SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Nova Scotia (Community Services) v. R.F., 2012 NSSC 125

Date: 20120402
Docket: SFHCFSA-072635
Registry: Halifax

Between:

Minister of Community Services

Applicant

v.

R.F. and S.M.

Respondents

AND

Date: 20120402
Docket: SFH-MCA 079265
Registry: Halifax

Between:

B.W.

Applicant

v.

R.F. and S.M.

Respondents

Revised Decision: This decision of April 10, 2012 replaces the previously released decision.

Judge: The Honourable Justice Elizabeth Jollimore

Heard: March 5, 6, 7, 8 and 23, 2012

Counsel: Jean V. Webb for Minister of Community Services
Samira Zayid for R.F.
S.M. on his own behalf
Colin M. Campbell for B.W.

By the Court:

Introduction

[1] There are two applications before me. The first is an application by the Minister of Community Services pursuant to section 46(5)(a) of the *Children and Family Services Act*, S.N.S. 1990, c. 5. The second is an application under section 18 of the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160.

The applications, the parties and the relief sought

[2] The Minister's application is brought against Ms. F and Mr. M who are the parents of seven year old C. Initially, the application also related to another child, Ms. F's child B. Mr. M isn't B's father. The application relating to B was resolved by an agreement that B would live with his maternal grandmother, subject to terms outlined in an order under the *Maintenance and Custody Act*.

[3] The deadline for determining the Minister's application is April 7, 2012.

[4] The *Maintenance and Custody Act* application is brought against Ms. F and Mr. M. The applicant is Ms. F's mother, Ms. W. To be clear, Ms. W is C's maternal grandmother and B lives with Ms. W.

[5] The Minister asks that I "terminate its child protection proceeding in favour of an order under the *Maintenance and Custody Act*" that places C with Ms. W. Pursuant to the proposed order, C's contact with Ms. F would parallel B's contact with her. Mr. M's contact with C would, the Minister asks, be supervised by Mr. M's mother. Both Ms. F and Ms. W support the Minister's request.

[6] Mr. M agrees that the Minister's application should be terminated. He seeks to have C in his custody. Mr. M opposes Ms. W's application for custody. He proposes that Ms. F would have access with C, but that her access would be supervised by someone other than Ms. W.

Family history

[7] Ms. F and Mr. M began to cohabit in January 2003 when B was approximately two and one-half years old. C was born at the end of 2004.

[8] Ms. F and Mr. M describe their relationship as "turbulent" and "volatile". There were arguments, yelling, name-calling and foul language. Each described violence by the other. In February 2005, Mr. M was charged with assaulting Ms. F. Following this, they separated. Mr. M was convicted and placed on probation.

[9] The two reconciled in the spring of 2007. In September of that year, following an argument with Ms. F, Mr. M was charged with two counts of uttering threats to cause bodily harm or death, one count of uttering threats to damage property and one count of criminal harassment. At that point, Mr. M left their home. This separation has been permanent.

[10] During their break ups and after their final separation in September 2007, C remained with Ms. F. There were various orders pursuant to the *Maintenance and Custody Act* relating to C. I was provided with orders from the spring of 2008, the summer of 2008 and early 2010. Ms. F's evidence and the language of these orders indicate there were additional orders that have not been provided to me.

[11] The final *Maintenance and Custody Act* order relating to C was granted in January 2010. C was placed in his mother's primary care and custody. C had access with Mr. M every weekend from Friday afternoon until Sunday afternoon, except the last weekend of the month. In May, C would spend the Mother's Day weekend with Ms. F instead of the final weekend of the month. This general access pattern was suspended at Christmas and at Easter, and these holidays were to be divided between the parents. As well, special arrangements were in place for contact between C and Mr. M on Hallowe'en, C's birthday and Father's Day. If the parents agreed, there could be additional access. There was a history of Mr. M having additional weekday access. This was close to a shared parenting arrangement.

[12] The order stated that Mr. M was to "refrain absolutely from consumption of non-prescription drugs or alcohol while caring" for C and each parent was to ensure that C's medication would travel with C on visits. If either parent forgot the medicine, that parent would be responsible for delivering it to the other.

[13] While this litigation was ongoing between the parents, there were various referrals to the child welfare authorities (which I'll refer to as the "Agency") from Mr. M, Ms. F and Ms. W. When the police were called by either parent, the police made referrals. As well, a teacher made a referral about Ms. F.

[14] Most of Mr. M's referrals to the Agency were not investigated. In some cases this was because the referrals were not of sufficient severity to engage the Agency's mandate under the *Children and Family Services Act*, in other cases it was because they were "referrals of questionable motive": referrals thought to be intended to advance Mr. M's cause in the parties' ongoing litigation. Of course, the failure to consider these referrals means it isn't possible for me to know whether any were valid, particularly those which were thought to be intended to advance Mr. M's cause in the litigation with Ms. F.

[15] A number of Mr. M's referrals were investigated: Ms. F transporting C without a car seat; her boyfriend uttering threats against Mr. M; Ms. F babysitting children in her home and leaving them (and her own children) unsupervised; and Ms. M smoking in C's presence.

[16] In mid-January 2010, just shortly after the final *Maintenance and Custody Act* order was issued, the Agency closed its file. A letter was sent to Mr. M telling him that the Department of Community Services was concerned about "the emotional impact" on C of his conduct. He was

told that "[m]aking a questionable report [. . .] contributes to putting the children in the home at risk of emotional harm and distress." I'm unsure how there was a risk of emotional harm and distress on the children where the Agency wasn't investigating most of Mr. M's referrals. He was referred to the section of the *Children and Family Services Act* dealing with the offence and penalties for making false and malicious reports to the Agency.

[17] Two weeks later, Ms. F sought admission to the Abbie J. Lane Hospital because she was experiencing psychotic-like symptoms: hearing voices and paranoid responses. Ms. F said that she'd slapped C. The hospital social worker made a report to the Agency.

[18] On the day after Ms. F's hospital admission, C was with his father for the weekend and, according to the Agency's case recordings, Ms. F called the police to have C removed from his father's care while she was in the hospital. The police declined to do so. As soon as Ms. F left the hospital, she again asked the police to remove C. They did not. Mr. M returned C to Ms. F after the Agency concluded its investigation into Ms. F's circumstances.

[19] Following Ms. F's departure from the hospital, the Agency made announced and unannounced visits to her home. Concerns related to her drug use, the children's diet (insufficient or inadequate food sent to school and at home) and her boyfriend's criminal associations or behaviour. Over the following months, there were a number of referrals by Mr. M, Ms. W and the police about Ms. F which were investigated. By the end of March 2010, the Agency decided that Ms. F and the children were in need of long term services. Then the school reported that B (then aged nine) had thoughts of suicide. Counselling was arranged for B and Ms. F arranged for B to live with Ms. W until the end of the school year.

[20] In early June 2010, Ms. F reported to the Agency that she was again hearing voices. The Agency raised the prospect of C living elsewhere for two weeks while Ms. F's mental health could be stabilized. To avoid conflict between Ms. W and Mr. M, Ms. F suggested C live with his father as C had earlier in the spring.

[21] The Agency asked Mr. M if he would agree to take C into his home on a temporary basis. Mr. M wanted a letter from Ms. F confirming this arrangement or a court order: in the past Ms. F had left C with him voluntarily and then, part way through the child's stay, sent the police to collect C. Mr. M wanted to avoid this. Ms. F wasn't willing to provide a letter. When informed of this, Mr. M said he would take C without a letter or court order. By this point, the Agency was unwilling to place C with Mr. M and placed C with Ms. W.

[22] Ms. W says an Agency worker asked her not to tell Mr. M that C was living with her. Mr. M believed C was living with Ms. W on a short-term basis, just as he'd been asked to care for C.

[23] During the summer of 2010, the Agency arranged counselling for C with Sara Lamb.

The child protection application

[24] A risk management conference was held on October 15, 2010. In her initial affidavit in support of the child protection application, Suzanne Mercer, an Agency social worker, deposed that the Agency decided to bring the application "[d]ue to concerns over [Ms. F]'s lack of commitment to fully participate in the services recommended by the Agency and [Mr. M]'s emotional instability and inability to manage his anger". At a later risk management conference, according to Ms. Mercer, consideration was given to Mr. M's

> . . . making numerous invalid reports against [Ms. F]. And in considering [Mr. M]'s agitation and volatility with Agency staff when his son is present, and knowledge of [Mr. M]'s actions behaviours during access pick up and drop off.

[25] The original Notice of Taking into Care, dated October 27, 2010, identified sections 22(2)(b),(g) and (ja) of the *Children and Family Services Act* as the bases for the Minister's application.

[26] In general terms, these sections refer to a substantial risk that children will suffer physical harm inflicted or caused by a parent or caused by the parent's failure to supervise the children adequately [s. 22(2)(b)]; a substantial risk that children will suffer emotional harm (demonstrated by severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour) and the parent doesn't provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm [s. 22(2)(g)]; and a substantial risk that children will suffer physical harm caused by chronic and serious neglect by a parent, and the parent doesn't provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm [s. 22(2)(ja)].

[27] The Notice of Child Protection Application was filed October 28, 2010 and repeated these statutory references. The application sought to have B and C placed with Ms. W, and outlined the terms of cooperation, compliance and access imposed on Ms. W by that arrangement. The application sought an order for supervised access by each parent. Orders for various referrals were sought with regard to both parents: a substance abuse assessment; individual therapy and counselling; and random urine drug testing. For Ms. F, an order for a mental health assessment was sought. For Mr. M, the Minister sought an order that he self-refer to New Start Counselling for an assessment regarding anger management. In every case where an assessment was sought to be ordered, the request included an order that the parent follow any recommendations flowing from the assessment.

[28] Certain production orders were sought. With regard to Ms. F, records from the Abbie J. Lane Hospital, from Dr. Aziz, Dr. Muhsin and Joyce Lyons were sought. With regard to Mr. M, records from New Start Counselling were sought. The records of both parents from N.S. Medical Services Insurance and the Halifax Regional Police were requested. With regard to the children, records were sought from the Halifax Regional Police, Dr. Aziz, Dr. Muhsin, N.S. Medical Services Insurance and the Halifax Regional School Board.

The five day hearing

[29] Both Ms. F and Mr. M were represented by counsel at the five day hearing. They consented to an order on the basis that there were reasonable and probable grounds to believe that B and C were in need of protective services and the children were placed with Ms. W on November 1, 2010. Supervised access was put in place for each parent.

[30] At this stage, Ms. F was willing to consent to all the production orders the Minister sought. She also consented to an order that she self-refer for a mental health assessment, submit to random urine drug testing and be referred for individual therapy and counselling.

Completion of the interim hearing

[31] Completion of the interim hearing was scheduled for November 15, 2010: Ms. F was present, while Mr. M had injured his hand and was at the hospital emergency room. His counsel didn't have instructions on some of the relief that the Minister was requesting, but said that Mr. M was contesting C's placement with Ms. W and sought to have C in his care. A placement hearing was scheduled for March 16 and 17, 2011. In Mr. M's absence, completion of the interim hearing was adjourned to November 25.

[32] On November 25, 2010 the interim hearing was completed with the parents' consent. Mr. M was present. The children remained with their maternal grandmother, having supervised access with their parents. Mr. M consented to the production of his Halifax Regional Police Department and New Start Counselling records. He also consented to the production of C's Halifax Regional School Board records, medical, MSI records and any Halifax Regional Police records relating to C. At this hearing, Mr. M's lawyer raised the issue of the anger management counselling: Mr. M was more than willing to participate in an assessment, but felt that New Start was not the appropriate place.

[33] As a result, the interim order provided that Mr. M would "be referred for individual therapy and counselling for anger management" rather than to New Start Counselling. He was also ordered to "self-refer for a mental health assessment".

The protection hearing

[34] A conference was held on January 17, 2011 prior to the protection hearing. Mr. M wasn't present and his counsel had no instructions. The deadline for the protection hearing was January 26, 2011, so the matter was adjourned to January 24. However, Mr. M's counsel still had no contact with him and no instructions on that date.

[35] A finding that the children were in need of protective services based on section 22(2)(g) of the *Act* was made on January 24, 2011 with Ms. F's consent. Mr. M's counsel appeared on his behalf: she had no instructions from Mr. M to consent to or oppose the order. Mr. M wasn't present. I made the protection finding pursuant to section 22(2)(g) of the *Act* on the basis of the evidence contained in the affidavits filed on the Minister's behalf. The protection order continued the terms of the interim order that Mr. M would "be referred for individual therapy and counselling for anger management" and that he would "self-refer for a mental health assessment" as he had earlier agreed.

[36] In this context I should note paragraphs 29 to 32 of the Court of Appeal's decision in *Nova Scotia (Community Services) v. B.L.C.*, 2007 NSCA 45. There, Justice Bateman's reasons remind me that "Consent findings of protection are an efficient procedural tool which avoid early stage litigation and facilitate a focus on remediating the parenting issues." This, of course, is true of Ms. F who consented to the protection finding. Mr. M did not consent to the protection finding. I made the finding in his absence and without evidence or submissions on his behalf as to the appropriate finding.

[37] Justice Bateman noted that at the protection hearing there's no agreed statement of facts. Typically, the only evidence is provided in affidavits from Agency staff and, as Justice Bateman said at paragraph 29:

> It is impossible to know which, if any, of the affidavit's factual assertions are admitted by the mother. At the disposition hearing [the mother] cannot dispute that the child was in need of protective services but she may well take issue with the factual basis for that finding and may maintain that she has adequately addressed the issues leading to the child's need for protection.

[38] Because the dates for the placement hearing were approaching, deadlines were fixed for filing affidavits.

[39] On February 22, 2011, I granted a motion by Mr. M's lawyer to withdraw. Since then, Mr. M has acted on his own behalf.

[40] On March 10, 2011, the Minister's counsel wrote to the court, stating that Mr. M had advised the Agency that he no longer wished to participate in a placement hearing, so this hearing was cancelled.

The disposition hearing

[41] The Minister moved for a disposition order on March 11, 2011, seeking an order pursuant to section 42(1)(c) of the *Act* that the children remain in Ms. W's care "with the consent of [Ms. F]" subject to the Minister's supervision. The Agency filed its Plan for the Child's Care. According to the Plan, neither parent had begun random urine drug testing: each wished to delay the start of testing. The Plan said that Mr. M planned to start "urine collection in a month which will give him enough time for the marijuana to be out of his system". Ms. F's self-referral for mental health services was underway. Ms. F was receiving "in home" parental instruction weekly and during her access visits. Mr. M had self-referred to Community Mental Health Services and was on the wait list.

[42] The goal of the case plan "will continue to be measured by the Respondents' abilities to commit to their children and adhere to" certain conditions. As they related to Mr. M, the conditions were that he:

a. refrain from the use of non-medically prescribed drugs and the use of alcohol;

b. co-operate with random drug testing and be available to provide urine samples as requested for drug-testing purposes;

c. participate with Addiction Prevention and Treatment Services for assessment and treatment (if required) with regard to resolving personal issues regarding drug use;

d. attend anger management counselling;

e. self-refer to Community Mental Health Services for a mental health assessment and, if recommended, treatment to address personal and mental health issues that impact his ability to parent;

f. continue to consistently attend scheduled visits with C;

g. continue to consistently attend all scheduled appointments with his case worker and others, providing essential information on a timely basis and following through with reasonable requests, directions and recommendations; and

h. conduct himself appropriately and respectfully in communicating with Agency staff.

[43] To be clear, these are the conditions determined by the Agency. As well, these conditions are not reflected in the various court orders: at no point was Mr. M ordered to "participate with Addiction Prevention and Treatment Services for assessment and treatment (if required) with regard to resolving personal issues regarding drug use", nor was he ordered to "refrain from the use of non-medically prescribed drugs and the use of alcohol". Similarly, there were no orders compelling him to attend scheduled visits with C, to attend visits with his case worker or to "conduct himself appropriately and respectfully in communicating with Agency staff."

[44] On March 16, 2011 there was a pre-trial conference prior to the disposition hearing scheduled for April 7, 2011. All parties were present and there was discussion about the matter's progress. Mr. M didn't appear at the disposition hearing on April 7, 2011. Ms. F consented to a supervision order and, in Mr. M's absence, I granted the order which repeated the requirements that Mr. M would "be referred for individual therapy and counselling for anger management" and that he would "self-refer for a mental health assessment" as he'd earlier agreed.

Review hearings

[45] The first review of the supervision order occurred on July 11, 2011. Mr. M appeared and said that he had been willing to continue with the anger management counselling arranged by the

Agency with Jacqueline Barkley, but Ms. Barkley had decided not to continue it. He said that the Agency had not seen him do anything inappropriate in front of C. The order from this hearing stated that Mr. M would "be referred for individual therapy and counselling for anger management" and that he would "self-refer for a mental health assessment".

[46] A second review of the disposition order occurred on September 28, 2011. By this point, Mr. M had referred himself for a mental health assessment on two different occasions: February 22, 2011 and July 11, 2011. He arranged a third appointment on September 6, 2011 but it's unclear whether he attended this appointment. Because Mr. M told mental health service providers that he didn't feel he needed an assessment and it was compelled by a court order, the service providers wouldn't conduct an assessment. Mr. M authorized Agency staff to speak with his physician.

[47] At the September hearing, Mr. M expressed various concerns about C's placement with Ms. W. I suggested Mr. M file a motion to review the disposition order. In the absence of a motion from Mr. M, but as a result of these concerns, the next review was scheduled in November 2011, though it would typically not be expected until January 2012. The order following the September review continued the terms that Mr. M would "be referred for individual therapy and counselling for anger management" and that he would "self-refer for a mental health assessment". The language relating to the mental health assessment was not modified to address the difficulties that Mr. M experienced in attempting to refer himself for an assessment, but the Minister and Mr. M were aware of those difficulties because they were discussed in court on September 28, 2011 and there are other similar discussions documented in the Agency's case recordings.

[48] At the November review, a commencement date was set for Mr. M's random urine drug testing and the duration of the testing was agreed upon. Mr. M reported there were difficulties in C's medication travelling with him for visits. An organizational conference, a settlement conference and trial dates were scheduled. The November 10, 2011 supervision order continued the anger management therapy and mental health assessment self-referral provisions. The order also stated that Mr. M would submit to random urine drug testing for a five week period beginning December 14, 2011.

[49] The organizational pre-trial conference began on January 20 and was continued on February 2, 15 and 22 to organize matters relating to the trial such as the attendance of witnesses, filing deadlines and Ms. W's newly-filed *Maintenance and Custody Act* application.

This hearing

[50] Four organizational pre-trial conferences pre-dated the trial. At these I directed the Minister to *sub peona* as witnesses those whom the Minister contracted to provide services to the family. In my experience the Minister usually arranges the attendance of such witnesses, though here the Minister was requiring Mr. M to make these arrangements.

[51] At the January 20, 2012 conference, there was discussion of having Jacqueline Barkley testify about Mr. M's counseling. Following this conference I prepared a memorandum of filing

and other deadlines which I provided to each party. It directed that the Minister provide the parties with its witnesses' affidavits and "its exhibits (case notes, reports, documents produced pursuant to Orders to Produce, etc)" on February 10, 2012. Ms. F and Mr. M were to file their responding affidavits on February 21, 2012.

[52] The Minister failed to file affidavits from Ashley Lekas, who is Mr. M's social worker, and Angela Jones, the Dartmouth District Office's Casework Supervisor by its February 10, 2012 deadline. These affidavits were filed on February 22: the day *after* Ms. F and Mr. M filed theirs. This meant that Ms. F and Mr. M didn't have the opportunity to address this evidence in their affidavits.

[53] The parents were to file their own affidavits simultaneously on February 21, so neither of them was able to respond to the others'.

[54] I determined that each of the parents would be able to testify in response to the material that was filed late and to each other's affidavit.

[55] The Minister's counsel spoke with Ms. Barkley on February 22, 2012. During this conversation, Ms. Barkley mentioned preparing a report about her most recent involvement with Mr. M from August 31, 2011 to November 20, 2011. Of course, by the time of this conversation, the Minister's filing deadline had already passed.

[56] On February 22, 2012, the parties appeared before me for the last organizational pre-trial conference. At this conference there was no mention that Ms. Barkley might be filing a report.

[57] Ms. Barkley sent her report to the Minister's counsel electronically in the late evening hours of Monday, February 27, 2012. When the Minister's counsel opened this email on February 29, 2012, she forwarded the report to Ms. F's counsel. She did not forward the report to Mr. M. She did not make him aware that she'd received the report. She did not file the report at the court, aware that she would be required to seek leave to admit the report, given its lateness.

[58] When the hearing began on March 5, 2012, Mr. M was given a copy of Ms. Barkley's report while we were in the courtroom. The Minister's counsel asked that the report be admitted, saying that it "goes to the heart of the matter". Regardless of its argued relevance, I was not told of any earlier efforts to make Mr. M aware of the existence of the report or its contents. Mr. M learned of the report only as the trial began and five hours before Ms. Barkley was scheduled to testify. At Mr. M's request, I adjourned Ms. Barkley's testimony for one day to allow him to review the report, to prepare for her testimony and to prepare his cross-examination of her.

[59] The hearing came before me during the week of March 5 to 8, 2012. The Minister's witnesses were Agency staff Ashley Lekas, Angela Jones and Suzanne Mercer. There was testimony by others who provided services to the family: Clara Coward (who provided parent education and individual counselling services to Ms. F), Sara Lamb (who counselled the children), Jacqueline Barkley (who provided anger management counselling to Mr. M) and Anne Hartling-Briggs (Ms. F's family skills worker). Ms. F, Ms. W and Mr. M all filed affidavits and were cross-examined.

[60] At the beginning of the hearing, I confirmed that no briefs were filed by any of the parties. I expressed my concern that the failure to abide by the Civil Procedure Rules' requirement to file a brief put Mr. M at a disadvantage in conducting the hearing. Briefs were filed by the represented parties prior to March 16 and I heard final argument on March 23.

Concerns relating to Mr. M

[61] At the start of the child protection proceeding, the Minister wanted Mr. M: to be referred for a substance abuse assessment, therapy, counseling and treatment; to submit to random urine drug testing; to be referred for individual therapy and counseling; and to self-refer to New Start Counselling for counseling and treatment for anger management issues.

[62] There has never been an order that Mr. M refer for a substance abuse assessment, therapy, counseling and treatment or that he, in general, be referred for individual therapy and counseling though, as events transpired, he was referred to individual therapy and counseling for anger management.

[63] At the risk management conferences where the Agency determined that a child protection application should be made, the concerns relating to Mr. M were his:

a. "making numerous invalid reports against [Ms. F]";

b. "emotional instability and inability to manage his anger";

c. "agitation and volatility with Agency staff when [C] is present"; and

d. "actions behaviours during access pick up and drop off".

[64] The witnesses' affidavits and testimony and the documentary exhibits make it possible to assess these concerns so I can better understand the situation in 2010 when the child protection application began. Essentially, there are two complaints: Mr. M's repeated referrals about Ms. F and his emotions (instability, anger, agitation and volatility), particularly in the presence of C.

[65] With regard to "numerous invalid reports against [Ms. F]", I've noted at paragraphs 13 to 15, that most of Mr. M's referrals were never investigated. The case recordings indicate the referrals weren't investigated because they were of insufficient severity to engage the Agency's mandate or because it was thought that the referrals were intended to advance Mr. M's position in his litigation with Ms. F. Because many of the referrals didn't pass the Agency's threshold for an investigation, the Agency didn't confirm whether they were true. The case recordings note that once when Mr. M made a report, he said his lawyer told him to report to the Agency. At another point, Mr. M said that he was working on building a case for custody and "his lawyer will likely subpoena the information that is reported". He later said that he was recommended by the judge who dealt with Ms. M's *Maintenance and Custody Act* application to contact the Agency if he had any concerns relating to C's care when with Ms. F.

[66] In cross-examination, it was suggested that Mr. M had made "hundreds" of referrals to the Agency. Mr. M was prepared to admit that there might be one hundred referrals. There were no referrals in 2004. In 2005, he made five calls. Some of these calls arose because Mr. M sought information about an earlier referral he'd made to the Agency. His next referral came in early 2008. This is when he explained (according to the case recordings of January 14, 2008) "he was recommended by the judge to contact the agency should he have any concerns related to [C]'s case when in the care of his mother". From January 2008 to December 2009, Mr. M made sixteen referrals. Notably, in these referrals, Mr. M raises one issue repeatedly: C is left with Ms. W and Ms. F has told him that Ms. W was physically abusive to her when she was a child.

[67] Mr. M admits that he's been agitated and irate with staff at the Agency. Initially, this related to the fact that C had been placed with Ms. W for a much longer period than he had thought and he had not been advised C was seeing a counselor. On September 22, when Suzanne Mercer first met with Mr. M, she told him she hadn't read the full file. At that point, she'd had responsibility for the file (and thirteen others) for twenty-one days since she'd returned to work following a year-long educational leave.

[68] Shortly thereafter, Mr. M met with more members of the Agency's staff. The case recordings from a meeting on October 8, 2010 state a suspicion that Mr. M had been drinking. He was confronted about this and he denied it. When Mr. M left the meeting, one staff member called the police. Mr. M was stopped by the police who concluded that he wasn't under the influence.

[69] The claim that C was present when Mr. M demonstrated "agitation and volatility with Agency staff" is not borne out by the case recordings. During a meeting on February 3, 2010 when Mr. M and C were both at the Agency office there was no reference to Mr. M being agitated or volatile. Later that year, on October 8, 2010 Mr. M was described as leaving a meeting "in an agitated state" where he "refused to calmly or rationally discuss the custody order" in Suzanne Mercer's affidavit. According to Ms. Mercer, C was in the waiting room and Mr. M "did not understand how his demeanor could impact his son hearing his outbursts". On this day, Mr. M had met with two staff members. Both staff members entered case recordings about the meeting. Neither case recording by those who were actually present said that C was present or in the waiting room. Ms. Mercer wasn't present and had no independent knowledge of where C was during this meeting. The only information from Agency staff is that C wasn't present. Ms. Mercer admitted this mistake in her testimony. So, the Agency's evidence to the time when the child protection application was begun indicates that when C was present, Mr. M didn't demonstrate agitation and volatility with Agency staff and when Mr. M did demonstrate this behaviour, C wasn't present.

[70] Historically, there were difficulties with access exchanges. For example, in September 2010, Mr. M berated Ms. F because C wasn't wearing a hat. C was present when this occurred. Eventually, exchanges involved Ms. W because of difficulties in exchanges between Mr. M and Ms. F. After a problem occurred at an exchange with Ms. W (which I will describe further at paragraph 86, Mr. M absented himself from the access exchanges entirely.

[71] Returning to the Agency's concerns about Mr. M (his repeated referrals about Ms. F and his emotional instability, anger, agitation and volatility, particularly in the presence of C) and considering them with the information now available, I can appreciate why Mr. M wanted to challenge C's placement with Ms. W.

[72] My task is to determine whether there continues to be a need for a protection order, considering C's changing needs and C's family. I'm to consider if the circumstances that gave rise to the original order still exist and if C is still in need of the state's protection. This is outlined for me in *Children's Aid Society of Halifax v. C.V.*, 2005 NSCA 87 at paragraph 8. The bases of the original order were sections 22(2)(b), (g) and (ja) of the *Act*. Generally, these sections refer to a substantial risk that a child will suffer physical harm inflicted or caused by a parent or caused by the parent's failure to supervise the child adequately [section 22(2)(b)]; a substantial risk that the child will suffer emotional harm (demonstrated by severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour) and the parent doesn't provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm [section 22(2)(g)]; and the substantial risk that a child will suffer physical harm caused by chronic and serious neglect by a parent, and the parent doesn't provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm [section 22(2)(ja)].

Anger management

[73] The Agency's concern about Mr. M's behaviour is framed as a concern that he has an anger management problem which is variously described as emotional instability, anger, agitation and volatility.

[74] Mr. M responds in three ways. First, he says that he has done as much as he can to satisfy the requirement he participate in anger management counseling. Second, he says that C is not exposed to the conduct of concern. Third, he says that he is justifiably irate when the Agency staff members do not do their jobs.

Anger management counseling

[75] With regard to the first assertion, the Agency initially asked for an order that Mr. M self-refer to New Start Counselling "for the purposes of assessment and therapy, counseling and treatment for anger management issues". Mr. M objected to this because New Start does not provide anger management counseling: it provides domestic violence counseling.

[76] Mr. M wanted to take part in individual counseling and all the orders which addressed anger management spoke to this: he was never ordered to self-refer to New Start Counselling. Mr. M testified that New Start's programming relates to domestic violence, not anger management and this is why he was not willing to attend New Start for anger management counseling. The Agency located a clinical social worker, Jackie Barkley, to provide this counseling. An appointment was scheduled for January 20, 2011 but Mr. M was unable to attend this because he was in Cape Breton with his ill father and it was re-scheduled.

[77] Mr. M came to the Agency's offices for the re-scheduled meeting: road conditions were poor and Ms. Barkley didn't attend. Thereafter there was discussion between Mr. M and Suzanne Mercer: Mr. M said that he'd agreed to an anger management assessment, not therapy. Ms. Mercer disagreed and consulted with Ms. Barkley.

[78] The issue of how anger management was to be addressed was stalled until late March 2011. At that point, Mr. M describes himself as having a "breakdown". He'd had repeated surgeries. He saw his doctor and was prescribed anti-anxiety and anti-depression medication. He says while he was previously prepared to fight for his son, he no longer had the strength to do so. While he felt this way, he asked that his access visits be reduced and the placement hearing was cancelled.

[79] Mr. M's first meeting with Ms. Barkley was on May 5, 2011. They met again on May 19. According to Ms. Barkley, Mr. M was co-operative during their meetings. She agreed that their dealings were "open, honest and straightforward". Because Mr. M felt he didn't need anger management counseling and Ms. Barkley was not going to offer counseling to someone who didn't feel he had a problem, they spent these two meetings discussing her approach to counseling. She felt that this would allow Mr. M the opportunity to understand her and the process and come to trust it so he could decide whether to take part. At the conclusion of those two meetings, Mr. M was willing to continue to attend and to talk with her, but Ms. Barkley declined to proceed further on the basis that Mr. M didn't admit to having a problem.

[80] In August and September 2011, Mr. M asked Ashley Lekas, his social worker, if he could meet with Ms. Barkley again. This was arranged and he attended further meetings. In her February 27, 2012 report Ms. Barkley wrote "While the sessions since Sept. were intense, I feel [Mr. M] was making a sincere effort to change deeply rooted defenses."

[81] When Mr. M found work in the fall of 2011, he asked that his meetings with Ms. Barkley occur in the evenings. He was already leaving work early twice each week for his visits with C and he was concerned about his employer's response to an additional early departure (which would occur once every two weeks to accommodate his meetings with Ms. Barkley). Ms. Barkley wasn't willing to accommodate this request and said she "was left with the impression that [Mr. M] felt I needed to make the compromises and adjustments, rather than both of us". In cross-examination, Ms. Barkley admitted that she was unaware that Mr. M already had to leave work early for access.

[82] After Mr. M requested evening meetings, both he and Ms. Barkley contacted the Agency: Ms. Barkley did so on November 22, 2011 and Mr. M did so on November 28, 2011. Ms. Lekas said she wasn't aware of any service providers who could provide counseling on evenings or weekends but that she would look into it. The Agency made no further anger management counseling available to Mr. M.

C isn't exposed to inappropriate conduct

[83] Mr. M's second response to the Agency's concern about his temper was to say that C isn't exposed to inappropriate conduct.

[84] Mr. M admitted that C witnessed the incident in September 2007 which ended his relationship with Ms. F. Mr. M says that C came in to the room where he and Ms. F were arguing, C tugged on Mr. M's pants, crying, and asked if they could go outside to play. Mr. M says that, with this, he realized the impact of his actions and that's when he left.

[85] Since this occurred, there have been various instances when Mr. M has taken steps to ensure C is not exposed to inappropriate conflict. Mr. M arranged to meet with C's counselor, Sara Lamb, to discuss C. When he arrived, he found Ms. F in Ms. Lamb's waiting room. Mr. M left. He said this was to avoid placing C in a stressful situation. H said that when he saw Ms. F on a bus, he'd avoid her or get off.

[86] Mr. M hasn't always been successful in shielding C from inappropriate conduct. In October 2010, Ms. W reported to the Agency that Mr. M used obscene language in speaking with her at an access exchange in late September 2010. In cross-examination, Mr. M admitted that he'd collected C from Ms. W at a coffee shop and then put C "between two doors" at the entrance to the coffee shop. He then went back to speak to Ms. W. This is when he swore at Ms. W. He said that C could see what was happening, but he wasn't sure whether C heard him or not. When Mr. M and C got to the car, Mr. M explained that he hadn't been nice, C shouldn't have been there and he would apologize to nanny. According to Mr. M, as he drove away, Ms. W "gave him the finger". Ms. W doesn't recall this, but volunteered that she followed Mr. M out.

[87] Since that incident, which occurred before this application, there's no evidence that Mr. M has exposed C to a display of temper.

[88] Case recordings support Mr. M's claim that C isn't exposed to inappropriate conduct.

[89] Sara Lamb, C's counselor, testified that some of the people who harbour anger or bitterness to their child's other parent have difficulty putting aside those feelings and their feelings would be manifest to the child. Ms. Lamb said that parents assume they don't communicate much, without realizing that children are very observant of tone and expressions.

[90] Jackie Barkley described Mr. M's personality in her June 9, 2011 report. Two facets of his personality are particularly relevant: his absolutist thinking and his rigid intellectual and emotional framework. These features mean that Mr. M sees situations in black or white terms, without appreciating nuance and compromise. In a number of instances his rigid view has prompted an irate response. Ms. Barkley said that Mr. M's personality was a "risk" factor in raising a child.

[91] As a result of these comments, I want to carefully review situations where Mr. M is described as agitated, irate, angry or otherwise upset to see if Mr. M is correct in his assessment that C isn't exposed to this. Quotations from case recordings and Access Facilitator Reports haven't been edited.

[92] In January and February 2011 there were a number of instances where C wasn't brought to a visit or when his access visits began late. These occasions were on January 11, January 25,

February 9 and February 14. The case aide responsible for transporting C for his visits and supervising the visits was Heather Loadman.

January 11, 2011 visit

[93] On January 6, Ms. Loadman determined she had to re-schedule Mr. M's visit from January 11 to January 12. She wasn't able to reach him to tell him this, so Mr. M came to the office on January 11 expecting to visit with C.

[94] The only case recording on January 11, 2011 is an email the reception clerk sent to Suzanne Mercer stating Mr. M:

> is requesting a meeting with Jill and Angela together "as soon as possible". He advised me that he will be back tomorrow to find out when he is able to meet with Jill and Angela, as his phone is in Cape Breton. He also wanted to remind us that he will be here for his access on Thursday afternoon @ 2:30.

[95] There's no reference to Mr. M acting inappropriately. It's clear from the case recordings that Mr. M wasn't made aware that his January 11 visit had been re-scheduled to January 12. Nowhere is there any explanation why the access visit didn't occur or that Mr. M was ever offered an explanation. Mr. M wasn't told the visit would occur the following day, even when he confirmed that he'd be there for his access on Thursday (which was January 13). As a result, Ms. Loadman's Access Facilitator Report for January 12 says the visit was "CANCELLED" and "apparently [Mr. M] did not know about the change in his schedule".

January 25, 2011 visit

[96] Case recordings indicate that Mr. M was at the Agency's offices. He left a letter at the desk for Ms. Mercer. The case recordings say nothing untoward about this. It's only apparent that a visit is missed on this day because Ms. Loadman wrote an email to Suzanne Mercer on February 17, 2011 in which she says:

> January 25, 2011 – Rescheduled access from 2:15 to 2:45 so [C] would not miss any school. Could not reach [Mr. M]. We arrived on time for 2:45 visit.

[97] There is no Access Facilitator Report from the visit on January 25, suggesting that while Mr. M went to the Agency's office (which is documented in the case recordings), he didn't remain when access didn't start when scheduled.

February 9, 2011 visit

[98] On February 9, the reception clerk sent Suzanne Mercer an email saying that Mr. M wanted a message passed along to her that he was "unhappy" that Ms. Loadman was late.

[99] Ms. Loadman's Access Facilitator Report notes, with regard to the pick up:

> I extended my previous visit to make up for a storm day, and when the bank machine was not working downstairs I had to go to the drug store to get $3.00 for the parking lot which had me running approximately 20 minutes late.
>
> I called [C]'s grandmother and I said I would call her when I was on route. She offered to have [C] downstairs waiting for me. I tried to contact [Mr. M], however I could not reach him via his cell phone. I called the office and informed the receptionist I would be approximately 15 minutes late.
>
> When we arrived, we got into the elevator and [C] realized he had forgotten his markers in the car. He wanted to go back for them because he had made a deal with his father that if he brought in the markers he could take home some paint. So we returned to the car and did not get upstairs until almost 2:55.
>
> **According to one of the access facilitators in the office**, [Mr. M] had been upset and had requested to speak to a Supervisor. I apologized to him and added the time to the end of the visit. [emphasis added]

[100] Here, Mr. M is described as "upset" by another access facilitator. It is not Ms. Loadman's observation of Mr. M. The other access facilitator says that Mr. M asked to speak to a supervisor, but that request isn't in the reception clerk's email to Ms. Mercer. In terms of the visit itself, I am quoting Ms. Loadman's observations in their entirety. The visit lasted ninety minutes.

> [Mr. M] greeted his son with a smile and gave no indication he was perturbed about our late arrival.
>
> He gave his son a hug and a kiss, he sat him on his lap for a few minutes and asked him about his day. He offered him a snack, [C] asked him what he had brought, but [C] said he did not want anything. [Mr. M] asked him what he had eaten and [C] told him a "Nutella sandwich". [Mr. M] made a comment about Nutella not being allowed at school because it was made from nut products. We informed him schools were closed today due to the snow storm.
>
> [C] told his father about some games/movies that his brother was going to get be given "he will be able to play burned games". [Mr. M] informed his son, he does not believe in using burned disks because it is illegal; he added "if you are going use games you

should buy them". [C]s father told him it was up to his Nanny, and then looked at me and said "see what I mean?"

On one occasion when [C]'s father spoke to him, [C] ignored him. [Mr. M] responded "Did you hear me? What do we do when we hear each other? We say something – we respond and acknowledge each other OK?"

[Mr. M] asked [C]: "What do you think – I will get my hair cut at the end of the month?"

[C] and his father sat at the small table together and [C] drew a picture for his father of a Jet Pack. They talked about where they would go. [C] told his father he would take him with him to Disney World. They talked about Disney World memorabilia.

[Mr. M] said things like:

We always played outside at our house.
We seldom watched TV or played Video games – even if it rained.

[C]'s father directed his son to wash his hands before he ate. He went to the washroom with him and they both washed up. [Mr. M] brought a variety of items for [C] to choose from:

Dried apricots
Apple
A fruit cup (peaches and pears)
Chocolate pudding
Dried cranberries

[C] chose to have the apple, his father brought an apple cutter, it cored and sliced it. [C] snuggled up on his father's lap, snacked on his apple and listened intently while his father read him a book called Monsters Inc. They pointed out items and characters in the pictures and discussed the story as it progressed. [Mr. M] stopped when he thought [C] might no understand the meaning of a word, like toxic and disbelief, and gave him a definition.

[Mr. M] often told his son he loved him, he loved him so much he could squeeze him till his head popped off and occasionally mentioned he missed him. [Mr. M] was affectionate. He often touched [C], ruffled his hair, kissed him, rubbed his back, sat [C] on his lap and tickled him. He praised [C] when he used his manners, for working hard at school, remembering the markers getting Gotcha's at school and sounding out words.

> By 4:00 [C] had eaten his fruit cup, his chocolate pudding, the apple and was snacking on the dried cranberries.
>
> I like it when you cuddle with me. Soon you will grow up and you won't want to sit on my lap anymore. [C] laughed and said "yes I will!"
>
> [C] chose another book for his father to read called Richard Scarey's Great Steamboat. Mystery.
>
> At 4:20 [Mr. M] suggested [C] wash his hands and face. [C] ended up using the bathroom. When he came out he had urinated in his pants – he had not been able to get them undone in time. [Mr. M] responded by acknowledging it was tough to get them undone sometimes, it was an accident, accidents happen. He helped [C] get his coat and hat on and I helped clean things up. [Mr. M] headed out at approximately 4:30 and when we got downstairs he was at the bus stop. I buckled [C] into his booster seat, and his father came over and gave him a kiss good-bye. They waved at each other as we left the [the sentence ends there]

February 14, 2011 visit

[101] On February 14, 2011 there is a case recording made by Suzanne Mercer noting that she received an email from the reception clerk which said:

> Today at 1:03 pm, Mr. [M] came to the desk and told me that he is going for a smoke and asked that I send an email to you because he said that today was the 4th time which Case Aide Heather was late arriving for his access visit. He stated that he wanted her to be removed as the Case Aid. **He expressed his concerns to me in a stern and frustrated manner**. [emphasis added]

[102] According to the notes, Mr. M was told at 1:10 that Heather Loadman was running "about 5 minutes late". Mr. M "immediately said that it is not the child's fault for being late and again stressed this was the 4th time." Mr. M wanted the reception clerk to send Suzanne Mercer an email to have Heather Loadman removed as his Case Aide.

[103] Ms. Loadman's Access Facilitator Report from the February 14, 2011 visit state:

> I picked up [C] at his residence this afternoon. I arrived at 12:50, however according to his grandmother [C] had just run upstairs to "take a pee". I talked with her for awhile and then suggested it seemed to be taking quite awhile for him to be just "taking a pee". [C]'s grandmother rang the buzzer and spoke to [B]. She asked him if [C] was still in the bathroom, and asked him to hurry up

> because I was waiting. [B] said [C] had diarrhea and had pooed all over the toilet seat. I could hear him yelling at his brother to hurry up. Eventually [C] came downstairs and we headed out.
>
> I could smell feces and asked [C] if he had managed to clean himself up properly. He said he had. I suggested he may have something on his boots. I told him his dad might help us out with that once we got to the office.

[104] Under the heading "General Observations During Visit", Ms. Loadman wrote:

> [C] said his grandmother had given him medicine for his cold "she makes me have the purple stuff – you know how I don't like it". [Mr. M] asked him if it was a prescription or if it was Tylenol. I told [C]'s father his grandmother had no mentioned it to me.
>
> [Mr. M] greeted his son in the reception with a smile. Once we were in I explained [C] had to go upt tothe washroom just as I arrived at his grandmothers. Although he said he need to urinate, when he came downstairs with his brother, [B] announced he had diarrhea and had "pooed all over the toilet seat." I noticed a smell once we started the transport to the office. I let [Mr. M] know quietly and he attended to cleaning up his son. I stood at the bathroom door. According to [Mr. M] [C] had feces along his backside and his underwear was thrown out.
>
> [Mr. M] brought crackers, home made bread, salmon an apple and a fruit cup. [C] seemed to enjoy the fish.
>
> [C] told his father he could not find something. His father said "Remember how we used to have it. We had it organized. We had things that we played with all the time in one spot . . . if you have your things put away you know where they are when you want them. I would imagine they are in the house some where – it is very important to keep things organized – thats why I keep my bag packed so I am organized".
>
> [C] told his father they were trying trying to win a vacation on the Bounce – a Westjet vacation, a trip to Alaska and lots of money. [Mr. M] asked: "Bounce – is that that Rap Station?". I told him it was a "light rock" station. [C] suggested if they won "me, you and nanny could move and find a bigger house" [C]'s father responded "would n't you miss your mommy?" [C] said with a big grin: "we could call her."

> [Mr. M] pulled his son onto his lap and hugged him. [C] laughed and hugged his father while his father tickled him and gave him some big snuggles. [C]'s father said "You know something, I really missed you this week when you were not home. [C]'s father brought a Power Ranger book. It had magnetic pages and included magnetic cut outs of the book's characters. [C] led the play and made up the story line. "I like to get interactive games so he can use his brain". He took [C]'s head between his hands and kissed him.
>
> [Mr. M] often got Kleenex for his son and helped him blow his nose. On one occasion he twisted the Kleenex and used it to clean out [C]'s nose. He made comments about [C]'s snot box and snot factory.
>
> [C] and his father interacted throughout the access visit. They played hockey, made ramps, played with a robotic bug and used the magnetic book.
>
> Cleaned up at 2:33. He said good-bye at 2:40. [C] gave his father a "Super Hug". His father told him he was the best hugger and added "You are the best and I love you".
>
> When we got to the car [Mr. M] was waiting at the bus stop. He helped [C] into his seat and said a quick good-by again.

[105] Ms. Mercer didn't respond immediately to Mr. M about his request that Ms. Loadman be replaced. Two days later, Mr. M met with the Casework Supervisor, Angela Jones. Ms. Mercer had planned to attend this meeting but she was ill. One concern that Mr. M raised at the meeting was that "one of the case aides has been late for the last four visits and that C was covered in feces at the last visit after having had diarrhea."

[106] On February 17, 2011 Heather Loadman sent Suzanne Mercer an email about the missed and late visits. Heather Loadman's email is reproduced in the case recordings. In her email, Ms. Loadman writes that the visitation schedule was changed from January 11, 2011 to January 12, 2011 and no one informed Mr. M of this. The email says:

> I was unable to contact [Mr. M] (attempted phone calls, social worker and text messages) and when he came into the office on the 11th for his visit (Suzanne [Mercer] and Kevin [the reception clerk] were aware), they forgot to tell him about the 12th because **he was making quite a fuss**. I could not reach him. [emphasis added]

[107] I don't know the basis for Heather Loadman's statement that Mr. M "was making quite a fuss": she wasn't present to observe his reaction. Suzanne Mercer made no notation in the case recordings of seeing or speaking with Mr. M on January 11. The fact that the reception clerk

sent Ms. Mercer an email detailing what happened when Mr. M arrived for his visit suggests that Ms. Mercer wasn't present. The only person who seems to have been present was the reception clerk and his contemporaneous email to Suzanne Mercer doesn't describe Mr. M behaving inappropriately or making a fuss.

[108] Ms. Loadman's February 17, 2011 email to Ms. Mercer said that on January 25, 2011 "Rescheduled access from 2:15 to 2:45 so [C] would not miss any school. Could not reach Mr. M. We arrived on time for 2:45 visit." Case recordings reflect no efforts to contact Mr. M to tell him his visit would be one-half hour late in starting. Mr. M was at the Agency offices on January 25: the case recordings indicate he collected a letter left for him by Suzanne Mercer and left a note for her. There is no Access Facilitators' Report for this date. There are no records of inappropriate behaviour.

[109] Mr. M reported a number of concerns to Angela Jones on February 16, 2011 including his request that Ms. Loadman be replaced. On February 23, 2011 he met with Ms. Mercer and the Acting Supervisor to discuss his concerns, including his concern about Ms. Loadman's tardiness and her blaming C for being late.

[110] On February 23, 2011 Ms. Mercer and Heather Loadman discussed Mr. M's concerns about Ms. Loadman. The case recordings of this meeting include the statement "Heather advised worker that **she would never know that [Mr. M] is upset with her because he does not show it during the visit**" [emphasis added].

[111] This observation is echoed in the recordings on March 2, 2011 when Ms. Jones says

> I advised [Mr. M] that all of his visits go very well and that no one has raised a concern about his interactions with C. I explained that to the contrary, **it is remarkable how [Mr. M] can be so frustrated and agitated when meeting with Agency staff, however, be able to calm down and attend and behave like the meeting had not occurred**. [emphasis added]

[112] It is clear from Heather Loadman's notes that regardless of problems with his access, Mr. M did not display any untoward emotion in C's presence. His conduct in these sessions (which is representative of his conduct in his other access sessions) is exemplary: he brings nutritious snacks, he brings activities, he interacts with C on C's level, and he uses opportunities that present themselves to reinforce appropriate behaviour, such as sharing and using good manners. He helps C wash his hands before eating and at the end of the visit. They clean up the access room at the end of their visit.

[113] Neither Ms. Lamb nor Ms. Barkley were asked about these situations so I don't know if or how this information might affect their views about the risk Mr. M poses to his son. Ms. Barkley has said that Mr. M is extremely intelligent and his intelligence may play some part in his ability to isolate his feelings from his involvement with C. Ms. Lamb's view of C's relationship with the adults in his life might be influenced by C's comment that if they won the

radio contest, that he, Mr. M and Ms. W would live together. Ms. Lamb saw C with Ms. W, but not with Mr. M.

[114] The comments of Heather Loadman, whose job it is to observe and record events at access visits, and those of Angela Jones, the social worker who is the Dartmouth District Office Casework Supervisor, are that Mr. M's upset, frustration and agitation are non-existent when he is with C. Their observations and assessments are consistent with Mr. M's assertion that he does not expose C to inappropriate behaviour.

Mr. M is "justifiably irate" when Agency staff aren't doing their jobs

[115] In some regards, the Agency attempts to judge C's situation by Mr. M's relationship with Agency staff. Mr. M's demeanour in dealing with Agency staff is listed as one of the criteria by which progress on the case plan is assessed.

[116] Angela Jones, the Casework Supervisor, explained that it's not unusual for there to be difficulty when the Agency is gets involved with a family. She said that after time, relationships develop and cases progress. For Mr. M, there was ongoing tension with the Agency: at times Mr. M worked cooperatively with Agency workers, and at other times there were significant disagreements. None of the Minister's employees (Angela Jones, Suzanne Mercer of Ashley Lekas) would say that Mr. M's conduct was always bad. Ms. Jones said that Mr. M would yell at workers if he felt they were not doing their jobs.

[117] The Agency's recordings about this family begin in June 2004, a few months before C was born.

[118] The couple's first extended separation began in February 2005, after Mr. M was charged with assaulting Ms. F. During 2005, Mr. M made referrals to the Agency about Ms. F. In October 2005 he told a worker that he "is frustrated by the fact that the agency will not investigate the matter as he has called several times. He stated that he feels that the agency does not believe him because he has been charged and has an undertaking." In fact, when his referrals were analysed, the case recordings document that one consideration (often fatal) in the decision not to investigate was Mr. M's own credibility, which was seen as questionable in light of the outstanding charge. This was just as Mr. M feared.

[119] When the Agency began to work with Ms. F on a voluntary basis in 2010, Mr. M was asked if he'd agree to take C into his home on a temporary basis. When Ms. F wouldn't provide the letter or court order that Mr. M wanted to ensure that C wouldn't be removed whenever Ms. F changed her mind, and Mr. M said he would take C without a letter or court order, the Agency wasn't willing to place C with Mr. M, and placed C with Ms. W instead.

[120] C was placed with Ms. W on a long term basis and counseling was arranged for him. Mr. M wasn't informed of this and, according to Ms. W, she was asked by an Agency worker not to tell Mr. M that C was living with her. The Agency says that while its involvement with Ms. F is voluntary, it isn't for the Agency to interfere with the parents' relationship, but for the parents to deal with each other. However, this approach of staying out of the parents' dispute is

undermined where the Agency has involved itself, by asked Ms. W not to tell Mr. M where C is living.

[121] Mr. M came to the Agency in search of information on September 22, 2010. Suzanne Mercer had been assigned the file (and thirteen others) on September 1 when she returned to work after a year-long educational leave. She'd made announced and unannounced visits on Ms. F and visited Ms. W. When Mr. M came to see her, she told him that she hadn't fully read the file.

[122] After the child protection application started, Agency materials were regularly disclosed to the parents.

[123] Suzanne Mercer testified that when referrals are made about a parent, the normal procedure is to call the parent about the referral. She admitted that when a referral came in about Mr. M, he wasn't asked about the referral and given a chance to respond to it. She said it was "very difficult" to communicate with Mr. M and that some of the information would come from documents that were ordered to be produced. I was not provided with copies of all documents that resulted from the production orders which were granted in the fall of 2010. More than once, Mr. M pointed out that materials such as the police files simply record what someone has said: it doesn't make the remarks true. As such, documents produced as a result of the production orders aren't equivalent to an investigation. The failure to investigate referrals with Mr. M fell short of the Agency's own procedure for investigation and contributed to Mr. M's concern that he was not being treated properly by the Agency.

[124] Ms. F's visits with B and C occurred outside Agency offices (either at her mother's home or her own home) and Ms. Mercer, who was the social worker for both Ms. F and Mr. M, was present for many of them. In contrast, until June 2011, Mr. M's visits occurred at Agency offices and weren't supervised by Ms. Mercer or, when she was replaced, by Ms. Lekas, but by a Case Aide.

[125] Mr. M repeatedly raised certain issues with Suzanne Mercer such as C's use of his nasal spray and puffers, and the propensity of Ms. W and Ms. F to discuss "adult" topics in front of C. Mr. M believed there was little to no progress in dealing with the problems he identified. He was frustrated with his social worker, Suzanne Mercer, about this and wanted her replaced. It was months before this happened in May 2011. Mr. Mercer was replaced when the Agency concluded that her involvement was perceived by Mr. M to be a barrier to his progress and the Agency decided to remove that barrier.

[126] When a new social worker was assigned to him, she didn't attend court appearances and Mr. M felt that she was unaware of what was happening in court.

[127] Mr. M learned that Ms. W and Ms. F participated in C's counseling sessions with Sara Lamb. When he asked to attend, Ms. Lamb asked C for input before deciding that Mr. M could not participate. In contrast, C wasn't asked whether his mother or grandmother could attend.

[128] As noted at paragraphs 92 to 108, Mr. M's Case Aide was repeatedly late bringing C to access over many weeks. It was weeks before she was replaced.

[129] In March 2011, when Mr. M asked for his mother to have visits with C, he was told that his mother must undergo a police record check. No similar check was required of Ms. W when the children were placed in her home. After this issue was discussed in court, a police check was done for Ms W.

[130] Also in March, Ms. Mercer consulted with Angela Jones about the fact that Mr. M had missed his past four access visits without calling to cancel or re-schedule them. The Case Aide identified that the telephone number provided to Mr. M to use to confirm visits was incorrect. Even though this error was the Agency's, Mr. M was told that if he missed another visit, his visits would be suspended.

[131] Mr. M attended an "access review meeting" in April 2011. He thought that at this meeting, he and Agency staff would review his access and he could propose changes to his access before the Agency decided what changes to make. At the meeting he learned this wasn't a *review* meeting, it was a *report* meeting. There had already been an earlier staff meeting to decide upon changes to his access and he was given no opportunity to offer any input into the decision. Mr. M's upset at learning this meant that his access would not be expanded as had earlier been planned.

[132] It's likely these aren't the only complaints that Mr. M has with the Agency. These easily come to mind from the testimony I heard and from various appearances during the course of this proceeding.

[133] I don't want to get too distracted by the question of whether Mr. M's ire with the Agency was justified. The decision before me is whether C should be returned to Mr. M or placed in Ms. W's care following a permanent care order, and the relationship between Mr. M and the Agency has limited relevance to that decision. However, the relationship does need to be addressed. Unquestionably, the client/Agency relationship would have been smoother if Mr. M'd overlooked these situations and others where he believed he was being treated improperly or differently than Ms. F.

[134] As Mr. M testified, he isn't silent when he thinks something is wrong, especially in matters relating to his child. In some cases, the Agency clearly fell short of what should reasonably be expected of it: Ms. Mercer admitted she didn't follow normal practice by allowing Mr. M to comment on referrals about him. Mr. M was given an incorrect phone number and, when he was unable to confirm or cancel his access as a result, he was threatened with its suspension. C was repeatedly brought late to access. In other cases, the Agency's policies and practices may have been followed, but they were such that Mr. M felt he was treated unfairly: his mother needed a police check before access with C, while Ms. W didn't need a police check before C was placed with her; the access review meeting wasn't a consultation.

[135] In some regards, Mr. M's ire was justified because the Agency didn't follow its own procedures.

[136] In other regards, the Agency workers were insensitive to Mr. M's experience: one possible result of the Minister's application is Mr. M's permanent loss of his child. Agency staff are well educated and professionally trained. Here, the Agency workers either failed to appreciate how Mr. M viewed situations or failed to adjust their approach to him to accommodate his views. It's reasonable that Mr. M would expect more. His upset in the circumstances is to be expected.

Mental health

[137] No specific concern was identified with regard to Mr. M's mental health in the initial child protection application: the Minister's concern was framed as concern about Mr. M's emotions (instability, anger, agitation and volatility). The Minister, Ms. F and Ms. W all point to the fact that Mr. M hasn't completed a mental health assessment and argue that concern about Mr. M's mental health hasn't been alleviated. Mr. M says that he's done all possible to complete a mental health assessment. Further, there's evidence of Mr. M's own efforts to address his competency to parent.

Mental health assessment

[138] On January 24, 2011 I ordered Mr. M to self-refer for a mental health assessment. Mr. M went to his doctor and was re-directed to a community mental health clinic. He went to the Cole Harbour Community Mental Health office on February 22. This isn't the mental health office closest to Mr. M's home. He says he chose this office because Ms. F was being seen at the office closest to his home.

[139] Mr. M asked for a mental health assessment, explaining that the court ordered him to do this. He was told that court-ordered assessments are not done: assessments are done only for individuals who say they want or need an assessment or counseling. Since Mr. M wanted the assessment solely to satisfy a court order, the service wasn't available for him.

[140] Mr. M reported this to Suzanne Mercer, who called the Cole Harbour office. Mr. M's description of the availability of a mental health assessment was confirmed. It was left to Ms. Mercer to deal with this problem.

[141] A further intake appointment was arranged at the community mental health clinic on April 19. Mr. M cancelled this visit when he became frustrated with the Agency. By mid-May, he had called to re-schedule. He returned to the mental health clinic on July 21, 2011. By this point, he no longer felt he needed the clinic's assistance because he was seeing and being treated by his own doctor. Mr. M reiterated his willingness to participate in an assessment arranged by the Agency. The case recordings note no further steps by the Agency at this point.

[142] Mr. M arranged another appointment at the Cole Harbour Mental Health office for September 6, 2011. There's no mention in the case recordings whether Mr. M attended this appointment. There's no mental health assessment, so either he did not attend or, if he did, his request for services was again rejected.

[143] In his affidavit, Mr. M deposed that he went to the Nova Scotia Hospital and asked for a mental health assessment. In his affidavit, he also deposed that he telephoned the forensic hospital attached to the "Burnside Jail" (the Central Nova Correctional Facility). He was unable to obtain an assessment through either source. It appears Mr. M relayed at least some of the information he learned about the availability of assessments to Ms. Lekas, though this didn't result in an assessment.

[144] When Mr. M was unable to self-refer for the mental health assessment, he let Agency staff know so the Agency could solve this problem. It didn't.

[145] The requirement that a parent self-refer for a mental health assessment is a confounding one. A self-referral can only be made if the parent claims to need mental health services. A parent who doesn't feel the need for these services or who believes that sufficient mental health services are being accessed elsewhere must lie in order to comply with the order to self-refer. I wonder what happens to the parent who tells this lie. How does the parent answer the clinician's questions about the claimed need for services? What does the clinician make of the answers in assessing the parent's mental health? What would Yossarian say about this Catch-22?

[146] I find that Mr. M made reasonable efforts to self-refer for a mental health assessment.

Mr. M's efforts to address his mental health

[147] In the spring of 2011, Mr. M reported to Agency staff that he wasn't emotionally ready to have C with him full time. He said that he had recently started taking anti-depressant and anti-anxiety medication prescribed by his doctor. He sought adjustments to his access schedule to accommodate his health. Mr. M was encouraged to attend the mental health offices, though he was under his own doctor's care.

[148] In late September 2011, Mr. M asked the Casework Supervisor, Angela Jones, and his social worker, Ashley Lekas, what he would need to do to prove to the Agency that he was able to parent C. He was told "the Agency will need to have input by and confirmation from [Mr. M]'s doctor who is prescribing him medication that his mental health is being managed and that [Mr. M] could assume a parenting role." It was acknowledged that Mr. M had provided consent to speak with his doctor. In cross-examination, Ms. Lekas admitted that Mr. M's doctor wasn't contacted for confirmation about Mr. M's fitness to parent until January 12, 2012 when the doctor said that Mr. M was managing his depression and anxiety and taking medication. The doctor reported no concerns about Mr. M, according to Ms. Lekas.

[149] I find that Mr. M took appropriate steps to address deterioration in his own mental health: he contacted his doctor, he took prescribed medication, he adjusted his access with C to a level that was manageable for him and on which C could depend.

Drug and alcohol use

[150] At the risk management meetings which preceded the child protection application, Mr. M's use of alcohol or drugs was not mentioned as a basis for the Agency's claim that C was in

need of protective services. In February 2005 when he was charged with assaulting Ms. F, Mr. M was intoxicated, according to the police records.

[151] During her cross-examination, Suzanne Mercer said that to her recollection there's been no referral to agency about Mr. M's drug or alcohol use.

[152] Mr. M volunteered information to the Agency about his "raging alcoholism" when he was in his twenties, his binge drinking in the past and his use of marijuana. He's willing to describe himself as an "alcoholic": he does this, he says, on the basis of his mother's description that a person with an alcohol problem is always an alcoholic even if he or she maintains sobriety. He says he hasn't used alcohol or drugs while caring for C and there's no evidence to the contrary.

[153] There was no suggestion or indication that Mr. M has abused prescribed medication. To the Agency and me, Mr. M outlined his use of prescribed medication for anxiety and depression. He authorized the Agency to obtain information from his doctor. Ashley Lekas spoke with Mr. M's doctor on January 12, 2012 who reported that Mr. M was managing his depression and anxiety and taking medication. The doctor reported no concerns, according to Ms. Lekas.

[154] Mr. M recently stopped taking prescribed medication under his doctor's supervision.

Random urine drug testing

[155] At the November 2011 review hearing, Mr. M agreed to make himself available for drug testing for period of five weeks, beginning on December 14. Drug testing involves random visits during pre-selected hours when a urine sample is collected. It isn't known when the collection agency representative will attend to collect a sample. The person is required to be available for a two hour period each day and, if a random visit occurs, it will occur during that time. Mr. M says that the hours when he would be available should start after 8 p.m. so C's access would be over and C would not be there when the nurse came for a urine sample and he says that this was discussed at court on November 10. Ms. Lekas was not at court that day. Regardless, the Agency would be aware of the schedule of C's access with Mr. M.

[156] On December 13, 2011, Mr. M left voicemail for Ashley Lekas saying he'd be working in Cape Breton and be unavailable for testing. The case recordings note his message on December 13 and record a responding message from Ms. Lekas that random urine testing couldn't begin until a time was set for him to be home. Mr. M testified that he asked what he could do to ensure he met his obligation and even offered to have blood drawn in Sydney and sent to Halifax at his own expense for testing. This isn't in the case recordings and I don't know if this offer was made in a voicemail message or during Mr. M's conversation with Ms. Lekas. Ms. Lekas didn't deny this testimony.

[157] According to Mr. M, Ms. Lekas wasn't aware that the time for the testing was set at court in November because she wasn't being informed of what was happening in court and she wasn't attending herself. In any event, Ms. Lekas was waiting for confirmation of a testing time before arranging the testing, while Mr. M believed the testing time had been resolved in court in

November. I should be clear that there was no discussion on the record of the hours when Mr. M would be available for testing. If it was discussed on November 10 it was done outside the courtroom and I acknowledge that frequently there are discussions between the parties before or after the court appearance. No one disputed Mr. M's testimony that the testing time had been discussed on November 10.

[158] Mr. M left another message for Ms. Lekas about the testing on December 14. On December 16, Mr. M and Ms. Lekas finally spoke to each other about the random urine testing. According to the case recordings, Ms. Lekas left it with Mr. M to advise her when he was able to begin testing and he didn't do this. On December 20, 2011, Mr. M left a voicemail for Ms. Lekas asking about doing hair follicle testing starting on January 20, 2012. This was not put in place.

[159] Mr. M hasn't participated in random urine drug testing. A parent's abuse of alcohol or drugs while responsible for caring for a child is a cause for concern: since 2005 there have been no reports of Mr. M abusing alcohol in C's presence and there is no record of any report of abuse of drugs, prescribed or otherwise.

Analysis

[160] This is a review hearing pursuant to section 46 of the *Children and Family Services Act.* Generally, I must consider whether the Agency's involvement remains justified and, if so, how it should be involved as determined by the child's best interests. As I'll explain more fully later, the range of involvement is severely limited at this point. C must still be a child in need of protective services for the Agency's involvement to be justified. This is contested.

[161] Section 46 outlines the process for review hearing. The possible orders I can make in a review hearing are noted in section 46(5):

> (a) vary or terminate the disposition order made pursuant to subsection (1) of Section 42, including any term or condition that is part of that order;
>
> (b) order that the disposition order terminate on a specified future date; or
>
> (c) make a further or another order pursuant to subsection (1) of Section 42, subject to the time limits specified in Section 43 for supervision orders and in Section 45 for orders for temporary care and custody.

[162] The option of varying or terminating the disposition order pursuant to section 42(1) brings other options into consideration. These options, too, are available subject to the statutory time limits. The options are:

> (a) dismiss the matter;

> (b) returning C to the parent, subject to supervision for a specified period;
>
> (c) placing C in a third party's care under supervision for a specified period;
>
> (d) placing C in the Agency's temporary care and custody for a specified period;
>
> (e) placing C in the Agency's temporary care and custody for a specified period after which C would be returned to the parent or another person for a further specified period; and
>
> (f) placing C in the Agency's permanent care and custody.

[163] Section 45(1)(b) of the *Children and Family Services Act* says that where I have made an order for temporary care and custody, the total period of duration of all disposition orders, including any supervision orders, shall not exceed twelve months, where a child was under six years of age at the time of the application commencing the proceedings. An equivalent limitation is found in section 43(4) with regard to supervision orders.

[164] I granted the first disposition order on April 7, 2011. C was five when this proceeding began, so the twelve month period for the total duration of all disposition orders expires on April 7, 2012.

[165] According to Justice Saunders in *Children's Aid Society of Halifax v. B.(T.)*, 2001 NSCA 99 at paragraph 19, I'm to consider each of the possible dispositions in section 46(5) and, by virtue of section 46(5)(c), section 42(1). His Lordship's reasons limit my considerations. At paragraph 23, he explained:

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

[166] This proceeding is nearing its conclusion: the deadline for a final disposition is April 7, 2012. As a result, the only two options available for my consideration are dismissing the Minister's application or placing C in the Agency's permanent care and custody.

[167] In *Children and Family Services Act* proceedings, the child's best interests are paramount. In various regards, the *Act* directs me to make an order or a determination "in the best interests of a child". When that is the case, section 3(2) of the *Act* directs that I consider those of enumerated circumstances which are relevant.

[168] The circumstances listed in section 3(2) are:

> (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 [. . .] 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.

[169] Many of these circumstances are relevant. There are a few which are clearly not relevant: C has not been identified as a child with a particular cultural, racial or linguistic heritage and while both C's maternal and paternal family have exposed C to some religious activity, his

religious upbringing has not been identified as a contentious issue. C's views and wishes have not been put into evidence.

[170] In terms of delay, we are at the date when a final disposition must be made. The *Act* contains time limits which are tailored to children's development and their appreciation of time. Unless proven otherwise, where I am acting within the *Act*'s time limits, I assume the "effect" of delay is not deleterious.

[171] The standard of proof that applies to my considerations was stated in *F.H. v. McDougall*, 2008 SCC 53, a civil action arising from a historic sexual assault, where Justice Rothstein wrote at paragraph 49:

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

[172] As I've said, my task is to determine whether there continues to be a need for a protection order, considering C's changing needs and C's family. I'm to consider if the circumstances that gave rise to the original order still exist and if C is still in need of the state's protection. This is outlined in *Children's Aid Society of Halifax v. C.V.*, 2005 NSCA 87 at paragraph 8.

[173] There were no prior contested proceedings. Mr. M did not follow through with his plan to challenge C's placement with Ms. W. At other times, when Mr. M disputed the Agency's Plan or evidence, I suggested he seek a review but he didn't do so. As a result, this is the first time I am hearing evidence from anyone other than the Minister about C's circumstances and those of his family.

[174] It appears there are two plans are available for my consideration. The Minister says that Mr. M hasn't adequately addressed the child protection concerns that relate to him and "the child protection concerns which were present at the time this court application was initiated will be alleviated with [C] being placed in the care and custody of [Ms. W] pursuant to the *Maintenance and Custody Act*." The Minister says that this is a case for C's permanent care and custody and, once that is done, C would be placed with Ms. W. Ms. F supports this request. Toward this end, Ms. W started her *Maintenance and Custody Act* application.

[175] Mr. M argues that I should terminate the Minister's application and order that C be placed in his custody.

[176] The applications before me mean the options aren't quite as clear as I've presented them in the two preceding paragraphs. Under the *Children and Family Services Act*, if I grant the Minister's application for a permanent care and custody order, C will be placed with Ms. W. The terms of C's placement with her would be governed by an order under the *Maintenance and Custody Act* so that any future disputes about C's upbringing could be resolved by the adults in

C's life, without involvement by the Minister. If I dismiss the Minister's application, then I must resolve Ms. W's application under the *Maintenance and Custody Act* for C's custody.

[177] When considering the options available to me in the application under the *Children and Family Services Act*, I cannot lose sight of the obvious: only if C is in need of protective services can I order anything other than termination of the application.

[178] Sections 22(2)(b),(g) and (ja) of the *Children and Family Services Act* are the bases for the Minister's application. Each of these sections refers to "substantial risk" of physical harm or emotional harm. "Substantial risk" means "a real chance of danger that is apparent on the evidence" according to section 22(1) of the *Act*. The Minister is to prove that there is a real chance of the described harm that must be proved to the civil standard. The Minister need not prove that this harm will actually occur on a balance of probabilities.

Substantial risk of physical harm

[179] Section 22(2)(b) refers to a substantial risk that C will suffer physical harm inflicted by Mr. M or caused by Mr. M's failure to supervise and protect C adequately. Neither the Minister nor any of the other parties adduced evidence that suggested a real chance of danger that Mr. M might inflict physical harm on C.

[180] In February 2008, Ms. F called the Halifax Regional Police. Her statement to the police described C's bowel problem and said that the day after C returned from a two hour supervised visit with his father, C went to the bathroom

> and he started to scream and cry for me. It was hurting to poop. I asked him what happened? Did anyone touch his bum? He said that when he was with daddy he stuck his finger up into his bum where he poops.
>
> And that's when I took [C] to the doctors. The doctor asked [C] what was wrong and he said daddy hurt him. I asked why? He said daddy stuck his finger in it. The doctor asked him what it was and he said "my bum". The doctor looked at his bum. She said she couldn't see any penetration. His bum hole was tight. I don't know if that means good or not. But she said she had reason for concern for the scratch because it looked like a finger scratch on his bum.

[181] The notes from C's interview by the police indicate C made no disclosure about Mr. M touching him at all. C said that he visited his father and they played with toys and "yesterday his mom was yelling at his dad". When the police spoke with C's doctor, the doctor's notes indicated that "the area appears to have a rash and it's unlikely trauma related". Noting that the parents were in custody litigation, the police closed the file.

[182] I review this incident in the interest of completeness: the Minister, Ms. F and Ms. W made no reference to it during the hearing. I conclude, based on this, that they attach no significance to it.

[183] There is evidence that, in 2007, Mr. M used physical discipline with B and that he used threats as method of disciplining B. Mr. M testified that these methods of discipline were tried minimally and, when they didn't work, they were abandoned.

[184] Neither the Minister nor any of the other parties adduced evidence that suggested a real chance of danger that Mr. M might fail to supervise or protect C in any regard. Mr. M's been observed to be an attentive parent. His attention is not distracted by negative emotions that he feels. In contrast, Mr. M has been adamant about protecting C: insisting that C use a car seat, take his medicine, wear a hat, avoid exposure to violent video games, not be allowed to cross the highway and not be exposed to drycleaning chemicals, among other concerns. These concerns were not merely opportunities for Mr. M to complain about Ms. F or the situation at Ms. W's home: he had concerns about C playing with the communal toys in the access room at the Dartmouth District Office of the Department of Community Services. Accordingly, he brought toys which he knew were clean and was careful about C washing his hands. Mr. M is very attentive to C's physical safety.

[185] There is no evidence of a real chance of danger that Mr. M will inflict physical harm on C or cause this to happen, including where this might happen as a result of inadequate supervision and protection.

Substantial risk of emotional harm

[186] Section 22(2)(g) refers to a substantial risk that C will suffer emotional harm and Mr. M doesn't provide services or treatment to remedy or alleviate the harm. Additionally, the risk can exist where Mr. M refuses to consent to the services or treatment or where he is unavailable or unable to consent to these services or treatment.

[187] According to Judge Levy in *F.&C.S. (Annapolis) v. B.S. & J.S.*, 2004 NSFC 5 at paragraph 20:

> This section [s. 22(2)(g)] requires multiple findings of fact: (1) a "substantial risk" ("a real chance of danger that is apparent on the evidence") that the child or children (2) will suffer emotional harm (3) "demonstrated by severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour" and (4) that the parent "does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm".

His Honour said, at paragraph 29, that the risk must be real and, if the parent is able and willing to accept services for the child, "the definition is obviated" and continued:

> Harm or risk of harm alone is not enough under section 22(2)(g) [. . .]; the court also has to find the refusal, failure, or inability of the parents to accept appropriate and adequate services to address that harm or risk or [sic] harm.

[188] According to section 22(2)(g), "emotional harm" is demonstrated by severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour.

[189] Ms. Lamb met with Mr. M once in July 2011 and during that meeting Mr. M was "unable to speak of [Ms. W] or [Ms. F] without profanity", according to her November 14, 2011 report. Ms. Lamb testified that if C saw Mr. M act this way it would be emotionally harmful to C. Ms. Lamb was more specific about this when she was asked what it would be like if C lived with someone who acted as Mr. M did in Ms. Lamb's office. She responded by saying that it would be "more difficult" for C to express his feelings, visit with his family and feel relaxed. This could result in stress and tension as C grows up.

[190] I accept Ms. Lamb's testimony that C would be harmed by observing the behaviour Mr. M demonstrated in Ms. Lamb's office. The harm she described is not that prescribed by section 22(2)(f) of the *Act*: severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour.

[191] Of course, I've already concluded that Mr. M protects C from witnessing his inappropriate behaviour and, since this proceeding began, Mr. M has taken steps to isolate himself from Ms. W and Ms. F and to avoid interactions with them.

[192] Based on the evidence I heard, I do not accept that Mr. M would fail to provide services or treatment to alleviate harm to C. I have described the steps that Mr. M has taken to ensure C's well-being as it relates to other aspects of C's health, such as C's physical health.

Substantial risk of physical harm resulting from chronic and serious neglect

[193] Lastly, section 22(2)(ja) refers to a substantial risk that C will suffer physical harm caused by Mr. M's chronic and serious neglect, and Mr. M doesn't provide services or treatment to remedy or alleviate the harm, or he refuses to provide services or treatment to remedy or alleviate the harm or is unavailable or unable to consent to those services.

[194] At the risk of repeating myself, Mr. M's been very attentive to C. During access, he provides appropriate snacks and both supervises C during their play and when C absents himself from the access room to go to the washroom. Mr. M was concerned about those who provided child care for C. Without having this particular aspect of the legislation highlighted for him, Mr. M described his views on children's extra-curricular activities: rather than sending C on his own to participate in an activity, a parent should participate in the activity with C.

[195] The risk of physical harm as a result of chronic and serious neglect is not a real concern where Mr. M has once disciplined B, in an inappropriate fashion, for straying from home and where Mr. M has expressed concerns that the children were being left unsupervised by Ms. F.

[196] Based on the evidence I've heard, I do not accept that there is a real risk of danger that C would suffer physical harm caused by Mr. M's chronic and serious neglect or that Mr. M would fail to provide services or treatment to alleviate harm to C.

[197] In all, I conclude that C is not in need of protective services.

[198] Before I make an order under section 46(5) of the *Act*, I'm to consider whether the circumstances have changed since the previous disposition order, whether the plan for C's care that I applied is being carried out and the least intrusive alternative in C's best interests. (One other consideration is inapplicable here by virtue of the imminent deadline for concluding this proceeding.) Since the last disposition order, C's counseling has ended, as has Mr. M's anger management. The Agency's plan, with regard to C, is waning. Ms. F's services seem to have run their course. The Agency's plan is to have C placed with Ms. W. This is not the least intrusive option, but it is less intrusive than others.

[199] I set out the considerations relevant to C's best interests in paragraph 168. Those which I find are relevant here are: the importance of a positive relationship with parents and a secure place as a family member for C; C's relationships with relatives; the importance of continuity in C's care and the possible effect of the disruption of that continuity; the bonding between C and C's parents; C's physical, mental and emotional needs, and the appropriate care or treatment to meet them; C's level of physical, mental and emotional development; the merits of each plan; and the degree of risk, if any, that justified the finding that C was in need of protective services.

[200] C's level of physical, mental and emotional development is age appropriate. He has particular health needs which receive more attention from Mr. M who has demonstrated greater concern that C's health needs are properly met. C has a strong bond with his father which is illustrated throughout the Access Facilitator Reports. Notes about C's visits with Ms. F indicate a tension between Ms. F and Ms. W as to who adopts the parent's role. For C to maintain the strongest bond with a parent means C would live with Mr. M, rather that Ms. W: only this option has C living with one of his parents. C's relatives include Ms. W and her husband, Ms. F, B, Mr. M and his mother. C has access to more of his relatives in Ms. W's home. C's relationship with B is not, as I will discuss later, an entirely positive relationship. I have little evidence of C's relationship with Ms. W's husband.

[201] Comparing the Minister's plan with Mr. M's, I conclude that Mr. M's plan is the least intrusive plan that is in C's best interest.

[202] There has been no shortage of change in C's life. His parents separated shortly after his birth and reconciled and separated on a number of occasions before their final separation in September 2007. Access arrangements have not been static and, most recently, provided C with generous access with Mr. M. At different times, Ms. F placed C with his father and with her mother. C is seven. He's participated in French and English language education. There have been numerous child care arrangements in place at Ms. W's. Despite all this change, the focus of Ms. Lamb's counseling with C wasn't instability. It was the conflict between Mr. M and Ms. F. I take from this that C is a resilient child who has been able to adjust to change. Based on what

I'm told about C's performance in his English school, this seems proven to be true in the context of his education.

[203] I've said that this hearing was my first opportunity to hear evidence from Mr. M. Based on my review of all of the evidence, I conclude that the degree of risk which justified the finding that C was in need of protective services, as it related to Mr. M, was modest.

[204] I dismiss the Minister's application for permanent care and custody of C.

[205] As a result of this conclusion, I must now consider Ms. W's application for custody of C.

The *Maintenance and Custody Act* application

[206] Ms. W filed her application for custody of C on February 2, 2012. At that point, this hearing was already scheduled and was to start in less than five weeks' time. Because her application did not come to trial through the normal course, the parties were not scheduled to attend the Parent Information Program. All would benefit from the Program and I order that they attend. Attendance notices will be provided to counsel for Ms. W and Ms. F, and to Mr. M with these reasons.

Ms. W's standing

[207] Section 18(2)(b) of the *Maintenance and Custody Act* provides that I may make an order placing a child in the care and custody of a parent or guardian or any other person with leave of the court. Ms. W is not a parent. A guardian is defined in section 2(e) of the *Act* to include "any other person who has in law or in fact the custody or care of a child". Since November 1, 2010 orders granted in the child protection application have placed C in Ms. W's "care and custody". Ms. W is C's guardian.

Paramount consideration

[208] In the circumstances of the two applications before me, I have considerable evidence about Ms. F's parenting and Mr. M's, but much less information about Ms. W's, even though her *Maintenance and Custody Act* application is a contest between her and Mr. M, in the context of C's welfare.

[209] Much of the hearing focused on whether C should be placed in the Minister's permanent care and custody and, following that, with Ms. W (as was the Minister's plan). There was less direct focus on the *Maintenance and Custody Act* application. In deciding this application, I need to review the evidence I heard from the perspective of this application.

[210] According to section 18(5) of the *Maintenance and Custody Act*, in any proceeding concerning a child's care and custody or access and visiting privileges, I shall apply the principle that the child's welfare is the paramount consideration.

[211] Section 18(4) of the *Maintenance and Custody Act* provides that "the father and mother of a child are joint guardians and are equally entitled to the care and custody of the child" unless otherwise provided by the *Guardianship Act*, S.N.S. 2002, c. 8 or ordered by a court. Here, the contestants for C's care and custody are not C's parents, so the "equal entitlement" enshrined in section 18(4) of the *Maintenance and Custody Act* does not apply to them.

[212] Mr. M focused much of his argument on his view that he has a superior claim to C's custody because he is C's father and Ms. W is not C's parent. In dismissing this point, I can do no better than look to the Supreme Court of Canada's unanimous decision in *King v. Low*, [1985] 1 SCR 87 where Justice McIntyre wrote, at paragraph 34: "the Court in questions of contested custody, including contests between a natural parent and adoptive parents**, must consider the welfare of the child the predominant factor** and give it effect in reaching its determination. [emphasis added]"

[213] At paragraph 27 of the Court's reasons in *King v. Low*, [1985] 1 SCR 87, Justice McIntyre put the "dominant consideration" of the child's welfare in context:

> This is not to say that the question of custody will be determined by weighing the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. The welfare of the child must be decided on a consideration of these and all other relevant factors, including the general psychological, spiritual and emotional welfare of the child. It must be the aim of the Court, when resolving disputes between rival claimants for the custody of a child, to choose the course which will best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult. Parental claims must not be lightly set aside, and they are entitled to serious consideration in reaching any conclusion. Where it is clear that the welfare of the child requires it, however, they must be set aside.

[214] Each child is unique. To give C's welfare its due consideration, I must consider C.

The child, C

C's physical health

[215] C's has health concerns. At one point, C had bowel problems which were resolved surgically.

[216] C's chronic health condition is asthma. His family physician has prescribed puffers to treat asthma and, by times, C has used a nasal spray to address an unspecified ENT complaint. For this, he has been referred to a specialist, Dr. LeBlanc.

[217] In 2009, Dr. LeBlanc wrote a letter detailing C's daily use of the nasal spray. Mr. M was consistent in checking whether C was using the nasal spray. In early May 2011, Dr. LeBlanc saw C. Mr. M was advised of the outcome of this appointment in early June. Dr. LeBlanc said the nasal spray was no longer needed and that C should be re-assessed in October 2011: if fluid was building up, then the spray should be re-instated. There's no indication that Ms. W followed up on the October 2011 appointment.

[218] In early August 2011, Mr. M wanted C's use of puffers to be reviewed. The Agency's case recordings indicate that Ms. W didn't know whether C's puffers were to be taken on a long term basis or only as needed. Ms. W told the Agency that C "has been taken off the puffers along time ago" and when C started coughing a few weeks earlier, Ms. F told her to put C back on them. Ms. W didn't know if there was an expiry date on the puffers she was giving C. The puffers are a prescribed medication. Ms. W's lack of awareness about their appropriate use and expiry dates, and her willingness to have C use a medication not under a doctor's direction cause concern. Ultimately, Ms. W took C to the doctor who prescribed two different puffers: one to be used once each day and a second, to be used if C has difficulty breathing - in the winter or when he has a bad cold, for example. In December 2011 the Agency records note that Ms. W was not sending C's puffer to school so he might not have it when needed.

[219] C's appropriate use of medication is a concern of Mr. M's extensively documented in the Agency's case recordings. At one point he attempted to obtain C's records from the IWK Health Centre, but he was denied these because he wasn't C's custodial parent.

[220] The *Maintenance and Custody Act* orders provided by Ms. F demonstrate that C's medication was an issue prior to the Agency's involvement: the most recent order required that C's medication travel with him and, if it didn't, the parent who failed to send it was responsible for delivering it to the other. Sending the medication back and forth not only meant that C had his medicine but it meant that each parent could monitor whether the medicine was being used by seeing its depletion. On multiple occasions, Ms. F failed to send C's medication. When this occurred, Mr. M relied on the enforcement clause of the order, which stated

> All sheriffs, deputy sheriffs, constables, and peace officers shall do all such acts as may be necessary to enforce this Order, and for such purposes, they, and each of them, are hereby given full power and authority to enter upon any lands and premises whatsoever to enforce the terms of this Order.

[221] Sometimes Mr. M called Ms. F about the medication and told her that if she didn't send it, he would call the police for its delivery. Mr. M wasn't asked what other options might exist to obtain the medicine. Ms. F was failing to meet her obligation to deliver the medicine. Given the parents' conflict, it was wise for him not to go to collect the medicine. Mr. M said that calling the police avoided Ms. F's complaints that he was harassing her. When asked how C would react to the police's presence, Mr. M answered that he explained to C that his medicine was very important and the police's help was needed. He said he would thank the police for their help and try to make the situation a positive one where C could see the police were helping.

[222] Ms. F admitted that Mr. M took time off work to attend C's medical appointments and he attended appointments even when their cohabitation ended. They disagree about the extent to which Mr. M prepared family meals: Ms. F said that this task was shared equally.

[223] Ms. W says that C's weight is age appropriate. The Access Facilitators' Reports indicate C has a healthy appetite and eats a wide range of foods. C is active when at play. Between Ms. W and Mr. M, Mr. M has been far more attentive to C's physical health than Ms. W.

C's emotional health

[224] In the summer of 2010, C began counseling with Sara Lamb, a clinical therapist. I was provided with four reports from Ms. Lamb, the most recent of which is dated November 14, 2011. In total, C met with Ms. Lamb twenty-one or twenty-two times, including those visits which pre-dated the Agency's application.

[225] Initially, Ms. Lamb reported that C. would avoid talking about his family, the past and conflict between his parents. As time passed, C came to be less anxious in meetings with Ms. Lamb and expressed the opinion that the main difference in living with Ms. W was the fact there were no more fights between his parents. Ms. W told Ms. Lamb that C and B are in "fairly frequent conflict" and said they were "pre-occupied with violent games".

[226] In her March 24, 2011 report Ms. Lamb said that C was comfortable at Ms. W's home and happy not to hear his parents' fighting, though he "allude[d] to the fact that people in his family 'say mean things about each other'." While C seemed to enjoy therapy and wanted it to continue, he hadn't developed much comfort with expressing emotion to Ms. Lamb. Ms. Lamb suggested bringing a "trusted adult" into counselling as a means to fostering greater confidence and openness on C.'s part. As a result, Ms. W became involved in the counselling session, though she is one of the parties involved in the conflict among the adults.

[227] Ms. Lamb's final report was dated November 14, 2011. In it, she reported that C said his stress was "at the floor" and that no one was saying anything bad about anyone else. C stated that his father and Ms. W "don't even know each other" and Ms. Lamb described this as an obvious untruth which suggested this was an uncomfortable topic for C. She said that "obviously" C was exposed to some degree of adult information and is aware of tension in adult relationships. In terms of ongoing therapy, Ms. Lamb said there was not much progress in C's emotional or family discussion. I specifically asked Ms. Lamb if C had a need for ongoing counseling and was told that in the current situation it was hard to imagine that ongoing counseling would be helpful.

C's education

[228] C completed grade primary in a French immersion program in June 2010. Over the course of this school year (2009 – 2010), the cumulative record indicates C missed almost twenty percent of the school year. When the child protection application was begun, C was starting grade one and having difficulty in the French immersion program. According to a letter from the school principal and the guidance counsellor, C was "not meeting many of the outcomes for the

French language, reading, and writing criteria." C wasn't speaking French in class, except to ask to go to the washroom. C's teacher said that C wasn't progressing as he should be. By the end of 2010, C was transferred to an English program in a school located near his grandmother's home.

[229] Mr. M and Ms. W don't live in the same school district. When C was enrolled in the French immersion program, he was at a school in Mr. M's district. Mr. M says that this school has an English program. When C left the French immersion program, he was moved from this school to a school in Ms. W's school district.

[230] I have not been given school records showing C's progress for the remainder of grade one (the 2010-2011 school year) or the current school year. The Agency's case recordings note Ms. F reporting that C earned mostly As and Bs on his May 2011 report card and Ms. W says that since leaving French immersion, C no longer struggles and enjoys going to school.

[231] Access Facilitators' Reports record Mr. M assisting C with homework and reading. There's also reference to his one-on-one engagement with C in educational play. I don't have similar evidence with regard to Ms. W's involvement in C's learning.

[232] Materials from C's school, Sara Lamb, the social workers and case aides indicate no concern that C is anything but a child consistent with his chronological age. C demonstrates no developmental delays.

C and B

[233] C and B are half-siblings: they share only a mother. B is four years older than C.

[234] Ms. W reported to Sara Lamb that the children are in "fairly frequent conflict" and "pre-occupied with violent games" in December 2010.

[235] The information I have about B indicates that some of his difficulties are quite significant. He began counselling with Sara Lamb following a report that he was thinking about suicide. B expressed a need to protect his mother from her boyfriends and recognized that "anger is an issue for him", according to Sara Lamb. Her most recent report of November 14, 2011 described B as one "prone to anxiety". She has coached him in how to handle "his overwhelming feelings of anger and frustration." The Agency's support was sought for B's participation in a program at the IWK Health Care Centre, "Young Men's Work: Breaking Cycle of Domestic Violence group". Insufficient enrolment meant this program was cancelled. There was an indication that B has difficulties at school and, at one time, there was discussion about having B participate in a psycho-educational assessment.

[236] I reviewed Sara Lamb's reports at paragraphs 224 to 227. C's circumstances pale in comparison to B's.

[237] Access reports described that the children can be rivals for their mother's attention. They bicker, sulk and whine about losing at games and being disciplined and it appears that Ms. F has

difficulty managing this. Mr. M is less often required to correct C's behaviour than Ms. F. The Access Facilitator Reports indicate that Mr. M is more effective in directing C's behaviour.

[238] I've mentioned that C is reported to have improved marks since leaving the French immersion program. C's academic success has been a sore point between the children because B is not similarly accomplished.

Ms. W's plan

[239] Ms. W proposes that C would be in her custody on the same terms as B. The order relating to B requires Ms. W to discuss all major issues with Ms. F before making decisions. Ms. F is to have access with B at dates and times which were not specified. This access is supervised by Ms. W or a person agreeable to Ms. F and Ms. W. After six months of supervised access, if Ms. F and Ms. W agreed, access may be unsupervised. Notice of any change to Ms. F's supervision must be given to the Minister, which must receive notice of any intention to vary the order.

[240] With regard to Mr. M, Ms. W proposes that his access would be supervised by his mother or some other third person acceptable to Mr. M and Ms. W. Mr. M's mother would provide all transportation for access. Ms. W would discuss all major decisions with Mr. M before making decisions. Mr. M's time with C would match the time they currently have: one and one-half hours together on Tuesday evening, two hours together on Friday evening and three hours together on Sunday every week. Ms. W asks that Mr. M not have access with C every Sunday, so that she, B and C may have one weekend together each month.

[241] Ms. W asks that, like the order relating to B, if either parent applies to vary the requirement for supervised access, the Minister of Community Services must be notified. In Mr. M's case, she asks that he, additionally, be required to complete anger management counseling, drug testing and an addictions assessment referral before he be allowed to apply to vary the supervision requirement.

[242] Ms. W asks that both parents be ordered to abstain from the use of drugs or alcohol for twenty-four hours prior to and during their time with C. (This prohibition isn't contained in the order relating to Ms. F's contact with B.) She asks that all be ordered not to speak negatively about the other or to allow third parties to do so in C's presence. She proposes that each parent could have direct access to information from third parties about C.

[243] Ms. F supports her mother's plan.

[244] Ms. W filed a brief affidavit in support of her application. Some of the evidence I have of her home comes from those involved in the *Children and Family Services Act* application. Ms. W's home is shared with her husband and B. Much of C's contact with his mother occurred in this home and there has been nothing to suggest her home is inadequate.

[245] While with Ms. W, there have been various arrangements for C's childcare before and after school. On occasion, C has gone to work with Ms. W when there has been no child care in place. It seems this has just been for a single day at a time.

[246] In the child protection application there were concerns about C being exposed to discussions between Ms. W and Ms. F about adult matters. Mr. M argues that these concerns haven't disappeared. Clara Coward, who provided individual counseling and parent education to Ms. F testified that when her work with Ms. F ended in July 2011 (because Ms. Coward was moving to new employment), Ms. F and her mother were still exposing C to adult discussions.

[247] Mr. M says that this concern remains. I agree that Ms. W doesn't seem to appreciate when she is exposing C to discussions that belong between the grown ups. For example, in the past, C took part in "Treasure Seekers". In January of this year, this activity resumed and was scheduled for an evening when C was having access with Mr. M. When C expressed an interest in attending , rather than providing C with a non-specific response, Ms. W says she told C that she would check with Mr. M's social worker to see if Mr. M would change his access schedule so that C could attend.

Mr. M's plan

[248] Mr. M wants to have C in his custody and opposes Ms. W's application for custody. He proposes that Ms. F would have access with C, but that her access would be supervised by someone other than Ms. W.

[249] Mr. M had supervised access with C in the home he shares with his mother. Like Ms. W's home, there has been nothing to suggest his home is inadequate. Mr. M will modify his work hours so he will not need to work out of town, on evenings or weekends. His mother is available to provide child care for C.

[250] C'd be the only child in this home, eliminating the tension between C and B.

Financial provision for C

[251] I have no application for child maintenance. Following the children's placement with Ms. W and her husband, they assumed financial responsibility for the children. They received some assistance from the Department of Community Services in paying for daycare and summer camps.

[252] Mr. M was unemployed until the fall of 2011. Since becoming employed, Mr. M paid for C's participation in his school's milk program for one term. He has given C money to make purchases at the school book fair. This assistance wasn't requested and came voluntarily.

Relationship among Ms. W, Ms. F and Mr. M

[253] None of the parties disputed C's love for all the others. Each acknowledged the need for C to maintain a relationship with the others.

[254] There was conflict in the relationship between Ms. F and Mr. M. Currently, the parents have little contact with each other. I've described how Mr. M retreats from situations that put him into contact with Ms. F, by leaving Ms. Lamb's office, having access exchanges with Ms. W instead of Ms. F and leaving a bus if she was on it, for example. Ms. Lamb says, in her final report, that C told her his "stress is 'at the floor" and that no one in his family is saying anything bad about anyone else".

[255] While there were honeymoon periods when Mr. M and Ms. F reconciled, it seems there were no honeymoons in the relationship between Mr. M and Ms. W. When he and Ms. F reconciled in 2007, Ms. W's displeasure at this was such that she took back the furniture she'd allowed Ms. F to use to furnish her apartment. Mr. M responded by making clear that Ms. W and her husband were not welcome in the couple's home and they were not to come to the couple's apartment. When B's birthday came, Ms. W and her husband came to the couple's apartment with a gift for B. This overture wasn't accepted. Mr. M wouldn't let them in, he asked them to leave and, when Mr. W placed his foot in the apartment so that Mr. M couldn't close the door, Mr. M called the police. I'm asked to view this as a situation where Mr. M sacrificed B's interest in receiving a birthday gift. I agree this is one way to view the situation and it's a view that's correct.

[256] I think it's equally correct that Ms. W and her husband chose to ignore what they were told about not being welcome. They decided that they could disregard it if they brought a birthday present for B. It seems they either chose to put B in the middle of the adults' dispute or they were oblivious to doing this. There was no evidence that Ms. W made any efforts to ensure that B received his gift in some other way, by asking that B come to her apartment to collect it, by asking her daughter to come collect it for B. Neither Ms. W nor Mr. M can claim the moral high ground in this incident, but I have greater concern about Ms. W for provoking it.

[257] Mr. W says that Ms. W interfered with the parents by telling B that he could leave his parents and live with her. Ms. W admits to this, saying that she told B this to give him hope.

[258] The September 2010 incident at the coffee shop where Mr. M was angry with Ms. W is more recent. Ms. W's statement that she followed Mr. M to the coffee shop door after he berated her is curious. Ms. W testified that she wants things to be stress-free. This contrasts with her following Mr. M to the door (and with Mr. M's evidence that she then gestured obscenely at him as he and C drove away – which she said she didn't remember). In dealings between Mr. M and Ms. W, Mr. M seems more aware of what provokes conflict and, as a result, has a better ability to attempt to avoid conflict. Ms. W seems unaware when she is acting provocatively.

[259] All the parties can do better, and it's in C's interest that they do so, in reducing conflict. For my part, I must acknowledge their current conflict as a factor to be addressed in determining the custodial arrangement that best serves C's welfare.

Conclusion regarding *Maintenance and Custody Act* application

[260] C's welfare is my paramount consideration. I return to Justice McIntyre's comments at paragraph 27 of the Court's reasons in *King v. Low*, [1985] 1 SCR 87:

> It must be the aim of the Court, when resolving disputes between rival claimants for the custody of a child, to choose the course which will **best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult**. Parental claims must not be lightly set aside, and they are entitled to serious consideration in reaching any conclusion. Where it is clear that the welfare of the child requires it, however, they must be set aside. [emphasis added]

[261] Reviewing the evidence, I conclude that Mr. M has been more attentive to C's emotional and physical health and his education than Ms. W. Neither home has been described to me as being physically inadequate. At Mr. M's home, his grandmother is available to care for C while Mr. M works. At Ms. W's home, there would be some reliance on child care services.

[262] While the relationship between Mr. M and Ms. W hasn't been coloured by the same conflict that existed in the relationship between Ms. F and Mr. M, the relationship between C's father and grandmother hasn't been conflict-free. There isn't a foundation of trust and respect between them.

[263] In *Baker-Warren v. Denault*, 2009 NSSC 59 and *C.M. v. R.P.*, 2010 NSSC 330, Justice Forgeron considers parallel parenting orders as an option where neither sole custody nor co-operative parenting meets the child's best interests. Here, I believe that co-operative parenting isn't possible for Mr. M and Ms. W, but sole custody could isolate one from important aspects of C's life. Justice Forgeron described parallel parenting at paragraph 26 of her reasons in *Baker-Warren v. Denault*, 2009 NSSC 59:

> A parallel parenting regime permits each parent to be primarily responsible for the care of the child and routine decision-making during the period of time when the child is with him/her. Significant decision-making can either be allocated between parents, or entrusted to one parent. Parallel parenting ensures that both parents play an active and fruitful role in the life of their child while removing sources of conflict through a structured and comprehensive parenting plan.

This quotation refers to "both parents". In the context of this case, the "parents" are Mr. M and Ms. W.

Information

[264] Mr. M, Ms. F and Ms. W shall each be entitled to request information directly from those who provide care or services to C and to receive information directly from them. None shall require the permission of the others to obtain this information. This entitlement shall be reflected in a separate order under the *Maintenance and Custody Act* which each may provide to those from whom they seek information. A separate order dealing solely with this issue will provide some degree of privacy.

[265] In terms of those from whom Mr. M, Ms. F and Ms. W may seek information directly about C, when I refer to those who provide care or services to C, I include doctors, dentists, daycare workers, camp leaders and teachers within this group. Depending on C's circumstances, there may be others.

[266] Mr. M and Ms. W shall maintain an information notebook. Each shall keep the other informed of important matters relating to C's health, education and general welfare. This information will be relayed in writing in a shared information notebook. Ms. W will purchase the first notebook and make the first entry. When this book is full, Mr. M will purchase the replacement notebook and make the first entry in it. They shall continue to alternate the purchase of notebooks, keeping track of the purchaser by virtue of the first entry.

[267] The information notebook shall be placed in C's bag whenever he travels from one home to another. All information in the notebook will be focused on C and written in a respectful tone. The information which should be relayed in this notebook is, for example, if C's visited the doctor or dentist and what happened at this appointment, any outstanding homework C has, any issues related to C's use of his puffers or nasal spray. This is not the only information which may be relayed in the notebook: Mr. M and Ms. W are free to exchange as much information as they choose. They must, however, share information that is important for C's well-being.

[268] C is not to be used to relay messages between the parties. C may initiate telephone contact with Ms. F, Mr. M and Ms. W when he chooses, subject to reasonable household rules about bedtimes. Withdrawing C's entitlement to make these phone calls may not be used to discipline C.

Decision-making

[269] Ms. W has suggested that she will discuss decisions with both parents, but this suggestion seems optimistic in light of their conflictual history. In recognizing this history and fashioning a decision which tries to minimize conflict, I am not abandoning hope that all the adults will remember C's comment to Sara Lamb: his stress is at the floor when people are not saying bad things about each other. In terms of routine decision-making relating to C, while C is with Mr. M or Ms. W, he or she will be primarily responsible for C's care and routine decision-making. For Ms. W, routine decision-making will include deciding the terms of Ms. F's access with C.

[270] Mr. M and Ms. W are each responsible for any child care arrangements that C requires while C is with him or her.

[271] There are some custodial decisions which I can easily see arising: decisions relating to where C attends school, health care and participation in extra-curricular activities. With regard to where C attends school, the order outlining the terms of C's residence and decision-making shall be provided to the Halifax Regional School Board by either Mr. M or Ms. W, with a request that the Board determine the school C should attend. If the Halifax Regional School Board rules permit C to remain in his current school, he will do so. If the Halifax Regional School Board rules require that he must move to another school, C will move to the appropriate

school. Other educational decisions shall be made on the basis of the recommendations of C's teachers.

[272] Ideally, if C is to change schools, the School Board will not require C to do so during this school year. However, if the School Board does require that, then it must happen.

[273] All parties are entitled to attend parent teacher meetings and events such as school concerts and recitals.

[274] In terms of health-care, C has a family physician who shall remain C's doctor. C's current dentist shall remain his dentist. C has also seen Dr. LeBlanc, an ENT specialist. Unless and until C's family physician determines C should be referred to a different ENT specialist, Dr. LeBlanc shall continue to treat C. Where Mr. M, Ms. F and Ms. W are not unanimous in how C's health is to be treated, the treating physician (whether his general physician or a specialist) shall determine what will happen.

[275] All parties will have access to C's health card number. Unlike his medication, C's health card need not travel with C.

[276] If there is a medical emergency, the party having care of C shall make whatever decisions are required to respond to the emergency and shall notify each of the other parties as soon as practicable about the nature of the emergency and the emergency treatment.

[277] When C travels from one home to another, he must have any medication he is taking (including puffers) with him. The adult who fails to ensure the medication is with C shall be responsible for its delivery. Where medication is prescribed, the party who was with C when it was prescribed shall be responsible for purchasing the medication.

[278] Ms. W and Mr. M are each entitled to take C to the doctor as she or he thinks is necessary. If C is taken to the doctor, the adult who takes C shall notify the other by way of a written notice in the information notebook.

[279] C has few extra-curricular activities. The schedule he will have for spending time with Mr. M and Ms. W is such that each may select activities for C during his or her time with C during the school year. During the summer months, they may select activities for C that occur during their own time with him, but they should appreciate that, unless they agree, C will not be able to take part in activities which carry over into the other's time.

[280] The party who enrolls C in an activity shall be responsible for the associated costs.

C's residential arrangements

Re-location and mobility

[281] Mr. M, Ms. W and Ms. F shall not remove C from Nova Scotia without a court order authorizing this or the written authorization of each other. This authorization must be signed,

dated and witnessed. The only exception is where C requires emergency medical treatment outside Nova Scotia. If such an emergency occurs, the person who takes C from Nova Scotia shall provide the other parties with written confirmation of the emergency and the necessity of medical treatment outside Nova Scotia as soon as practicable.

[282] No one shall move C's residence from the Halifax Regional Municipality without the other parties' written authorization (which shall be dated, signed and witnessed) or the court's authorization. All should understand that if the location of C's residence is changed – possibly even if it is changed within the Halifax Regional Municipality – C's schedule may be changed.

General governing terms

[283] Ms. F and Mr. M shall abstain from the use of non-prescribed drugs and alcohol and the abuse of prescribed drugs for twenty-four hours prior to and during their time with C. Ms. F has completed addictions counselling and random urine drug testing. Mr. M has not and, while there's evidence that he uses non-prescription drugs (marijuana) and alcohol, there has been no evidence that he has used non-prescription drugs or abused alcohol or prescription drugs while he was caring for C.

[284] No one shall smoke in C's presence or permit C to be in the presence of anyone who is smoking.

[285] None of the parties shall speak negatively about the others or allow third parties to do so in C's presence. Each party will speak respectfully of the other parties and C's extended family members to C. If C is in the presence of someone who is speaking disrespectfully of the other parties or C's extended family, C shall be immediately removed.

Ms. F's supervision

[286] All parties agree that Ms. F's contact with C should be supervised. Mr. M wants her access supervised by Agency personnel. The Agency does not involve itself in private custody matters. Agency involvement is not an option nor, in my view, is it necessary. Ms. W's supervision is adequate to protect C. If Ms. W is not available, she and Ms. F may agree on another supervisor. All the other terms agreed to by Ms. W, Ms. F and the Minister shall be incorporated into the order unless inconsistent with my decision, where my decision shall prevail.

[287] I order that C have no contact whatsoever with Ms. F's partner (or former partner, as the case may be), W.F.

Mr. M's supervision

[288] Until the Agency placed the children with Ms. W, C enjoyed very generous access with Mr. M on the basis of both parents' consent. Based on the orders provided by Ms. W, Mr. M's contact with C was not supervised. Events of the past eighteen months do not persuade me that I should order C's contact with Mr. M to be supervised. I am aware that Mr. M and his mother

share a home and are co-tenants on their current year-long lease. For the foreseeable future this means that Mr. M's time with C involves the "soft" supervision of living with his mother.

Transfers

[289] Many of C's transfers have been scheduled so that C can be picked up from or returned to his school. This will limit contact between Ms. W and Mr. M. Where transfers cannot occur at his school, C's transfers shall occur in a public place. In the past, the family has used a coffee shop and they may wish to return to this option. If C is starting a visit with Mr. M, Ms. W shall take C to the transfer location where C will be met by Mr. M's mother. If C is starting a visit with Ms. W, Mr. M's mother shall take C to the transfer location to be met by Ms. W. If either Mr. M or Ms. F attends the transfer (which I do not recommend, but do not prohibit) he or she will remain outside and not engage in any conversation with the other.

Transition

[290] The schedule I'm providing outlines the time C will spend with Mr. M and Ms. W during the school year and at Easter. As this decision is being prepared, there are a few months left in the school year and the Easter weekend is just ahead of us. The Easter schedule I am ordering in paragraph 296 will begin in 2013.

[291] To transition C from his current schedule to the one I am ordering for the school year, I order that C will visit with his father on Tuesday, April 3, from 6 p.m. until 7:30 p.m. On Thursday, April 5, C will be with his father from after school until 4 p.m. on Saturday, April 7. The school year schedule, which I've outlined in paragraphs 293 to 297, will begin Thursday, April 12. The parties should understand that this will happen even though the court order based on my decision will not be formalized by this time.

Summer schedule

[292] Starting on the Friday evening following the last day of school, C shall begin to alternate his time between Mr. M's home and Ms. W's on a weekly basis, every Friday evening at 5:00 p.m. This weekly alternation shall continue until the Thursday afternoon following the first day of school in September when the school year schedule will begin. In even-numbered years, the first week of the summer schedule shall be with Mr. M. In odd-numbered years, the first week of the summer schedule shall be with Ms. W.

School year schedule

[293] Commencing on the Thursday afternoon following the first day of school in September, the school year schedule will start. During the school year, from September until the end of June, C shall be with Mr. M on every weekend from Thursday after school until Monday morning when C is returned to school, except for the last weekend of the month, when C shall be with Ms. W. The exception to this pattern will be in May, when C shall spend the last weekend of the month with Mr. M and the weekend containing Mother's Day with Ms. W. The school

year schedule will also be suspended or modified as I outline in paragraphs 294 to 297. If Monday is a school holiday, C shall be returned to Ms. W by 9:00 a.m.

Christmas schedule

[294] The school year schedule shall be suspended during the period from December 24 to December 27 annually. Commencing this year and continuing in even-numbered years, C shall be with Mr. M on December 24 from 6:00 p.m. until 8:30 p.m. and on December 26 from 10:00 a.m. until December 27 at 10:00 a.m. So, in even-numbered years, C will be with Ms. W from 8:30 p.m. on December 24 until 10:00 a.m. on December 26. In 2013 and in odd-numbered years, C shall be with Mr. M from noon on December 24 until noon on December 26. At all other times from noon on December 24 until 10:00 a.m. on December 27 in odd-numbered years, C shall be with Ms. W. The family shall return to the school year schedule at 10:00 a.m. on December 27 each year.

March break schedule

[295] C's school year schedule will be modified only slightly during the March Break: during this week, C shall be with Mr. M from Wednesday (during the March Break) at 5 p.m. until being returned to school on Monday.

Easter schedule

[296] The school year schedule shall be suspended during the days comprising the Easter weekend: from Thursday after school until Tuesday morning when school resumes. Mr. M and Ms. W will alternate spending Easter with C annually. Starting in 2014 and continuing in even-numbered years, C shall be with Ms. W from after school on Thursday until he returns to school on Tuesday morning following the holiday weekend. In odd-numbered years beginning in 2013, C shall spend this time with Mr. M.

Parents' birthdays

[297] Each parent is entitled to be with C on his or her birthday. If the schedule is such that the parent is already with C, that resolves the issue. If not, then the parent will be with C from 9 a.m. until 7:30 p.m. on the parent's birthday, subject to the parent's own availability and C's school schedule: C may not miss school.

Other

[298] If there are any occasions when all three parties agree to alter this schedule, they may do so. Otherwise, the schedule shall not be changed.

Review

[299] In my effort to provide for a comprehensive parallel parenting arrangement I do not flatter myself that I've identified and addressed all the issues. I order that the parties return for a

thirty minute review in August, 2012. I will direct the Scheduling office to contact each party or its counsel to arrange this appearance when I will hear from the parties about the parenting arrangement I've ordered and I'll determine whether a further hearing is required. I remain seised of Ms. W's application for this review and any hearing arising from it.

Conclusion

[300] I conclude that it is in the best interests of C that I dismiss the Minister's application for permanent care and custody of C. Ms. Webb shall prepare this order for review by the parties to the Minister's application, and issuance.

[301] I order that Ms. W, Ms. F and Mr. M all attend the court's Parent Information Program.

[302] Mr. Campbell shall prepare a discrete order permitting each party to access information about C directly from third parties as I outlined in paragraphs 264 and 265 for review by all parties to Ms. W's *Maintenance and Custody Act* application.

[303] Mr. Campbell shall prepare the parallel parenting order for review by all parties. The Minister of Community Services is only concerned with those aspects of it that relate to Ms. F.

[304] In terms of reviewing the orders, a party reviewing an order has ten days from the date the order is provided to it to comment on the form of the order. If the drafter (Ms. Webb or Mr. Campbell) hears no complaints with regard to the form of the order within ten days from the date the order is provided, then she or he may submit the order to me for my review. Mr. M must provide Mr. Campbell with an address where Mr. Campbell can have a courier deliver the draft orders to Mr. M. Alternately, Mr. M must make arrangements to collect the order from Mr. Campbell. If Mr. Campbell failed to note Mr. M's telephone number, he may obtain it from the court.

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Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia