IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Nova Scotia (Community Services) v. A.H., 2011 NSSC 255

Date: June 23, 2011
Docket: 068399/069644
Registry: Sydney

Between:

Minister of Community Services

Applicant

v.

A.H. and J.T.J.

Respondents

- and -

A.J. and S.J.

Third Parties

Editorial Notice

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

Judge: The Honourable Justice Kenneth C. Haley

Heard: January 27, 2010, February 17, 2010, March 9, 2010, March 22, 2010, March 26, 2010, May 11, 2010, June 16, 2010, September, 13, 2010, November 29, 2010, January 25, 2011, February 2, 2011, February, 8, 2011, February 16, 2011, April 4, 2011, May 17, 2011, in Sydney, Nova Scotia.

Counsel: Robert M. Crosby, Q.C., counsel for the Applicant
Shannon Mason, counsel for the Respondent, A.H.
Mark Gouthro, counsel for the Respondent, J.T.J.
David Campbell, Q.C., counsel for Third Parties, A.J. & J.J.

By the Court:

[1] This is the application of the Minister of Community Services, hereinafter called the "Agency", seeking an Order pursuant to Section 42(1)(f) of the *Children & Family Services Act* that the child, J.T.H.J., age 1 ½ be placed in the permanent care and custody of the Agency, with no provision for access.

[2] The parents, A.H. and J.T.J., oppose the application, and support the companion application of the paternal grandparents., A.J. and S.J., for custody of the child pursuant to Section 18(2)(a) of the *Maintenance & Custody Act*.

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

> - January 27, 2010 - 5 day Section 39 Interim Hearing wherein the court found there were reasonable and probable grounds to believe the child was in need of protective services. The child was placed in the temporary care of the Agency, and the matter was adjourned for completion of the Section 39 phase until February 17, 2010.
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> - February 27, 2010 - The Respondent parents consented to the completion of the Section 39 hearing, and the matter was adjourned for Protection hearing to March 26, 2010.

- March 26, 2010 - The Respondent parents consented to a protection finding pursuant to Section 40 of the Act that their child was in need of protective services. The status quo continued with notice that the paternal grandparents were preparing to make an application for custody.

- May 10, 2010 - Leave granted to the paternal grandparents to seek custody of their grandchild. The Agency agreed to review and assess the merits of the application.

- June 16, 2010 - Disposition Hearing pursuant to Section 42. Status quo continued. The Respondent mother advised she no longer is in support of the paternal grandparents' application, and she will seek return of the child to her care and custody.

- September 13, 2010 - Disposition Review. Status quo continued.

- November 29, 2010 - Disposition Review. Status quo continued. Final Disposition Review scheduled for February 16, 17, 18, 22, and 23, 2011.

- February 16, 2011 - Matter adjourned to May 17, 18, 19, and 20, 2011. Court found it was in the best interests of the child to exceed statutory deadlines.

[4] Due to the length of the proceeding complications developed throughout resulting in the statutory time lines as defined by the ***Children and Family Services Act*** having been necessarily exceeded.

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

[6] In the case **D.C. v Family & Children Services of Lunenburg County and T.M.C. and C.L.G.**, (2006) 249 N.S.R. (2d) 116 (NSCA) Justice Oland stated at paragraph 17 as follows:

> "[17] However, the law is clear that exceeding that time limit does not always constitute an error of law. In **Children's Aid Society of Cape Breton-Victoria v A.M.** 2005 NSCA 58 (CanLII), [2005] N.S.J. No. 132, 2005 NSCA 58, in seeking to overturn an order placing her children in permanent care, the appellant parent argued first, that the judge had no jurisdiction to make a permanent care order once the section 45 (1) (a) time limits had been reached, and second, if the judge had discretion to extend the time, he erred in doing so because he failed to consider whether the extension was in the best interests of the children. Cromwell, J.A. for this Court stated:
>
> [28] Turning to the first submission, there was no loss of jurisdiction here. The Court made this clear in **Nova Scotia (Minister of Community Services) v. B.F.** 2003 NSCA 119 (CanLII), (2003), 219 N.S.R. (2d) 4l (C.A.); [2003] N.S.J. No 405 (Q.L.) (C.A.) At paras. 57 and 58 and **The Children's Aid Society and Family Services of Colchester County v H.M.** reflex, (1996), 155 N.S.R. (2d) 334 (C.A.). The *Act* contemplates that there will be a judicial determination of the child's best interests. If a time limit, which is a milestone toward that determination, caused the Court to lose jurisdiction to determine the child's best interests it would contradict the purpose of the ***Act***. Therefore, the Court did not

> lose jurisdiction by reserving its decision as to disposition for longer than the time limits for temporary care orders under section 45."

[7] The final Disposition Review was heard by this Court on May 17, 18, 19, and 20, 2011.

[8] The Agency called the following witnesses, namely:

(1) Barb Estwick - Child Care Worker

(2) Tracey Penticost - Access Facilitator

(3) Ainslie Kehoe - Long Term Protection Worker

(4) Dr. W.R. Vitale

[9] On May 18, 2011, the Respondent mother elected not to proceed with her request to have the child returned to her care. She now supports the application for custody filed by the paternal grandparents. As a result, the Respondent mother elected not to testify, as did the Respondent father, who has supported the paternal grandparents' application from the onset.

[10] Therefore, the court heard from the paternal grandparents in opposition to the Agency's position, namely:

(1) A.J. , and

(2) S.J.

[11] In support of the paternal grandparents' application the Court heard the evidence of Heather Ratych, who had prepared a "Kinship Report" regarding the paternal grandparents' application.

[12] The Court received into evidence the following Exhibits, namely:

- Notice of Motion
- Affidavit of Ainslie Kehoe
- Notes
- Agency Plan dated April 29, 2011
- Report of Heather Ratych dated June 8 2010.
- C.V. of Dr. Vitale
- Report of Dr. Vitale (handwritten) dated August 31, 2010
- Report of Dr. Vitale (typewritten) dated August 31, 2010
- Addendum Report of Heather Ratych dated June 13, 2010

- C.V. of Heather Ratych
- Letter from Ontario Early Years Centre dated March 16, 2011
- Ontario Family Court Order dated August 10, 1998

[13] At the conclusion of evidence the Court requested written submissions to be filed on or before May 27, 2011.

EVIDENCE

[14] In view of the Respondent mother withdrawing her application for custody, and now supporting the paternal grandparents' application for custody, which has always been supported by the Respondent father, the Court will thus review and consider the evidence relevant to the Agency's position versus the paternal grandparents' position in terms of placement of the child, J.T.

[15] The Agency seeks permanent care of the child, J.T., with no provision for access. The paternal grandparents, A.J. and S.J. seek care and custody of their grandchild, with the long-term goal of ensuring the child has a relationship with his biological parents and extended family, should that be in the child's best interests.

[16] In March, 2010, the Agency received notice from the paternal grandparents that they were interested in pursuing custody of J.T., and having him live with them in Ontario.

[17] As a result, the process of obtaining a home study was initiated, and Heather Ratych was recommended by the Ontario Agency to the local Agency, and to the paternal grandparents on a private retainer basis, since the wait list for a publicly funded study was very long. The costs associated with the preparation of this Report were paid for by the paternal grandparents.

[18] Ms. Ratych was qualified to give expert opinion, as it relates to a child's placement in the child's best interests. She testified she was a former protection worker for the Child Welfare Authorities in Ontario. Ms. Ratych testified that she supports the placement of the child with the paternal grandparents. Her reports are marked as Exhibits #5 and #7. She states:

"The plan is safe, realistic, and viable."

[19] The investigation conducted by Ms. Ratych was in depth and detailed. The paternal grandparents cooperated fully with background checks, all requests made of them, and the report is very thorough in terms of its content and assessment of their parenting abilities.

[20] The Agency has acknowledged it has an obligation to consider and support family placement whenever possible. The Agency does not support the paternal grandparents' plan, because they are not convinced that the plan is permanent, and in the long term best interests of the child, J.T.

[21] The Agency evidence focused on the history of the paternal step-grandmother, S.J., with her own children and grandchildren. The Agency submits that the conduct of S.J. in returning her own granddaughter to her daughter after nine years of custody was "alarming". The Agency submits this past conduct is not indicative of a long-term, stable plan for J.T.

[22] S.J. testified the return of her granddaughter to her daughter, the biological mother, after nine years was the result of her daughter then being capable to care for

her child, and also a function of Court Order by the Ontario Family Court awarding joint custody to S.J. and her daughter.

[23] A copy of the Order was provided to the Court after proceedings were concluded with the consent of counsel. The court marked it as Exhibit #8, and in particular paragraph 4 of the Order dated August 10, 1998, reads as follows:

> "(4) The parties shall confer with each other on all plans and arrangements relating to access to and custody of the children and generally, on all important matters relating to the Children's health, residence, education, religion training and upbringing. Neither party may make a unilateral decision without the consent of the other (or court order or decision of a mutually acceptable mediator)."

[24] The Agency also voiced concern about past substance abuse issues of S.J., which they consider to be a possible "stressor"; however this issue has repeatedly been under control and non-existent since 2006, when S.J. sought assistance and dealt with her problem.

[25] In particular, Ms. Ratych testified about S.J.'s past substance abuse and stated:

> "It does not appear to be an ongoing issue that will pose risk to the child".

[26] Regarding A.J., the paternal grandfather, the Agency is concerned that one of his own children was involved with a mental health program in Ontario called "Kinaark Centre". In Agency Protection Worker, Ainslie Kehoe's opinion it would require a number of years of significant behavioral issues for a child to be placed in such a program.

[27] The Agency is also concerned that the Ratych report recommends support services for the paternal grandparents for six months, which the Agency views as excessively long; thus affecting the long-term viability of the placement.

[28] The Agency submits that permanent care with no access and adoption provides a more stable and long term option for J.T. The Agency submits there are too many "red flags" to consider otherwise.

[29] S.J. is a 51 year old housewife, who does not work outside the home. She has had a relationship with A.J. since 2002, and they have been married for three years.

[30] S.J. has four children of her own, and nine grandchildren, with whom she states she has “a really good relationship”.

[31] A.J. is 47 years old, and just recently completed a two year program as a computer systems technician. He hopes to be working with * in Ontario, and earn between $60,000.00 and $85,000.00 per year. He currently earns approximately $30,000.00 per year doing maintenance.

[32] Neither S.J. or A.J. drink alcohol or use any illicit substances. A.J. smokes, but does so outside the home. Neither have a criminal record.

[33] S.J. and A.J. live in a two bedroom townhouse, with a fenced-in backyard in a good neighbourhood. There is no evidence to suggest the physical premises offered by the paternal grandparents is anything but a safe and suitable environment for a child. As stated by S.J.:

> “We offer a home, love, growth, and education.”

[34] S.J. plans to be a full-time, stay-at-home mom for J.T., and the neighbourhood provides easy access to recreational facilities, parks, schools, and churches.

[35] The paternal grandparents seek full custody of J.T. with plans to adopt.

[36] They plan to expose J.T. to the full extended family. As stated by A.J.:

> "J.T. will not be denied his family....I guarantee that."

[37] It was nonetheless acknowledged that any contact with the biological parents would not be automatic. It would have to be assessed, and occur only if it was in J.T.'s best interests. As stated by A.J.:

> "We will have to talk about the involvement of the mother and father".

[38] When questioned why they were making the application for custody at this stage of their lives, A.J. stated:

> "...J.T. needs us...he needs a home...we can provide that...I know we can...I am confident in my and my wife's ability to parent".

[39] Similarly S.J. stated:

> "...J.T. needs a loving home...He should not be in the system with strangers...removed from the family...I know we can do this".

[40] Ms. Ratych, in her evidence, maintained support for placement of the child, J.T., with the paternal grandparents, with specific conditions attached.

[41] Both S.J. and A.J. are willing to be fully compliant with the recommendations of Ms. Ratych, and work in concert with the Agency, if required.

[42] Ms. Ratych, in her evidence, maintained support for placement of the child, J.T., with the paternal grandparents, with specific conditions attached.

AGENCY SUBMISSIONS

[43] Counsel for the Minister submits:

- That the Agency acknowledges its obligations under the legislation to consider family placements, and does not take this responsibility lightly.

- That it is the opinion of the Agency that the A.J. and S.J. plan is not in the best interests of the child, J.T.

- That it is in the best interests of J.T. to remain in his current placement, and be placed for adoption by his current caregivers.

- That the A.J. and S.J. plan is not permanent, in that there is concern that the paternal grandparents' plan contemplates return of the child, J.T. to either or both of his birth parents.

- That S.J. has demonstrated in the past that at a time of stress caring for a child, namely her granddaughter, S., was not a priority.

- That the Agency has serious concerns regarding A.J.'s children, who have had significant behaviour difficulties, resulting in Child Services, through Kinaark Centre, which provides services to children in need of serious help.

- That A.J. did not accept responsibility for his son's mental health issues, and minimized his son's behaviours.

- That although there is no evidence of alcohol or substance abuse by A.J. and S.J., the Agency still has concerns.

- That the Agency has considered the alternative family placement, and has determined it is not in the best interest of J.T.

PATERNAL GRANDPARENTS' SUBMISSIONS

[44] Counsel for A.J. and S.J. submits:

- That A.J. and S.J. provide a reasonable familial alternative to the permanent care of the infant child, J.T.
- That A.J. and S.J. have discharged the burden of proof placed upon them, in that they have established, on a balance of probabilities, that they can provide a reasonable alternative to permanent care.
- That the Agency's concerns regarding the stability, viability, and permanency of A.J. and S.J.'s plan have been successfully addressed.
- That the plan put forth by A.J. and S.J. is "safe, realistic, and viable", and is supported by Child Care Expert, Ms. Ratych.
- That A.J. and S.J.'s plan is reasonable in that it is sound, sensible, well-conceived, and has a basis in fact.
- That the Agency's application should be dismissed, and custody of J.T. be awarded to the paternal grandparents, A.J. and S.J., pursuant to Section 18(2)(a) of the *Maintenance & Custody Act*.

MOTHER'S SUBMISSIONS

[45] Counsel for A.H. submits:

- That the Respondent, A.H., has not put forth a plan of care.

- That the Agency's Protection Application be dismissed, and an Order under the *Maintenance & Custody Act* be granted, awarding custody of J.T. to the paternal grandparents A.J. and S.J.

- That the Agency has not given adequate consideration to the family placement being offered by A.J. and S.J.

- That A.J. and S.J.'s Plan represents the less intrusive alternative that is in J.T.'s best interests.

- That there is no guarantee whatsoever that the Agency's Plan is more permanent than the Plan of A.J. and S.J.

- That the Agency's concerns about the placement is not a sufficient justification to reject the plan of A.J. and S.J.

- That J.T. deserves the opportunity to be raised by family where he can be afforded an opportunity to have continued contact with his biological parents.

- That Ms. Ratych's expert report should be given considerable weight in terms of a safe, realistic, and viable placement for J.T.

- That the plan of A.J. and S.J. is sound, sensible, workable, well conceived, and in the best interests of J.T.

FATHER'S SUBMISSIONS

[46] Counsel for J.T.J. submits:

- That the Respondent, J.T.J. has not put forth a Plan of Care.

- That the father, J.T.J., supports the custody application of the paternal grandparents, A.J. and S.J.

- That Section 42(3) of the *Children & Family Services Act* mandates the Court to consider whether it is possible to place the child with a relative or extended family before considering permanent care and custody with the Agency.

- That no one is perfect, and any reported blemishes about A.J. or S.J. do not outweigh the fact that placement with them is a safe, realistic, and viable plan on a permanent basis.

- That the Agency application for permanent care should be dismissed.

BURDEN OF PROOF

[47] A proceeding pursuant to the *Child and Family Services Act* is a civil proceeding **NS.(MCS)v DJM [2002] NST No. 368 CCA)**.

[48] The burden of proof is on a balance of probabilities which is not heightened or raised because of the nature of the proceeding. In **C. R. v. McDougall [2008], 3, SCR 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:
>
> 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.

[49] The burden of proof is on the Agency to show that the Permanent Care and Custody Order is in the child's best interest.

TEST OF STATUTORY REVIEW

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

> 35 "It is clear that it is not the function of the status review hearing to retry to original need for protection order. That order is set in time and it must be assumed that it has been properly made at that time. In fact, it has been executed by the courts on status review is whether this is a need for a *continued* order for protection ...

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

LEGISLATION

[51] 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;

[52] 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.

[53] 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]

[54] 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

(10c) 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 © 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."

[55] The application by the paternal grandparents is pursuant to the ***Maintenance & Custody Act.*** The relevant provisions considered by the Court are as follows:

> "Section 18(2)(a) - The court may, on the application of a parent or guardian or other person with leave of the court make an order:
>
> (a) that a child shall be in or under the care and custody of the parent or guardian or authorized person.
>
> Section 18(5) - In Nay proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child, the court shall apply the principal that the welfare of the child is the paramount consideration."

ISSUE

[56] Should the child, J.T., be placed in the permanent care and custody of the Agency, with no provision for access, or placed in the care and custody of the paternal grandparents, A.J. and S.J. pursuant to the *Maintenance & Custody Act*?

ANALYSIS

[57] I have carefully reviewed all of the evidence, together with the respective plans and submissions of the parties.

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

[59] In terms of the third party application for custody by A.J. and S.J., the Court acknowledges that the onus of presenting a reasonable alternative to the Agency's care and custody rests with the parties seeking to have it considered by the Court.

[60] According to the legislation which I must follow, the court has only two stark options available at this time: (1) order permanent care or (2) dismiss the proceeding and return the children to the Respondents

[61] As noted by the Nova Scotia Court of Appeal in **G.S. v. Nova Scotia (Minister of Community Services** [2006] NSJ No52(CA) at paragraph 20:

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

[62] In this instance neither of the Respondent parents are an option for placement because no Plan of Care has been put forward by either of them. Instead they mutually support the Application for custody by A.J. and S.J. As a result Section 42(4) of the Act is not applicable.

[63] The need for protection may arise from the existence or absence of the circumstances that triggered the first order for protection, or from circumstances which have arisen since that time (Catholic Children's Aid Society of Metropolitan Toronto v. M.C. (SCC) supra).

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

[65] In order for the Court to access whether or not the child, J.T., remains in need of protective services, an analysis of the family placement option must be done in accordance with Section 42(3) which states as follows:

> "(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 © of subsection (1), with the consent of the relative or other person."

[66] As stated above the onus of presenting a reasonable alternative rests with A.J. and S.J. **The Children's Aid Society of Halifax v. T.B.** [2001] N.S.J., 255 (C.A.) at para. 31 states:

> "The onus of presenting such a reasonable alternative must surely be upon the person or party seeking to have it considered."

[67] The Agency and Court is not required to investigate or "rule out" each and every possible placement alternative, but it must consider those reasonable family or community alternatives, seriously put forward by their proponents, which appear to be sound, sensible, workable, well conceived and have a basis in fact. (**Children's Aid Society of Halifax v. T.B.**, supra)

[68] The Nova Scotia Court of Appeal expressly adopted, in **Family and Children's Services of Kings County v. B.D.** [1999] N.S.J. No. 220 (C.A.), at para.

19, the following principles, taken from the trial decision in **Nova Scotia (Minister of Community Services) v. S.B.,** [1999] N.S.J. No. 144 (Fam. Ct.):

> "The word 'possible' [in section 42(3)] must be read in the context of the whole of the *Act* and in a fashion consistent with the stated purpose of the *Act*, Section 2(1). Extended family is a placement alternative that is desirable and consistent with the *Act*, as is support for families and alternatives that minimize the intrusiveness of these actions. Any placement alternative, however, must be considered in the context of the needs and best interests of the child. Section 3(2) defines family security and relationships as a consideration in determining the child's best interests not an overriding trump to the child's best interests."

[69] Justice Cromwell in **Family and Children's Services of Kings County v. B.D.** [1999] N.S.J. No. 220 (C.A.), spoke of reasonable family or community options. Neither the Agency nor the Court is obliged to consider unreasonable alternatives. Their statutory obligation is nothing more than to assess the reasonableness of any family or community alternatives put forward seriously by their proponents.

[70] When comparing a private custody family placement option and a plan for permanent care and custody with the agency at the end of the maximum time limits, it must be remembered that the decision is not whether to remove the children from a parent, but whether the home of this third party, offers a better alternative than the

plan of the Children's Aid Society. **Children's Aid Society of Halifax v. C.M.**, [1995] N.S.J. No. 421 (C.A.), at paragraph 40 states:

> "In *Family and Children's Services of Kings County v. B.D.* [1999] N.S.J. No. 220 (C.A.), paragraphs 12, 13, 14...the judge was required by the *Act* to consider a number of factors. Chief among them is what the *Act* refers to as the paramount consideration, the best interests of the children: [Section 2(2) reproduced in the decision.] In considering the best interests of the children, the Court is to take account of all the relevant circumstances: s. 3(2)... . Also central to the Court's determination is the preservation of family and community ties and the principle that the least intrusive alternative consistent with the children's best interest be employed..."

[71] In terms of assessing competing plans the following was noted in **Family & Children Services of Cumberland County v. D.M.M.** [2006] N.S.J. No. 341 (C.A.) at para. 18:

> "The trial judge saw and heard the third parties and was in the best position to determine their ability and whether to entrust the infant to their care."

DECISION

[72] I have scrutinized the evidence with care, and I am satisfied that the evidence of the Agency is not sufficiently clear, convincing, and cogent to satisfy the balance of probabilities test. The Agency evidence is speculative at best, and the evidence

before the Court does not support the submission that the past is the best predictor of future events.

[73] Quite the contrary, the alternative family placement offered by A.J. and S.J. is sound, sensible, workable, well conceived, and has a basis in fact. It is a far more superior and less intrusive plan than that of the uncertainties of permanent care offered by the Agency. A.J. and S.J. have met the onus placed upon them.

[74] As stated by Justice Bateman in **Children's Aid Society of Halifax v. C.M.** [1995] N.S.J. No. 421 (C.A.) At paragraph 40:

> "It must be remembered that the decision is not whether to remove the child from a parent, but whether the home of this third party offers a better alternative than the plan of the Children's Aid Society."

[75] Ms. Heather Ratych was qualified as an expert in the area of kinship assessment as it relates to placement of a child. Ms. Ratych testified that in the normal course, the best place for a child is with his/her parents. However, if that is not possible, the second best option in this case is for J.T. to be placed with his grandparents. Ms. Ratych testified about the importance of family in a child's life.

[76] Ms. Ratych spoke with A.J. and S.J. on a number of occasions, she did a thorough inspection of the home, and she testified that the J. were very open and honest in talking about the issues. She remains in full support of the their plan to assume custody of J.T. She testified that the plan is safe, realistic, and viable.

[77] The Court rejects the submission that it is in J.T.'s best interests to be placed in the permanent care and custody of the Agency, with a better alternative offered by the paternal grandparents.

[78] In view of the "reasonable" alternative offered by the paternal grandparents I find that the child, J.T., is no longer a child in need of protective services, and as a result the court is therefore required to dismiss the application of the Agency.

[79] I had the opportunity to hear and weigh the evidence of A.J. and S.J., and found them both to credible witnesses, who can act in the best interests of their grandson, J.T. The past historical concerns raised by the Agency do not persuade the Court, on a balance of probabilities, that J.T.'s best interests are best served by him being placed into permanent care. I am satisfied that entrusting the care and

custody of J.T. to them is in J.T.'s best interests, and a Custody Order in this regard will issue.

CONCLUSION

[80] The Agency's application is thus dismissed, and an Order awarding custody of J.T. to his paternal grandparents will issue. I find they can provide a consistent, stable, and permanent placement for the child, J.T.

[81] The Court accepts and adopts the recommendations of Ms. Ratych in her report, which will form part of the Order, and in particular:

(1) - J.T.'s placement will be monitored for six months by the Agency or its delegate. The first two months of placement will be monitored monthly, with the discretion to conduct subsequent bi-monthly visits as determined by the Agency or its delegate.

(2) - A referral for J.T. will be made to the * Public Health Unit/Healthy Babies Program.

(3) - A.J. and S.J. will attend a parent program as recommended by the Agency or its delegate.

(4) - A.J. and S.J. should be assisted by the Agency or its delegate in accessing available temporary care allowance and/or other financial assistance program to and for the benefit of J.T.

(5)(a) - Agency guidelines for access by the biological parents must be clearly outlined and defined and agreed to be followed by A.J. and S.J.

(b) - In the event access with the biological parents is contemplated, the Court directs an application by A.J. and S.J. be made to the Court with notice provided to the Agency or its delegate for the purpose of review.

[82] Earlier in the proceedings the maternal grandmother, A.H., had made an application to be added as a third party. Ultimately A.H.'s counsel advised the Court that she was not seeking custody of J.T., but was requesting an Order for access to her grandchild, and thus withdrew her initial application.

[83] In the event A.J. and S.J. were successful in their application for custody, it was agreed by the parties during the pre-trial process that they would support a provision for supervised access by the maternal grandmother, A.H., subject to the discretion of A.J. and S.J.

[84] The court supports such a proviso being included in the Order.

Order Accordingly,

J.