that it is confirmed by the Access Facilitator's evidence that Ms. I. is an excellent mother and that there is a loving bond between the mother and the three children.

[58] Counsel acknowledges that historical factors have a role to play in the Court's decision, however urges the Court to be mindful of the present and future circumstances when accessing risk.

[59] It is submitted that the primary focus in this proceeding has been the mental health of the Respondent and that there is no evidence of existing suicidal thoughts or self mutualization by the Respondent. Counsel submits that Ms. I. is now stabilized and it should not be fatal that she did not access remedial services.

[60] Counsel further submits the Agency had made up its mind in November, 2009 in terms of seeking permanent care and that this position was unalterable.

[61] Counsel submits the Applicant has not discharged its burden of proof; that there is no continuing risk to the children; that the children should be returned to the care of their mother and that the proceeding should be dismissed.

BURDEN OF PROOF

[62] A proceeding pursuant to the *Child and Family Services Act* is a civil proceeding **NS.(MCS)v DJM [2002] NST No368CCA)**.

[63] The burden of proof is on a balance of probabilities which is not heightened or raised because of the nature of the proceeding. **I C(R) v McDougall [2008], 3SCR 41**, The Supreme Court of Canada held at paragraph 40:

> 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 serousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected for the reasons that follow.

And further at paragraph 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.

[64] The burden of proof is on the Applicant to show that the Permanent Care and Custody Order is in the children's best interest.

LEGISLATION

[65] The Court must consider the requirements of *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;

[66] I have also considered Sections 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** In all proceedings and matters pursuant to this *Act*, the paramount consideration is the best interests of the child.

[67] I have also considered the relevant circumstances of Section 3(2), which provides:

> 3(2) Where a person is directed pursuant to this Act, except in respect of a proposed adoption, to make an order or determination in the best interests of a child, the person shall consider those of the following circumstances that are relevant:
>
> (a) the importance for the child's development of a positive relationship with a parent or guardian and a secure place as a member of a family;

(b) the child's relationships with relatives;

(c) the importance of continuity in the child's care and the possible effect on the child of the disruption of that continuity;

(d) the bonding that exists between the child and the child's parent or guardian;

(e) the child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs;

(f) the child's physical, mental and emotional level of development:

(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 views 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.
[Emphasis added]

[68] Other relevant Sections include Sections 42(2) (3) (4) , which provides as follows:

(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 have 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 unlikely to change within a reasonably foreseeable time not exceeding the maximum time limits, based upon the age of the child, set out in subsection (1) of Section 45, so that the child can be returned to the parent or guardian. 1990, c.5, s.42.

DECISION

PART 1 - PERMANENT CARE AND DISMISSAL

[69] I have reviewed the evidence together with the plan and submissions of the parties. I have applied the burden of proof to the Applicant.

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

[71] I find that the Order requested by the Applicant is the appropriate one. E.I.. X.I. and S.I. continue to be children in need of protective services. It is in the best interests of the children that they be placed in the permanent care and custody of the Applicant pursuant to S. 42(1)(f), and S. 47 of the Act. In particular S. 47(1) 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 or guardian for the child's care and custody."

[72] I recognize the love Ms. I. has for her children, and how saddened she will be by this result. I recognize that her home is clean, safe, and that there's no apparent violence. Most importantly I recognize the bond which exists between the children and their mother. Despite these positives I must, nonetheless, grant the application for permanent care.

[73] According to the legislation which I must follow, the court has only two stark options available at this time: (1) dismiss the proceeding or (2) return the children to the Respondent. There is no middle ground.

[74] I cannot return the children to Ms. I. because the children remain in need of protective services. A Permanent Care Order must then issue.

[75] I find the factors outlined in S. 42(2) of the *Act* have been proved by the Applicant. I find that less intrusive alternatives, including services to promote the integrity of the family have in some respects been attempted and failed, and in other respects would be inadequate to protect the children.

[76] I draw this conclusion based on the following findings:

> (1) Ms. I. has not had care of the children since July 2007, when she was hospitalized for an attempted suicide. Since that time she has attempted suicide on at least two occasions, and also had been hospitalized due to her depressed state.
>
> Ms. I is not sufficiently stable to undertake the care of her three children. Past history of relapse concerns the Court, and absent expert medical opinion to support Ms. I.'s claim that she is well, leaves the Court in serious doubt as to her capacity to adequately care for and supervise her children without subjecting them to risk of harm. Her unquestioned love and devotion to her children does not in any way alleviate the concern of the Court in this regard.
>
> (2) The Respondent does not understand the significant risks associated with her mental illness and parenting. Because of this lack of understanding the Respondent continues to place the children at risk.
>
> (3) The Respondent has not successfully completed the remedial services necessary for her to gain the insight into her illness necessary to promote the protection of the children.
>
> (4) By her own admission she has not taken services recommended by the Applicant, having given up all hope that the children would be returned.
>
> (5) Ms. I.'s unresolved mental health illness can lead to poor parenting decision-making in the future. As counsel has stated, the past is often the best predictor of the future. Therefore, until Ms. I. satisfactorily stabilizes her mental health with the support of the medical community, I find the children will remain at risk, and by that I mean significant risk that is apparent on the evidence.

[77] The obligation to provide services is not without limit. In **Children's Aid Society of Shelburne County v. S.L.S.** , [2001] N.S.J. No. 138 (C.A.), the Court of Appeal held, at paragraphs 35-37:

> "35 The trial judge was well aware of this issue which the appellant now raises. It was put to the trial judge, by trial counsel, in terms of giving the appellant "another chance". The trial judge noted in his decision that "any further services would be inadequate to protect the child".
>
> 36 In any event **the obligation of the Agency to provide integrated services to the appellant is not unlimited**. Section 13(1) of the Act obligates the Agency to take "reasonable measures" in this regard.
>
> 37. I agree with the submission of counsel for the Agency that the main limitation on the provision of services in this case was the appellant herself." [Emphasis added]

[78] I reject the suggestion that the Applicant did not support the Respondent in seeking ongoing remedial services, however it would appear that the lack of filing an updated Plan of Care beyond November 29, 2009 may have contributed to Ms. I.'s sense of discouragement in this regard.

[79] The Respondent is obviously sincere in her wish to have the children returned to her, but the court finds that is a totally unrealistic expectation under the given circumstances.

[80] Without proper support, from both within and without her family, Ms. I. is far too fragile, in the court's opinion, to undertake the demanding role of parenting.

It is not safe to return the children to her, and I find the circumstances justifying the order, are unlikely to change within a reasonable, foreseeable time. The Permanent Care and Custody Order is therefore granted.

PART II - ACCESS

[81] 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 & Family Services Act* which states as follows:

> "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;
>
> (b) the child is at least twelve years of age and wishes to maintain contact with that person;
>
> (c) the child has been or will be placed with a person who does not wish to adopt the child; or
>
> (d) some other special circumstance justifies making an order for access.

[82] The Nova Scotia Court of Appeal has held that he onus to show access should 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.T., No. 132 (C.A.), 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 component 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:

> "36 These submissions must be considered in light of three important legal principles. First, I would note that **once permanent care was ordered, the burden was on the appellant to show that an order for access should be made**: 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. at 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]

[83] The Nova Scotia Court of Appeal has recently considered S. 47(2) of the *Act* in **Children & Family Services of Colchester County v. K.T.** [2010], N.S.T., No.

474 (Application for Leave to Appeal to SCC pending) at paragraphs 39-41 as follows:

> "39 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 to adoption. **Third, for children under 12, the "some other special circumstance" contemplated in s. 47(2)(d), must be one that will not impair permanent placement opportunities.**
>
> 40 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.
>
> 41 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."

[84] The Respondent seeks access to her children. She relies upon the best interest of the children, and the positive bond which exists between them.

[85] The Applicant is opposed to this position and has relied upon the comments by the Nova Scotia Court of Appeal in support of its position.

[86] Justice Bateman of the Nova Scotia Court of Appeal commented upon the meaning of "special circumstances" in **Children's Aid Society of Pictou County v. A.J.G.** [2007] SNT, No. 284 (CA) stated at paragraph 33:

> "33 A.G. urges this Court to provide guidance as to what would constitute "special circumstances". The potential fact situations are so varied that it is impossible to provide any specificity. It must be highlighted, however, that "special circumstances" are only available as a basis for access where "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. (s. 47(2)(a))."

[87] This position is further highlighted by the comment of Chief Justice Michael MacDonald in **Children's Family Services of Colchester County v. R.T.**, supra, at paragraphs 37 and 38:

> "37 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.

> 38 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."

[88] The obligation to act in the children's best interests is one which I take seriously. I will do all within my power to ensure that their best interests are met. The interests of the Applicant and the Respondent are secondary to the best interest of the children.

[89] As stated by Chief Justice MacDonald at paragraphs 29 and 34 of the R.T. decision, supra:

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

> 34 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."

[90] The Applicant has confirmed its plan to seek a permanent placement for E.I., X.I., and S.I. through the process of adoption.

[91] At page 9 of the Agency Plan for Care it states:

> "(b) Description of the arrangements made or being made for the child's long-term stable placement (refer to the child's present placement, any intended changes to that placement, any special needs of the child, availability of long-term placements, agency plans to identify a permanent placement for the child, adoption prospects, etc.)
>
> The Agency will seek adoption placement for these children. The children will remain in the agency approved foster homes until an appropriate adoptive placement is identified. The Agency will seek adoption placement for the children as a sibling group.
>
> (c) Access, if any, proposed for the child and any terms and conditions to be included in such access arrangements.
>
> Given that the Agency Plan is to place the children, E., X. and S. I. for adoption, continued access is not planned. A final visit would be arranged at the request of the Respondent, C. I.."

[92] In my view the awarding of access to the Respondent would impair the contemplated permanent placement, and thus by virtue of S. 47(2) such access is deemed not to be in the children's best interest.

[93] Therefore the requested access Order by the Respondent is denied.

CONCLUSION

[94] An Order for Permanent Care and Custody in favour of the Applicant will issue, with no provision for access to the Respondent.

J.