SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Nova Scotia (Community Services) v. B.C, 2011 NSSC 321

Date: 20110128
Docket: SFSNCFSA66694
Registry: Sydney, N.S.

Between:

Minister of Community Services

Applicant

v.

B.C., J.C. and J.S.

Respondent

Editorial Notice

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

PLEASE TAKE NOTE THAT SECTION 94(1) OF THE CHILDREN AND FAMILY SERVICES ACT APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADINGS BEFORE PUBLICATION.

SECTION 94(1) PROVIDES:

Prohibition on publication
1. 94 (1) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.

Judge: The Honourable Justice M. Clare MacLellan
A Judge of the Supreme Court of Nova Scotia
(Family Division)

Heard: January 12, 2011 and January 14, 2011

Oral Decision: January 28, 2011

Unedited Oral Decision: February 2, 2011

Counsel: Robert Crosby, Q.C., Counsel for the Minister
Alfred Dinaut, Counsel for B.C.

By the Court:

[1] The matter before the Court is the case of the Minister of Community Services versus B.C. The Applicant's position is that it is appropriate, on the facts put forward, that permanent care be granted of the two (2) children - A., born September *, 2008, and G., born September *, 2009 - and that access be extinguished. At the time of hearing, the Applicant believed the Respondent was expecting a child. The Respondent had another child before A. and G. - that child was placed with a family member and is not the subject of this proceeding.

[2] This matter proceeded by consent at the protection stage pursuant to Section 22(2)(b) of the *Children and Family Services Act*. The first disposition proceeded in March, 2010 and a Temporary Care and Custody Order was issued by consent.

[3] This decision must be done expeditiously. I would like to undertake to give you a grammatically-proper decision in twenty (20) or thirty (30) days. My time periods do not allow that because next week I have a full chambers docket; the week after that I am on a course on Family Law in Calgary; the week after that I am sitting in Halifax. Therefore, before I could look at a grammatically-appropriate format would be at least a month's time. In my view, reviewing the exhibits and all the evidence preparatory to summations today, that would be an inappropriate delay for all substantive reasons, the best interests of the children and fairness to the Respondent. Therefore, an unedited version of this Decision is to be made available to counsel two (2) weeks after the Oral Decision.

[4] I would indicate that we had a number of days of hearings on this case. It is a very important case, as all permanent care or temporary care or any case involving the separation of a parent from their children is, of course, very important. This case was more difficult to analyse and I am going to go into that in some detail. I am going to read first the marked portions of the transcript of my questions on January 12th to Ms. Kehoe, the Protection Worker. This is pivotal to my ultimate decision and my interpretation on a balance of probabilities, my interpretation of Section 9, Section 13, Section 2, Section 3 and the Preamble of the *Children and Family Services Act*.

[5] On January 12, 2011, I asked Ms. Kehoe:

Q. So what are you doing from October, 2010 to yesterday (January 11, 2011) when I got the Permanent Care Plan. What were you doing trying to reach her? [The Respondent?]

A. I did try to reach her [the Respondent]. I wasn't having much contact. I wasn't really having any contact with her. She had been, I spoke with the Administrative Assistant and she had been phoning the office for cab approvals and things like that. It just very uncommon for her not to touch base. Normally she would just call and you have some clients who will avoid you as much as they can. Others will call regularly for one reason or another and she was one that often did call and it just seemed that since we made the decision to look for permanent care and custody, that was the point that she just kind of just stopped keeping in contact.

Q. That's understandable?

A. It is.

Q. O.K. so I'm more interested in what you did from an active position from...it was October 19th that I first heard permanent care when we were in Court Here. I don't remember if it was a review or a pre-trial but the record indicates it was October 19th, 2010. So what did you do from October 19th to yesterday when I got the plan, to get in touch with her. You phoned like once a week, you went to the house twice a month, what did you do? Give me the...?

A. We, we made the decision on October 4, 2010 to seek an Order of Permanent Care and Custody. There wasn't anything specific or urgent that I was needing to be in contact with her about, but it was just rare that I wouldn't hear from her or if there was a change in phone number she was always good to call and say there's been a change in my phone numbers. Here's where I can now be reached.

Q. O.K. so there's nothing you wanted to talk to her about, but when you are a Protection Worker, you work for the family don't you?

A. Yes.

Q. So do you think she needed some counselling from the Children's Aid Society or just an explanation as to why you're going the way you're going or did you do that?

A. We did meet, we met, we sat in person. I reviewed Dr. Landry's assessment. I didn't read it word for word to her, but I reviewed what was in

it and what led us to reach the decision that we reached. She was understandably upset. She's always been very co-operative and very workable in the sense that she's not an aggressive individual. She doesn't present with anger toward the Agency. She was upset on that day and that was the basis of our conversation with me explaining to her why we reached the decision that we did and I encouraged her at that point that for herself it would be good to follow through with the recommendations of Dr. Landry because she's a 19 year old girl and in her future she may want to get married, have a family, things like that.

We go further down on the transcript:

Q. I'm not interested in what she did, I'm interested in what you did?

A. Yes.

Q. I'm not interested in what she did, I'm interested in what you did?

A. I guess I could refer to my case notes to see specifically, but in terms of the limited contact after the decision of permanent care, there wasn't much else that we were offering for her after making that decision, other than if there was something that she wanted us to assist with. We could do that.

Q. O.K. so if I was to outline 'cause you cut yourself short and in that you cut the record short. You say, the Agency, as if it's a living body, had concerns and the Agency had concerns, we had concerns. So if you were going to give me a precis of what the substance of that is? She picks poor partners, she's young, the children have special needs and she hasn't been truthful and her house is less than perfect, less than appropriate? Is that correct?

A. Yes.

Q. Is there anything I'm missing?

A. It's just the self esteem issues and the immaturity that she presents with, we don't feel that she can meet the needs of the children.

Q. But she's only 19?

A. Yes she is.

Q. So do you think there's many 19 year olds who have self esteem? Aren't they all just trying to figure out where they fit, or most of them?

A. Yes, given that age, yes.

Q. So that's not unusual is it?

A. No it's not.

Q. To have 3 children at 19 may be unusual?

A. Yes.

I go on to question her [Ms. Kehoe] about the risk matrix and I ask her:

Q. O.K. in your risk matrix, your risk assessment, what role did the special needs of the children play? Do you sit down and say, well that's 20%, or that's 30% or that's the tie breaker? How did you factor in the special needs?

A. I, to give it a percentage I'm not sure, but it's a big consideration when we have a Risk Management Conference.

"...we look at first and foremost the history, which we would go through right from the time that we would be introduced to a family. Then we look at a summary of what's occurred, you know, most recently within the year, going through the last year. Then after that we look at the individual needs of each child. So we have the Child in Care Worker present at the Risk Management Conference and we go through what their needs are, what services they've had since they've been in care. Some may have services before they came into care. We look at all that and then their current progress and level of functioning. So it is a big factor in considering what's best for them and whether or not the parent has the ability to meet their needs because the needs of every child is different."

Q. When you and she sort of had a parting of the ways after the permanent care wish was made known, and I guess that's somewhere between October 4th and October 19th, before we came back to Court?

A. Yes.

Down further, I am asking her [Ms. Kehoe] when was the first time Ms. C. would have known that permanent care was sought:

Q. O.K. we're back to October and I'm back to what you're trying to do and there's nothing really I had to get in touch with her about. You recommended that she go to individual counselling? So it's not your role to help her with any of the grieving or adjusting or anything like that?

A. It is. I'm there for her if she wants to connect with me and discuss the situation with me and before we parted ways that day, I did explain to her that if when you leave here you have questions or you're thinking of things that you want clarified or you need to talk, I am available. She was also working with the Access Facilitator that she was working with in a Parent Aid role as well and she had a close working relationship with her.

Q. That continued?

A. Uh that worker is actually no longer with the Agency and unfortunately she has been assigned a new Access Facilitator.

Q. Since when?

A. That was just prior to Christmas, about I think 2 weeks maybe prior to Christmas.

Q. O.K. so she would be relying on her close relationship? She had a closer relationship with the Access Facilitator/Family Service Worker than with you?

A. Yes and I think given my role uh that would probably be understandable and I do know after the day that we were in Court, where we were giving the Agency's position to seek permanent care, she did go with the Access Facilitator after Court that day. She was having a difficult time.

Q. So when you're trying to call her, she's not calling you so then you try to call her after you have the sit down and you go over Dr. Landry's report, what did you get, a recording or the phone's disconnected or what do you get?

A. The recording indicating that the phone's been disconnected or no longer in service.

Q. And did you go to her house?

A. I did but I didn't do that until this week as a kind of a last resort.

Q. So what was magical about this week?

A. Just leading up to Court, if she had any questions or concerns or anything she would want.

Q. So the last substantive conversation you had with her would have been the conversation when you told her that you were following the Landry recommendations and going for permanent care and the next meaningful discussion you had with her would have been this week?

A. Yes, I'm sorry last week when we spoke over the phone.

Q. So that's mid-October, mid-November, mid-December, mid-January, O.K. and she lost the Access Facilitator who she had a relationship with in December?

A. Yes.

Further on in the testimony, I am asking Ms. Kehoe what she knew when she had her meeting in October for permanent care:

Q. O.K. All right so in your meeting in October and there's a number of people in the room that had involvement with her, the Access Facilitator, you, our supervisor and who else?

A. The child and Care Worker that works with the children and the Access Facilitator/Parent Aid Worker that was working with Ms. C.

Q. And up to that time in October, 2010, am I correct in my understanding that you hadn't heard of any activities that she was committed to that were remedial in nature?

A. That's correct, with the exception of Transition House Outreach because she had completed the phase one portion of that.

Further on at page 12 of the Court's transcription, I am asking her about G. and what she knew about G.:

Q. O.K. what's the time between the time she thought she was pregnant and the time you made your unscheduled home visit?

A. Only within about a week.

Q. She told you the baby was premature?

A Um hum

Q. Is that a yes?

A. Yes.

Q. So if it was a premature baby, it would still be in the hospital wouldn't it?

A. I would think, yes.

Q. So did you go looking through medical records or ask her for consent to go through any of this material and see which end was up as far as G. was concerned?

A. I did not. We accessed....I should say the Child and care Worker accessed his birth records upon him coming into care. Uh and I think he may have been like a week or two premature, but not months premature.

Q. O.K. so you didn't know anything about who delivered him or anything about tests done at birth or anything of that nature?

A. No. Well I did know that about the screening and the PKU because that was part of his, the newborn screening and they had discovered that he had PKU disorder and Ms. C. was aware of that.

Q. And so what if anything did you do from September 4th regarding assisting her in the care of G. to January, 2010?

A. At that time she had a Family Support Worker that was going in the home and working with her and I had been in contact with the I.W.K. and they didn't have any concerns at that time with her following through with the appointments and the blood work and everything that was required with G. and I had met with her and she was able to explain exactly, you know, what he needed in terms of his formula and things of that nature.

And then I go to the first time we are talking about the apartment being dirty. That is not particularly relevant to the point that I am about to make. I then go on to ask her about her involvement with the Child & Adolescent Services and she knew Dr. Sarakof and he is with Child and Adolescent

Services. She indicates:

A. As I understand he is, yes.

Q. And it's he that made the referral to the adult?

A. I believe so, yes.

Q. Did you ever speak to him?

A. No.

Q. And do you know when he made the referral?

A. No.

Q. But she saw him or did she see him before you made the decision for permanent care?

A. Well in March, 2010, she reported to me that she met with someone at Child & Adolescent Services, but due to her age she was to see someone at Mental Health Services, which she did, and then she said their recommendation was that she wouldn't need a psychiatrist but that she could see someone for individual counselling. Uh and then as I understand it, she connected with them at some point and was referred to Dr. Gillis.

Q. And have you spoken to any of the people along this chain?

A. No it was last week when her and I spoke that she had indicated she was connected with Dr. Gillis. I'm not familiar with him and she wasn't sure if he's a social...he's obviously not a social worker if he has a doctor before his name, but she was uncertain of specifically if he's a psychologist or a psychiatrist. I did look in the phone book and I wasn't seeing a Dr. Gillis. *(Judicial emphasis)*

Q. O.K. between March and October, 2010, you and she still had a dialogue, correct?

A. That's correct.

Q. So did she ask you for taxis for any of these appointments?

A. Uh she was in the fashion of phoning the Administrative Assistant for her taxis, which is typically what clients will do. They'll phone her and she'll approve their taxis.

Q. So she didn't tell you about any of the things she was doing from March until October last week?

A. Yes, not with respect to any kind of mental health or personal counselling.

Further on, and in relation to the relationship between Ms. C. and her children, I am asking her why [Ms. Kehoe] she did not assess risk for an openness contract before the permanent care and she goes into the policy of the Agency and she answers:

A. The Child in Care Unit would be in correspondence with the adoption unit to let them know that there is a permanent care hearing and the possibility that there may be children coming into permanent care and then from there they look at the current foster home to determine if adoption is an option there and then if not, they're looking at prospective adoptive parents that could meet the needs of the children and that is the point where we would have the risk on open-ness.

Q. Yes, I understand that's how, my question is why?

A. My understanding is that we need to have the order before we have that.

Q. O.K. do you believe that Ms. C. has a bond with the 2 (two) children?

A. Yes I do.

Q. So over here you believe she loves them?

A. Yes.

Q. And are you able to say if G. is young enough to be able to love her back?

A. I believe he would have a bond with her.

Q. And A. would?

A. Yes. She's maintained regular contact with them.

Q. What is regular contact?

A. Three times a week. It was an hour and a half.

And then there is a part that is not relevant. We go on to the next question.

Q. So over here we've got a mother who loves her children and her children have a bond with her?

A. Yes.

Q. She's got problems?

A. Yes.

Q. And over here we have unknown people, prospective adoptive parents, who we don't even know if they'll allow contact so you put a lot of faith on the fact that these people will be stable and nurturing, these unknown people?

A. Yes.

A question further on:

Q. O.K. so there would be, if you are successful in your application, there's going to be a lot of grieving isn't there?

A. Yes.

Q. Children are going to grieve?

A. I believe so.

Q. And she's going to grieve?

A. Yes.

Q. What have you done in your meetings on this to address that?

A. We would look at a gradual plan to decrease her access with the children and then monitor the childrens' reaction and how they are doing.

[6] When we examine the mother's timelines, the first disposition was March 28, 2010. Permanent care was mentioned for the first time on October 19, 2010.

The deadline is March 29, 2011. It is my overall impression, and I will go into it in some detail, that there has been an undue emphasis by the Agency in Ms. C.'s immaturity and in her lying and that that gave weight to the Agency's decision not to stay involved in a meaningful way in her life from October until the date of the Permanent Care Hearing a couple of weeks ago (January 12th & 14th, 2011). Unfortunately, for the assessment of this Court and for everyone involved in this matter, it is my impression - and this is based on a balance of probabilities for reasons I will go into later on - but in part, from the portion I quoted in the transcript, that the Agency personnel did not stay up-to-date on the progress that the Respondent was making and, therefore, was not aware of the Respondent's self-realization of her problems and so the Agency were not able to reconsider the Permanent Care Application due to its own self-imposed restrictions on the Agency personnel's interaction in a meaningful way with Ms. C.

[7] I will refer you now to the statutory onuses that are placed on the Agency and on all of us and that is contained in the Preamble. Section 9 and 13 deal with the Agency themselves. The *Act* provides:

> **WHEREAS the family exists as the basic unit of society, and its well-being is inseparable from the common well being;**
>
> **AND WHEREAS children are entitled to protection from abuse and neglect;**
>
> **AND WHEREAS the rights of children are enjoyed either personally or with their family;**
>
> **AND WHEREAS children have basic rights and fundamental freedoms no less than those of adults and a right to special safeguards and assistance in the preservation of those rights and freedoms;**
>
> **AND WHEREAS children are entitled, to the extent they are capable of understanding, to be informed of their rights and freedoms, to be heard in the course of and to participate in the processes that lead to decisions that affect them;**
>
> **AND WHEREAS the basic rights and fundamental freedoms of children and their families include a right to the least invasion of privacy and interference with freedom that is compatible with their own interests and of society's interest in protecting children 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 when it is necessary to remove children from the care and supervision of their parents or guardians, they should be provided for, as nearly as possible, as if they were under the care and protection of wise and conscientious parents;

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;

AND WHEREAS social services are essential to prevent or alleviate the social and related economic problems of individuals and families;

AND WHEREAS the rights of children, families and individuals are guaranteed by the rule of law and intervention into the affairs of individuals and families so as to protect and affirm these rights must be governed by the rule of law;

AND WHEREAS the preservation of a child's cultural, racial and linguistic heritage promotes the healthy development of the children.

...

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 the children.

(2) In all proceedings and matters pursuant to this Act, the paramount consideration is the best interests of the child.

[8] And then we go on to examine, of course, Section 3, which outlines what we examine when we are dealing with a child's best interests. In Section 3(2) I make reference, in particular, to:

(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;

...

> **(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;**

[9] The next relevant section is Section 9 of the *Children and Family Services Act:*

> **9 The functions of an agency are to**
>
> **...**
>
> **(b) work with other community and social services to prevent, alleviate and remedy the personal, social and economic conditions that might place children and families at risk;**
>
> **(c) provide guidance, counselling and other services to families for the prevention of circumstances that might require intervention by an agency;**
>
> **...**
>
> **(e) develop and provide services to families to promote the integrity of families, before and after intervention pursuant to this Act.**

[10] Section 9(e) is particularly relevant to the decision that I have made in this case.

[11] We will next reference Section 13 of the *Children and Family Services Act:*

> **Services to promote integrity of family**
> **13 (1) Where it appears to the Minister or an agency that services are necessary to promote the principle of using the least intrusive means of intervention and, in particular, to enable a child to remain with the child's parent or guardian or be returned to the care of the child's parent or guardian, the Minister and the agency shall take reasonable measures to provide services to families and children that promote the integrity of the family.**

Of particular relevance to this case are:

> **(2) Services to promote the integrity of the family include, but are not limited to, services provided by the agency or provided by others with the assistance of the agency for the following purposes:**
>
> **...**
>
> **(c) improving parenting skills;**
>
> **(d) improving child-care and child-rearing capabilities;**
>
> **(e) improving homemaking skills;**

[12] It is my view that the services under Section 13(2)(c), (d) and (e) were terminated prematurely or not properly canvassed by the Agency in relation to other services. In relation to Section 13(f), the services required to be performed by the Agency, or to be assisted by the Agency, are counselling and assessment. Basically I have no evidence of counselling provided by the Agency. It may well have taken place, but the evidence was not provided to this Court. Of importance, as well, is Section 13(2)(j), which states:

> **(j) self-help and empowerment of parents whose children have been, are or may be in need of protective services.**

[13] There was an acknowledged problem by everyone. It is not in dispute that Ms. C. has a problem with self-esteem and she has a problem with picking poor partners - no question about that. I find, and I will go into it in greater detail, that there has not been a consistent effort to help Ms. C. in this regard by the Applicant. Before I go any further in any analysis, I should indicate that Ms. C.'s background is not in dispute. Her life went along, it appears, reasonably solid until age 12 when her father died, then a series of events overtook her, as set out in Dr. Landry's report and in the material provided by the Agency. She appeared to have, at that time, a conflicted relationship with her mother and her brother and there was a step-father in the family. She found her mother was away from home a lot. Basically, she went out on her own at age 14 and was taken in by a family friend. Unfortunately, she began an intimate relationship with the son in that family and became pregnant at age 14 - giving birth to her first child at age 15. She went to Grade 9. It is unclear whether or not she did complete Grade 9.

[14] The central problem here is, in my view, and I find on the balance of probabilities, premature decision-making on the part of the Applicant, which is the best that I can conclude from the evidence. Active services, and I am not sure that they did exist up until October 4, 2010 by the Applicant, within the meaning of their mandate under Sections 9 and 13, the active services really ended October 4, 2010 upon the reading of Dr. Landry's report. I view Dr. Landry's report a Parental Capacity Assessment; basically as a road map to improvement. In Ms. C.'s situation, it became a road block to any further positive advancement. So it is important to read Dr. Landry's report. What did he say that caused the Agency to interpret his written report as...'This is it. No more temporary care.' No more active services. And, as we have just read from Ms. Kehoe on her questioning by the Court, she did not really think she had any real reason to be in touch with Ms. C. after she showed her the Landry report and told her the Agency was going for permanent care. The Landry report is **Exhibit #2** and we see at page 3 of that report that Ms. C. confided in Dr. Landry that much of her involvement with the Agency or her troubles with the Agency was due to "her boyfriend problems" and she notes that it was her involvement with partners and, in particular, the father of the children that resulted in her primary involvement, or her first involvement, with the Agency.

[15] Again, we look at Dr. Landry's report, page 5, second paragraph:

> **Ms. C. reports that she is not presently in a relationship, but she did have challenging relationships with Mr. W. and Mr. H. She reports that she did have social support from her Access Worker, Carolyn Forrest and Rhonda Latimer from the Family Place Resource Centre and she had some friends that were close. She has no current involvement in community groups but is participating in a number of groups to develop her skills, including stress management group, a parenting group and a group dealing with abuse. She notes that she has few past times other than spending time with her friends and watching television.**
>
> **... Ms. C. reports that she had some involvement with mental health services, with Child and Adolescent Services. She notes that she saw a psychologist, Peter Pierre and psychiatrist, Dr. Savinkov following a suicide attempt.**
>
> **... Ms. C. reports that she had a history of maltreatment. She notes that her brother was physically abusive to her. She reports that her parents knew that this was taking place and did nothing about it. She reports that it worsened after her father passed away and her mother wasn't around. She**

> **reports that in addition, that she was sexually assaulted when she was fourteen years of age. She reports that she sought counselling at Family Services but it was only for a short time.**

None of what I have just read is disputed. On page 8 of his report (and I placed emphasis on the last two paragraphs of that page under the heading "Summary"):

> **Her interpersonal relationships may be affected by her tendency to deny her more troublesome feelings and to withdraw from interpersonal relationships to deal with the build up of stress and tension. She notes that she has experienced myriad stressors including her marital separations, and the persistent conflict with her family of origin. It is likely that Ms. C. is pre-occupied with romantic relationships as a strategy to meet her dependency needs, especially in the context of a more immature adult role, one that is characterized by role diffusion or the failure to consolidate a more mature adult identity.**

[16] So there he is outlining, for whoever reviews that report, in a fair amount of detail, what her personal needs are, what he sees she needs to work on or have help in working on.

> **Ms. C. denies any current mental health concerns and her responses to the questionnaires would support the assertion that she is not experiencing any Axis 1 mental health difficulties presently. It certainly is the case that she may have some difficulty coping with stressful life events in the past and may be struggling with deeper psychological effects of her history of maltreatment. Ms. C. is at a stage in her development where she is beginning to develop her identity but has not yet developed a more "adult identity" with its roles and responsibilities and this is reflected in her own ambivalence with an adult role.**

[17] On page 9, which I incorporated in my decision making, re her ability to meet basic needs. Dr. Landry indicated, "There were no concerns raised about Ms. C.'s ability to meet the children's most basic needs. However, there were some concerns about Ms. C.'s ability to meet G.'s specific medical needs". That is a premise to his conclusion. When we review Ms. Kehoe's evidence on January, 2011, her main concern with Ms. C. was her selection of partners and her untruthfulness in relation to those partners. She did not have any real concerns in relation to G.'s medical needs. Indeed, Ms. C. was allowed under the Agency's watch from September until January (from G.'s birth on September, 2009 until the

apprehension in January, 2010) to find out the formula for PKU, administer the formula, and interface with the I.W.K. All of that was done by Ms. C. without incident. If there were any negative incidents, these were not provided in evidence. I put a reliance, as well, on Dr. Landry's report, page 9, **Exhibit #3**, under the heading *"Parental Affective Responses"* and he indicates:

> **There were no concerns raised about Ms. C.'s affective responses. She was very warm with the children and provided them with abundant attention. She was very sensitive to their cues for attention.**

[18] Under the heading: *"Behaviour management Skills"*:

> **Ms. C. notes that she is aware of some of the conventional means of discipline. During the access visit, Ms. C. was able to effectively organize the activities. She set limits effectively and was able to use distraction to ward off a temper tantrum.**

[19] Under the heading on page 10 of Dr. Landry's report, *"Disposition of the Parent toward the Child":*

> **Ms. C. reports that she loves the children very much and is anxious for them to return. This was evident during the access visit and evident by her nurturing behaviours toward the three children.**

[20] Further down under *"Environmental Issues"*, a subheading, *"Relationship to the Community"*, Dr. Landry reports:

> **Ms. C. does not generally participate in conventional social institutions such as religious institutions, school or extracurricular activities such as sports. Consequently, her values may not necessarily be conforming to more conventional values and she is likely to share the families of her extended family network. She has, however, been participating more recently in supportive groups.**

[21] Further, in the same report under the heading *"Parent's Use of Professionals/Agencies"*:

> **Ms. C. has reached out to support services to deal with her children's health difficulties before they were taken into care.**

[22] It is unclear at this stage, in my view, as to what Dr. Landry knew about Ms. C.'s attempts at remedial measures from August, 2010 onward. Dr. Landry concluded at page 11, mid-paragraph of the second last paragraph:

> **For example, she reports leaving her family home at 14 because of persistent family conflict and living with her boyfriend. She became pregnant at 14 years. These events may have contributed to more difficulty accepting a mature adult role and instead she may tend to be focussed on her own immediate emotional needs. <u>However, Ms. C. likely has the ability to work through some of these issues and to develop more adult roles given her abilities</u>. (Judicial emphasis)**
>
> **Ms. C. has been conscientious in following through with all of their requirements associated with her involvement with Children's Aid Society and the present assessment. She appears very motivated to parent the children. However, at the present time she does not appear to have the parental capacity present to care for the children independently and full time. She has the ability to parent the children and develop an appropriate attachment. Ms. C.'s psychological issues and lack of practical support make it more difficult to provide for the children effectively and ensure their safety. However, Ms. C. may be able to assume a more effective parental role if she deals with some of the issues outlined above.**

[23] I read his four points on the final page of that report to be his road map. It is my view that it was the Agency's role to assist in developing the ability that Ms. C. has that Dr. Landry writes about on the basis of the information that he was given (which I am not at all sure was complete in relation to some of the positive steps taken by Ms. C.). I will go into that possible void in some depth further in the decision.

[24] The Agency's role, as I indicated, was to assist in developing Ms. C.'s ability - the ability that Dr. Landry writes about - to advance, I believe, her capacity to parent. Instead, as I have indicated, his road map to develop Ms. C.'s capacity was treated as the trigger to apply for permanent care. There is no evidence of any other event that entered the Agency's consideration between the receipt of the Parental Capacity Assessment dated September 29, 2010 and the determination on October 4, 2010 to seek permanent care.

[25] I note that Ms. C. did work through seeking services on her own, with no assistance from anyone else, until she was able to connect with Mr. Gillis and to

commence work on problem areas. Mr. Crosby calls that "too little, too late". I accept, and it is not refuted, that Ms. C. attempted to start this service in March, 2010 and this would be after the Agency's first Plan was filed seeking temporary care and ultimately reunification, after the first disposition. There was a hold up in that. She did see someone, then she was referred to someone else. In any event, these steps did not work out too well for her but it was she who did the follow-up and she did finally connect with Mr. Gillis on her own, in both instances. The areas she asked Mr. Gillis to target (and this is her input to him) are adolescent trauma, self-esteem and past abuse. That is in keeping with what Dr. Landry had asked for in his report. So what does Dr. Landry say in *viva voce* to flesh out his report, or to say anything that is different from the report (Agency Plan, March 2010) or in addition to that Plan? Dr. Landry, on *viva voce*, indicates that his main concern is Ms. C.'s continued contact with poorly selected partners. This appears to be as a result of her immaturity. During *viva voce* evidence, Dr. Landry seemed not to have been provided with a detailed outline of Ms. C.'s many groups attended to correct her personal parenting difficulties. I am referring to the Court's transcript of Dr. Landry's evidence under questioning by Mr. Crosby, page 8:

> **Q. And her current...at the time that you conducted the assessment I guess is all you can speak of, what was her situation with respect to family support at that time?**
>
> **A. Well generally speaking, Ms. C. had described herself as being quite socially isolated from kind of practical social supports. There were some supports through, I believe, Transition House and the Family Place Resource Centre, but in terms of family or friends she reported having more limited social support.**

[26] As indicated, it appears from Dr. Landry's *viva voce* evidence that he did not have any detailed knowledge of her groups that she attended and the efforts she made to correct her personal and parenting deficits, which I find she did acknowledge. What she did to improve these deficits were explained in some detail by Ms. C. of the Family Place Resource Centre **(Exhibits #4 and #5)** and to a lesser, or at least unclear degree, by Ms. MacCormack, also from Family Place Resource Centre.

[27] I note that on direct examination, Dr. Landry, in his *viva voce* evidence, could not place a time-frame on Ms. C.'s advancement - what would be the time required for her to be able to parent, to develop the parental capacity. He is not

able to give an estimate in his report. Dr. Landry states that Ms. C. has not set vocational goals and that may well have been his view in September, 2010. However, it has been expressed to the Court, and not refuted, and somewhat corroborated by Ms. M.C.'s evidence, that Ms. C. has a job and has expressed a desire to this Court to only work on two areas - raising her children and working.

[28] I find that Ms. C. recognized, upon questioning, that her main problems are poor male selection and her false recounting to the Agency. She recognizes if she had gone to the Agency and indicated, "my problem with picking poor mates continues", the result for her with them may have been different. Dr. Landry is clear on direct evidence that he cannot estimate how long the therapeutic process will take for Ms. C. He would expect that, as of the date of giving evidence (which was two weeks ago - January 12, 2011), that she would have started the therapeutic process. I find that his expectations have been met by Ms. C. She has commenced the therapeutic process and attempted to commence it even earlier than his report. Ms. C. had continued involvement with the Family Place Resource Centre groups, as well as the Ann Terry Foundation, as well as her commencement with Mr. Gillis. She has done all this without any hands-on assistance by the Agency. Agency personnel have purported to adopt Dr. Landry's report, but they also conclude that Ms. C. does not have the ability to meet G.'s medical needs. Dr. Landry found that she did have the ability to parent, but does not yet have the capacity.

[29] Evidence from Ms. Kehoe and Ms. C. both confirm that she does have the ability to deal with G.'s medical needs. The Agency knew shortly after G. was born in September that he had PKU, but continued to allow her to parent until January, 2010 when her continued involvement with Mr. H. triggered the apprehension of both children. Ms. Kehoe said that the real concerns are now not her ability to parent G., but her problems with her partners. She agrees, and she accepts, that Ms. C. does not have a relationship with Mr. H. at the present time, but her concerns remain regarding her selection in the future.

[30] The Plan of the Agency appears to use terms "ability" and "capacity" interchangeably to mean the same thing. This is inconsistent with Dr. Landry's assessment of Ms. C.'s "capacity to parent" and "ability to parent", which are different things.

[31] I would like next to turn to Section 42 of the ***Children and Family Services Act***.

> **Disposition order**
> **42 (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.**

[32] When the Court is going to make an Order for Permanent Care or is asked to make an Order for Permanent Care, Subsection (4) comes into play:

> **(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.**

[33] Subsection 42(4) is almost impossible to determine on the evidence provided to me on this very important case. If Subsection 42(2)(a), which is the essential services, have not been provided, then a determination on whether there is going to be change in the foreseeable future cannot be made fairly. So all these services have to be attempted, orchestrated, worked on, overseen, facilitated. All of the above - some of the above - as appropriate for a 19 year old who has nobody for support, but wishes to parent. She has no supports and the Agency has stepped into her life as a wise and conscientious parent to her children. That would, at least, imply an active overseeing of what she was doing and a follow-through with her services.

[34] There is also confusion as to what Ms. C. thought she was allowed to do in relation to contact with Mr. H. According to Ainslie Kehoe's evidence, she advised Ms. C. that she was not to have any contact with Mr. H. with the children, without supervision. This would have taken place in approximately the Spring of

2010. Ms. Kehoe also indicated that the van incident occurred in July. Someone else referred to it as August, 2010. At that time, Ms. C. advised her this was not an issue because the children were not with her.

[35] Granted, it was certainly immature for Ms. C. not to realize there was risk driving a car that did not have appropriate plates and where she did not have insurance. I do not know about the state of her driver's license; but it was her clear understanding of what her contact prohibition had been from the Agency. When I examine the Orders that were in place here - the Order in effect as of June 21, 2010 was that there was no clause requiring no contact between B.C. and Mr. H. - so that's not contained in that Order. The September and October Orders of 2010 do not have a clause prohibiting contact between Ms. C. and Mr. H. I note in the Interim Orders (which is when Ms. C. had custody) that Ms. C. was not to allow Mr. H. to reside or have contact or associate, in any way, with the children. So there is a direct prohibition in relation to that in the Interim Orders. Once custody was removed, there was no restriction in subsequent Orders about Ms. C. having contact with Mr. H.

[36] I do not, for a minute, mean to imply that contact with Mr. H. was fine. What I do mean is that Ms. Kehoe indicates in her own evidence that the main point was not to have Mr. H. around the children. Ms. C., as we understand from Dr. Landry, has some verbal comprehension issues. She understood the prohibition to mean as long as the children were not there, she may have been okay. There is at least confusion in relation to what she knew and what she ought to have known. It was clear Ms. C. knew not to have the children with Mr. H.

[37] We next must examine the Plan and the Application of March 25, 2010. This is the first Disposition Plan of the Agency. Referring to pages 6 and 8 of that Plan, page 6, third paragraph states:

> **The objective of the Agency's intervention is to provide services to remedy the conditions which placed the children in need of protective services. The goal of this Agency Plan is for the Respondent, B.C., to obtain the necessary parenting style and lifestyle changes to enable her to meet her children's needs for supervision, safety, stability and nurturing. While Ms. C. has indicated that her long term plan involves resuming full time care and supervision of her children, it is the position of the agency that it is crucial that she participate in the services offered and that she demonstrate a consistent approach in parenting her children.**

[38] Page 8 of that same Plan, paragraph (d), the Agency indicated that Mr. H. had requested access. The Agency believed him to be the father of G. and his request for access to the children was granted.

[39] The *"Statement of the Anticipated Plan"*, (page 11) indicates:

> **The children, A.C. and G.C., have been in the Agency's care since January, 2010. It is the hope of the Agency that the Respondent, B.C, has acknowledged the major presenting problems and begin the process of problem solving.**
>
> **Significant progress must now be made in terms of Ms. C. stabilizing her personal circumstances, demonstrating a commitment to consistently being available for the children and being able to identify and meet the needs of the children.**
>
> **Final disposition will depend on the outcome and follow through with the current case plan and therapeutic intervention with the family. The engagement in the services offered and any progress observed.**

[40] That portion is relevant in that I have found that there was very little facilitation by the Agency from the date of that Plan (March, 2010) to the date of Dr. Landry's report (September 29, 2010), which triggered the Risk Assessment Meeting, which resulted in an Application for Permanent Care.

[41] There were some associations by Ms. C. with Mr. H. which I do find she knew the Agency did not want her to have during that same time period. However, it is not questioned by anyone that it was Ms. C. who referred herself, after that Agency Plan, and attempted to get some mental health counselling, saw a psychiatrist, and was referred to counselling. As well, after some strange time-gap, she was able to secure Mr. Gillis for counselling.

[42] Dr. Landry did not know about Mr. Gillis, and Ms. Kehoe did not know about the counsellor, Mr. Gillis. Ms. Kehoe had no involvement in assisting in acquiring these services, while at the same time Ms. Kehoe was concerned with Ms. C.'s immaturity. There was an inexplicable gap in the counselling and mental health services between March, 2010 when Ms. C. attempted, and her actual appointment with Mr. Gillis or first contact with Mr. Gillis, which was October 20,

2010. There is no evidence provided to this Court regarding the insistence, or even knowledge, the Protection Worker, Ms. Kehoe, had of this most important endeavour by Ms. C. This need was targeted in the Agency's own first Disposition Plan. Ms. C. attempted to secure counselling before Dr. Landry's report. The worker indicated that she learned of Mr. Gillis's involvement just before Court in January, 2011 and that Ms. C. had appointments with Mr. Gillis, who was not a doctor , but a clinical therapist.

[43] In any event, it was totally through the "immature" - Ms. C.'s own efforts that she made the first referral, that she followed through, that she reactivated the contact, that she met with Mr. Gillis and she continued with some of the services at the Family Place Resource Centre.

[44] The Protection Worker's absence of evidence, or absence of involvement with the 'hands-on assistance' to Ms. C., is inexplicable. It is, in my view, a great detriment to the Applicant's request for permanent care. The worker has also advised that Ms. C. must address her personal issues, but the worker was unaware when she gave evidence two weeks ago (January 12, 2011) , as to what Ms. C. attempted to do with courses and counselling, initiated by herself, including that she had commenced work. It is of concern that the worker was unaware of these developments until the week before the Permanent Care Hearing. This is a result of the misinterpretation, or the over-emphasis, of Dr. Landry's report and the confusion of terms re "ability" and "capacity". The Landry report, in my view, does not trigger a Permanent Care Application. What it does trigger is a recommended number of services that were necessary as of the date the report was received by the parties (October 4, 2010). There were still approximately six (6) months available to Ms. C. under a twelve (12) month term, with hands on assistance, to deal with these issues. Questioning of Ms. Kehoe, on cross-examination and this is paraphrased from my notes:

> **Q. Will it take longer than March 29th to correct Ms. C.'s concerns?**
>
> **A. Yes.**
>
> **Q. Is that your guess?**
>
> **A. Yes. As of last week she told the worker that she had 3 sessions, but the Minister accepts Dr. Landry's terms as to what she has to do.**

Q. Does she work now?

A. Yes.

Q. Full time?

A. Yes.

Q. She went to a psychologist?

A. Yes.

Q. She is trying to improve her situation for the children?

A. She has personal issues from adolescence and she needs to address personal issues herself before she can parent effectively.

Q. Regarding her involvement in Transition House?

A. She has not been forthcoming in her past regarding Mr. H.

Q. A question to the effect of has she refused services in the past? She has not refused services in the past?

A. Right.

Q. She has strong, positive attributes?

A. Yes.

Q. She loves her children and shows it?

A. Yes.

Q. She's not just acting?

A. Correct.

[45] While the Protection Worker advised the Court two (2) weeks ago that Ms. C. must address her own personal issues, the worker was unaware of what Ms. C. did and what she tried to do and what she initiated on her own. The worker actively sought out Ms. C. the week before Court when she interceded with a call from Ms. C. seeking assistance with taxis.

[46] Unfortunately, as well, for Ms. C., and again, inexplicably, the Family Place Resource Centre reduced her "at home sessions" just about the time that the permanent care decision was made from once a week to once a month.

[47] As well, I do have concerns in relation to Ms. MacCormack's (Family Place Resource Centre) comments that Mr. H. attended five (5) of the home visits. These visits ended November, 2010.

Onus of Proof

[48] The Supreme Court of Canada clarified the onus of proof in civil cases and what that means in **F.H. v. McDougall, 2008 S.C.J. No. 52** at paras 45, 46 and 49 as follows:

> **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 In the result, 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.**

[49] I find as a fact that Dr. Landry appears to have relied on the Agency reports as to the efforts made by Ms. C. to deal with her own personal issues. I find that the Minister's knowledge of Ms. C.'s efforts are flawed due to insufficient contact

with Ms. C. and insufficient follow through with her from approximately March, 2010 until October 4, 2010. There is evidence that there was a Family Skills Worker with whom she had a close relationship . I do not know what that person said to Ms. C. or what she helped her with. That person was not called, although I understand she was available. I do not have that evidence before me.

[50] It is my job to examine the onus on a balance of probabilities based on the clear and cogent evidence put before me, not to assume that the worker is right because she can tell me there is a Family Skills Worker who stopped doing "hands on parenting" once the Minister's decision was made, but that Family Skills Worker stayed on in the role of Access Supervisor. I do not have the power, nor would it be appropriate to discharge an onus on that type of weak evidence, which is hearsay and unreliable.

[51] The Applicant, in my view, has not discharged its onus as put forward by the Supreme Court of Canada on a balance of probabilities, that it is in G. and A.'s best interests to be placed in permanent care. The Plan, which was received the day prior to this Trial, although it was known as of October 4, 2010, that was the bottom line of the Agency's position. The Applicant's Permanent Care Plan and the *viva voce* evidence of Ms. Kehoe proved to me that the Applicant has not proven, on a balance of probabilities, that the least intrusive remedies have been tried and failed. These remedies have not been tried, and there is a statutory onus to do so. I have already quoted Sections 9 and 13, to outline what the Agency is to do. They are not to complain that someone is an immature 19 year old with an unfortunate background and then say, "Well, she is immature but let her arrange her own counselling", or to sit down with her the same day and tell her you (as the Agency) are no longer going to be on her side or assisting her in any way, but that you are seeking permanent care and that if she ever wants to marry and have children, she ought to follow Dr. Landry's report. Dr. Landry's report itself appears to have been misinterpreted by the Agency in relation to "capacity" versus "ability" and this misunderstanding, along with the failure to try remedies and to oversee remedies, and to render assistance with remedies and to be up-to-date in the recall of measures taken to the person performing the Parental Capacity Assessment is, of course, a concern.

[52] There is also no proof, on a balance of probabilities, that there could not have been sufficient change in the foreseeable future. However, I find that the Minister, on a balance of probabilities, through its misinterpretation of Dr.

Landry's Parental Capacity Assessment, has effectively allowed the meter of time to run out. I find that the efforts made by Ms. C., on her own, are consistent with Dr. Landry's recommendations and were undertaken prior to Dr. Landry's recommendations, but that the Minister was substantially unaware of the steps. It is not appropriate to put the onus on Ms. C. to communicate all steps with the Agency. It is the Agency's job, as a wise and conscientious parent, to oversee what Ms. C. is doing and to respect the integrity of the family. I indicate, further, for all the reasons given and, particularly, the failure of the Agency to provide the least intrusive avenues and the absence of support, the absence of knowledge, that the request before the Court on October 19, 2010 and heard by the Court on January 12th and 14th, 2011 for permanent care is premature. I order a Temporary Care and Custody Order with full support to be placed behind Ms. C. I note that the time for Ms. C. to correct her parental capacity issues has been drastically shortened from October 4, 2010 to January 12, 2011. This is more than four (4) months in a twelve (12) month time period in which the Minister has been inexplicably uninvolved in any active role. If there was any indication that recommendations in Dr. Landry's report were acted upon by the Minister in a manner in keeping with Sections 9, 13 and 42(2) of the *Children and Family Services Act*, as quoted, such evidence has not been made available to the Court in the days of evidence that we heard this matter.

[53] I find, as well, and I have not underestimated, that Ms. C. was untruthful with the Minister on at least three (3) occasions in relation to Mr. H. I appreciate that she has unfortunate selection in male friends. I accept Ms. C.'s evidence that she sees that she has issues with her partner selections, but she accepts and wishes to explore her ability to parent. The Minister's role is to assist in this journey - not to use her deficits as a road block, especially when all agree that she loves her children and her children love her. This is a bond and it is a bond we know exists. She can and has taken care of G. as required from the time of his birth until the time of apprehension, from September, 2009 to January, 2010. She has co-operated with everything that was requested by the Agency, with the exception of her selection in partners. She has indicated to me that she does believe if she had been honest with the Agency, the Agency might have assisted her in counselling as to why she wants to have such poor partners but, on her own, she has engaged with Mr. Gillis to deal with these same issues. I accept that she is trying to deal with this critical issue and this is the central issue of the Agency's concern, not her physical care of the children. This is the critical issue, and it has been, at least since October and November, 2010. It certainly was unwise of her to continue in

any counselling group that contained Mr. H. I accept she knows she cannot involve herself with any other partners until she obtains necessary counselling to deal with her self-esteem issues or a continuation of the counselling that she herself has set in motion. I accept that she has acknowledged it was wrong to lie to the Agency regarding her partners. It has taken some time to get this message across.

[54] I find that this journey of awareness for Ms. C., which has been abbreviated by the Minister prematurely withdrawing support from March until October. It is not sufficient for the Minister to delegate responsibility to various persons and then not to bring those services back to the worker responsible, and from that worker to the Court, and more appropriately, from the people offering the services under the Minister's umbrella. So, if there is a Family Skills Worker who had "hands on" dealings with Ms. C., it certainly would have been appropriate for the Court to have heard from that person. I do not know what she would have said, but I do have a void in the evidence which is fatal to the Agency's case. I have no direct evidence of hands-on-support to Ms. C. since October 4, 2010. As indicated, if such support did exist, it was not brought to my attention. The Minister's Application for Permanent Care is, therefore, denied. The Minister has not made out its case on a balance of probabilities as required by the law. The Minister is now responsible to examine what to do with the fact that the time-frame for Ms. C. to correct her problems has been inappropriately and inexplicably abbreviated by a premature decision by the Minister's personnel to seek permanent care on October 4, 2010 following the Landry report, which as I have indicated is not what the Landry report purports. Unfortunately, the Landry report does not contain all the services that Ms. C. herself attempted.

[55] Access between Ms. C. and the children will continue and a Temporary Care and Custody Order will be put into place. I will hear from Mr. Crosby after he has had time to consider my comments in this decision as to what he proposes to remedy the situation, if anything. We can go through the same exercise the end of March, 2011 - the end of the time-lines. If that would be fair, I do not know. If I am correct, and I believe I am, through the evidence put forward, that there ought to have been services continued from October 4, 2010 onward for Ms. C. and these services were not. At least there is no evidence they were. The Agency has restrictively interpreted, and erroneously interpreted, Dr. Landry's comments as is borne out by his *viva voce* evidence. The Minister is left in the position of, "How do we play catch up?", "How do we catch up?", or "Do we just do this all over again?" - possibly, with the evidentiary voids filled, if that can be done. I do not

know, but there is a serious problem here. It is a very serious problem of communication, compliance with Section 9, Section 13, Section 2 and the Preamble.

[56] For all those reasons, and having reviewed the case law thoroughly, that is my decision.

[57] The draft Oral Decision was transcribed and circulated on February 2, 2011. The following Addendum was forwarded to counsel on February 4, 2011:

> **NOTICE:**
> **Decision of Friday, January 28, 2011 was not read or edited by me due to urgency of conclusion and distribution to the parties. This urgency was appropriately expressed by Mr. Crosby's request of January 28, 2011 for a typed copy of the decision. When time permits I will provide an edited copy. The bottom line and findings of fact remain the same only the format will be altered. This notice refers to written decision circulated on February 2, 2011.**
>
> **ADDENDUM**
> **I accepted Ms. C.'s evidence on a balance of probabilities that she was not pregnant as of January 14, 2001. This finding should have been made at the time the oral decision was rendered.**

M. Clare MacLellan
J