SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Nova Scotia (Community Services) v. B.H., 2013 NSSC 59

Date: 20130219
Docket: 76577
Registry: Sydney

Between:

Minister of Community Services

Applicant

v.

B. H.

Respondent

Editorial Notice

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

Judge:	The Honourable Justice Kenneth C. Haley
Heard:	November 21, 22, 2013, January 21, 2013, with written submissions February 4, 2013, in Sydney, Nova Scotia
Counsel:	Mr. Adam Neal, for the Minister of Community Services Mr. Alfred Dinaut, for the Respondent, B. H.

By the Court:

[1] This is the Application of the Minister of Community Services, hereinafter called "The Minister", seeking an Order, pursuant to Section 42 (1) (f) of the ***Children and Family Services Act***, that the child, H. M. H. born September [...], 2008, be placed in the permanent care of the Minister with no provision for access.

[2] The Respondent is the maternal grandmother of the child and she has opposed the Application.

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

July [...], 2011 -

- Child, H. M. H., taken into care;

July [...], 2011 -

- Section 39, 5 day Interim Hearing,
- Based upon reasonable and probable grounds, the child was placed in the temporary care of the Minister pursuant to Section 22 (2) (b) and (g) or the ***Children and Family Services Act.***

August 9, 2011 -

-Completion of the Section 39 Interim Hearing;
- Child ordered to remain in temporary care of Minister.

October 5, 2011 -

- with consent, the child was found on a balance of probabilities, to be in need of protective services pursuant to Section 40 of the ***Children and Family Services Act***.
- child ordered to be placed in the supervised care of the Respondent, B. H.
- since the Respondent required surgery at the time the child was temporarily placed with the Respondent's sister under a kinship placement until the Respondent had recovered.

December 14, 2011 -

-Disposition Hearing; status quo to continue, Respondent still recovering.

March 5, 2012-

-Disposition Review; status quo to continue, Respondent still recovering.

April 3, 2012 -

-Disposition Review; child placed in the supervised care of the Respondent

May 31, 2012 -

- Disposition Review; by consent status quo to continue.

June 28, 2012 -

- Child reapprehended and placed in the temporary care of the Minister by consent.

August 28, 2012 -

- Minister advises it will seek order for permanent care for the child.
- Trial dates set for November 21 and 22, 2012

[4] On November 21 and 22, 2012 the Minister called the following witnesses, namely:

1. Mary Jo Church - Medical Records;
2. W. H. - Sister of the Respondent, Referral Source
3. Dorothy Gouthro - Family Support Worker
4. Tracey Pentecost - Access Facilitator
5. Nicole Sheppard - Protection Worker

[5] The matter was adjourned by consent to January 21, 2013 for completion of the evidence. At that time the following evidence was called on behalf of the Respondent, namely:

6. Blair Kasouf - Social Worker Family Services
7. B. H. , the Respondent

[6] During the proceeding the Court received into evidence the following exhibit:

Exhibit No. 1 - Clinical Notes of Blair Kasouf.

[7] Final written submissions were requested to be submitted to the Court on February 4, 2013.

MINISTER'S EVIDENCE

[8] The Minister filed its plan of care with the Court on August 16, 2012. At part 1 the Plan states:

1. Disposition Order sought

The Minister is seeking an order pursuant to section 42 (1) (f) of the *Children and Family Services Act* that the child, H. H., born September [...], 2008 shall be placed in the permanent care and custody of the Minister, the Minister of Community Services.

At part 4 (a), page 9, paragraph 2 of the Plan the Minister states:

H. H. has been a child in need of protective services since July 2011. She was in foster care from July 2011 to April, 2012, then removed from the grandmother's care in June 2012. Given the length of time the child has been a child in need of protection, her need for consistency, safety and security, it is the position of the Agency that the circumstances justifying the proposal are unlikely to change within the foreseeable time and that it is in the best interests of the child to be placed in an adoptive home.

And further at Part 4 (c) page 10, the Plan states:

Given the Agency's plan to place the child, H. H. for adoption, continued access is not planned as it would delay and possibly prevent the placement for adoption for this child. A final visit would be arranged at the request of the Respondent.

[9] The evidence of **W. H.** and **Nicole Sheppard** regarding the child, H. H., being taken into care is succinctly captured in Part 3 (a) narrative of the Plan of Care as follows:

3. Removing child from care of parent or guardian

Ms. B. H. was the custodial care giver of her granddaughter, H. H., date of birth, September [...], 2008, H. H. was placed with her grandmother shortly after her birth due to concerns that her birth mother was abusing drugs and involved in prostitution.

Previous child welfare involvement with Ms. B. H. dates back to 1998 which includes allegations of domestic violence, unfit living conditions, and parent/child conflict. The Minister became involved with Ms. B. H. in relation to her granddaughter in July, 2011.

On July 20, 2011 H. H. went to the store with Ms. B. H. ‘s adult daughter, J. H., and Ms. J. H.’s boyfriend B. B.. While at the store Ms. J. H. passed out on the sidewalk and was taken to the hospital by ambulance due to a drug overdose. Mr. B. B. returned H .H. after Ms. J. H. was taken to the hospital. Ms. B. H. told child welfare that she did have concerns with J. H. ‘s behaviour prior to allowing her to take H. H. to the store, but permitted such anyway.

On July 20, 2011 Provincial Emergency Duty Social Worker directed Ms. B. H. that she was not to allow unsupervised contact between Ms. J. H. and L. B. until the assigned social worker could follow up further with the matter. Ms. B. H. indicated that she agreed to not allow Ms. J. H. to care for L. B. or any other children until a worker could further assess the matter, and that she understood why the request was being made. Ms. B. H. stated that B.B. is an alcoholic, the Agency requested that he not have contact with the children while under the influence of drugs or alcohol.

On July 21, 2011 Social Worker Nicole Sheppard told Ms. B. H. that Ms. J. H. or B. B. would not be permitted alone in a care giving role with their daughter or her granddaughter, H. H.. Ms. B. H. indicated she understood this and agreed to abide by this condition.

On July 22, 2011 at 8.28 p.m., a referral was received from a credible confidential referral source. She explained that around 4:30 p.m., Ms. J. H. was present with the baby. Ms. B. H. was at work, and the boarder, D.C., was supposed to be present to supervise Ms. J. H.. with the baby, as well as provide care to H. H. until Ms. B. H. got off work at 10 p.m.. Upon leaving the residence the referral source observed that Ms. C. was leaving the residence with her boyfriend, and that Ms. J. H. and Mr. B. B. were left at the residence with the baby, and H. H.. The referral source also left the residence and contacted Ms. B. H. to inform her that Ms. J. H. and her boyfriend were home alone with the children.. Ms. B. H. responded by saying that Ms. C. would probably return shortly.

On July 22, 2011 at 9:15 p.m., Social Worker Wendy Campbell attended the H. residence. She discovered that Ms. C. and her boyfriend were in Ms. C.’s bedroom and there was a strong smell of marijuana coming from the room. Both appeared to be under the influence. Ms. C. reported that she had told Ms. B. H. she had plans and could not supervise Ms. J. H. with the children. Within two minutes of Social Worker Campbell’s arrival, Ms. J. H. took a knife and cut her wrists deeply. The two children were taken into care of the Minister at this time.

H. H. was returned to the supervised care of B. H. on April 3, 2012. A stipulation of this was that J. H. was not to be unsupervised with the child.

[10] The child was re-apprehended for a second time on June 21, 2012. The Plan of Care at Part 4 (a) page 5, paragraph 1 states:

> Another referral was received on June 21, 2012 from police that Ms. B. H. had attempted suicide by taking pills and was on her way to the hospital and the child, H. H. was at the home with her aunt, J. H. H. H. was taken into care at this time.

[11] The Minister has significant concerns with respect to B. H., her associates and the care she provided to H. H. The Minister's evidence is that B. H. does not acknowledge any risk to H. H. while in her care or that of J. H.

[12] The Minister's evidence is that B. H. has been very reluctant to accept any remedial services offered or recommended by the Minister. Her failure to comply in this regard suggests to the Minister that B. H. has not gained any insight into the risk and the reasons that lead to her granddaughter being taken into care.

[13] B. H.'s lack of cooperation and reluctance to accept remedial services is reflected in the evidence of other witnesses. According to **Dorothy Gouthro**, Family Support Worker, B. H. said she did not need education in parenting. B. H. said "she knows how to raise kids".

[14] Ms. Gouthro confirmed the Minister's concern that B. H. lacked insight into the protection issues and the resulting effect on H. H.

[15] **Tracey Pentecost**, Access Facilitator, testified that B. H. did not take a lead role in playing and interacting with H. H. during supervised visits. The access facilitator was concerned that B. H. did not know how to parent H. H. and that B. H. had no control over the child's behaviour. Over time there was sufficient improvement noted to warrant the return H. H. to B. H.' s supervised care.

[16] Issues nonetheless arose about H. H.'s schedule and concerns that H. H. was being allowed to stay up too late. This impacted upon H. H.'s ability to attend daycare which was another matter of dispute between the Minister and the Respondent. An accommodation was made in this regard and daycare was reduced from five days to three days a week.

[17] In addition concerns were expressed with regard to the cleanliness of B.

H.'s home. Further concerns were raised with regard to B. H. allegedly using a grocery gift card to obtain cigarettes and/or marijuana for friends.

[18] In general the Minister is concerned about the environment that H. H. has been exposed to by the Respondent, including her daughter J. H. and other associates, along with the Respondent's lack of consistency and stability in terms of providing appropriate child care for H. H.

[19] **Nicole Sheppard**, Protection Worker, was questioned by the Minister as follows at pages 33 - 34 of her transcribed evidence:

> **Q.** Okay, more recently what has the communication been like between yourself and Ms. H. when you contact her to discuss concerns and services?
> **A.** Recently she has been okay, she has been easier to talk to, she is not being unpleasant.
> **Q.** Now you say throughout there was concern with insight, has that changed?
> **A.** No.
> **Q.** Okay, about taking responsibility for the concerns, has that changed?
> **A.** No.
> **Q.** Okay. Now when was the decision made to seek permanent care in this matter?
> **A.** We had the risk conference on August, mid August, I think it was August 16, 2012.
> **Q.** Okay, walk me through the decision process that reached the conclusion of permanent care?
> **A.** We talk about the full case history that we have, time lines for court, the fact that H. H. has come into care the second time, the fact that there is still been lack of insight on B. H., she is still denying that H. H. has ever been at risk from the beginning. Those are the things that we talk about.
> **Q.** Okay, and was it upon those concerns that you determined permanent care in this case?
> **A.** Yes.

And at page 37:

> **Q.** Okay. And just finally, the Minister's position at this hearing with respect to the child H. H. is what?

A. Permanent Care with no access.
Q. Okay and with respect to the permanent care, what's the long term plan for H. H.?
A. That she would be adopted and in a permanent home.
Q. And you mentioned that the foster family have come forward as expressing interest to adopt at that time, is there anything at this moment that would exclude them as being a possible adoptive home? For H. H. ?
A. No. We would support that, then they would go through the adoption assessment.

RESPONDENT'S EVIDENCE

[20] **Blair Kasouf**, Social worker with Family Services, testified he provided grief counselling; health counselling and self care counselling to the Respondent November, 2011 to August, 2012.

[21] Mr. Kasouf had twelve meetings with the Respondent over which time he determined the Respondent had stress in her life due to the passing of her husband and the apprehension of her granddaughter by the Minister.

[22] Mr. Kasouf was of the view that the Respondent had a very strained relationship with the Minister.

[23] The **Respondent, B. H**., testified on her own behalf. She now resides with her daughter, J. H. in a two bedroom apartment in Sydney, Nova Scotia.

[24] B. H. testified that her daughter J. H. was diagnosed with schizophrenia and is dealing with some mental health issues as a result.

[25] B. H. testified that when she sees a change in J. H. she calls J. H. 's doctor immediately.

[26] B. H. testified that J. H. has had her medication changed. There have been no further suicide attempts since the two reported incidents in July 2011.

[27] B. H. has had H. H. in her care since 2009. H. H.'s mother, the Respondent's daughter, is a crack cocaine user and the Alberta Child Welfare

Authorities placed H. H. in the Respondent's care.

[28] The Respondent is a diabetic but is now doing well since her foot surgery. Her source of income is disability and baby bonus. Her disability does not affect her ability to care for H. H.

[29] B. H. testified regarding the events of July 21 - 22, 2011, the date of the initial apprehension of H. H. by the Minister.

[30] The Respondent testified that when her sister, W. H., called to advise her that J. H. was alone in the apartment with H. H., she called the apartment and her roommate, D. C., answered the telephone.

[31] When questioned about the evidence of W. H., who stated D. C. had left the apartment, the Respondent replied she was not sure what had happened. She stated:

> "I was not there. D. C. has since moved out."

[32] The Respondent acknowledged she had a confrontational relationship with the Minister. She believed that she was providing good care for H. H. and that the Minister was over zealous in pursuing their concerns. She testified:

> "We have differing opinions on child care."

[33] B. H. denied selling her grocery card for cigarettes and/or drugs. She testified:

> ...that never happened
>
> ...I needed that for milk money

[34] B. H. explained her alleged overdose of over the counter sleeping medication by stating she was tired and stressed as a result of the constant supervision of the children in J. H.'s presence.

[35] B. H. testifies she took a natural medication to help her sleep and that J. H. misunderstood how much B. H. took which caused J. H. to call 911. B. H.

testified:

> ....I did not try to commit suicide
>
> ....I wanted to rest...I was tired

[36] B. H. was taken to the Crisis Centre and released the same evening.

[37] The Respondent testifies there has been no recent contact with B. B. the father of L. B. She testified:

> ....I would call the police if he showed up

[38] Similarly B. H. testified she has had no contact with J.M., her "movie buddy" since June 2011 and that she has no idea where he is.

[39] B. H.'s plan is to relocate to Ontario with J. H. and her granddaughters, H. H. and L. B.

[40] B. H. would like to help her daughter, S. H. address her drug addiction issues. She testified that if S. H. was to have any contact with H. H. it would have to be strictly supervised. She is prepared to give S. H. a"body check", if required, to ensure H. H. would not be exposed to her mother's possible drug use.

[41] B. H. also is supportive of her daughter, J. H. She testifies J. H. is good with children and further states:

> ...I know if she is fine that I would have no problem leaving J. H. alone [with the children] for five minutes

MINISTER'S SUBMISSIONS

[42] The Minister submits by way of written submissions dated February 5, 2013 as follows:

> -That the Respondent's daughter, J. H., who currently lives with her, has had a long history of severe mental instability, including three suicide attempts.

-That the Respondent's other daughter, S. H., who is the mother of the child H. H., is living on the streets in Alberta and addicted to crack cocaine.

- That the Minister first became involved with the Respondent and her granddaughter H. H., when the Minister received a referral in April, 2011 alleging that the Respondent's daughter J. H. had attempted to commit suicide by taking an over dose of pills.

- That on July 20, 2011, J. H. again overdosed and had passed out while out for a walk with her boyfriend B. B. and daughter L. B.

- That although the Respondent testified she can tell when J. H. is not doing well and can intervene, she was not present to or was unable to intervene to effectively stop those two suicide attempts by her daughter J. H.

- That as a result of the April and July suicide attempts, the Minister directed the Respondent not to leave her daughter, J. H., or her partner, B. B., unsupervised or in a child caring role with either H. H. or L. B.

- That the Respondent instantly took the position that the referral source was lying and that the roommate, D. C., was present at the apartment in a supervising role.

- That the referral source and Respondent's sister, W. H., testified that at the time she left the apartment, J. H. And B. B. were left alone with the children.

- That W. H. testified that she called the Respondent who did not seem to be concerned, and, as a result W. H. called Child Protection Services.

- That the Protection Worker, Wendy Campbell, responded to the complaint and reported that marijuana was being used by D. C. and her friend in D. C.'s room with the door closed.

- That the Respondent left work to meet with the Protection Worker at the apartment.

- That while the Respondent and the Protection worker were engaged in conversation, J. H. entered the kitchen, obtained knife and began cutting her wrists.

- That H. H. was taken into care by the Minister on July 22, 2011 following the above noted incident.

- That during supervised access visits the Respondent was noted to take a very passive role and allowed J. H. to do most of the interaction with H. H.

- That when H. H. was returned to the Respondent's supervised care she reluctantly agreed to permit H. H. to attend day care three days a week having been in opposition to the recommended five days per week.

- That during pick up of H. H. for daycare H. H. was rarely up and ready to go and missed 50 percent of daycare because she was still asleep.

- That upon return to the temporary care of the Minister in June 2012, H. H. re established regular sleeping pattern in the foster home.

- That the Respondent's expressed lack of concern to establish a structured routine for H. H. is a concern to the Minister which, in its view, creates a safety issue for H. H..

- That the Respondent's association with B. B., J.M. and D. C. is a concern to the Minister.

- That the Respondent's refusal to cooperate with Family Support workers to work on parenting skills until after the plan for permanent care was filed, is a concern to the Minister.

- That the Respondent's hospitalization on June 21, 2012, as the result of an alleged suicide attempt, is a concern to the Minister.

- That the Respondent's explanation that she took an over the counter medication to sleep should be rejected.

- That the Respondent has shown disregard for the services identified by the Minister in this matter.

- That the Respondent denies that she has any parenting deficiencies and lacks total insight in this regard.

- That it is not in the best interests of H. H. to be returned to the care of the Respondent.

- That the safety concerns for H. H. continue to exist and the Respondent has not

adequately addresses these concerns so as to reduce or eliminate the risk of harm to H. H..

-That it is the best interests of H. H. to be placed in permanent care with a view to adoption which would provide a stable environment for H. H..

[43] The Minister concludes its submissions at page 12 as follows:

The Minister of Community Services submits that the evidence has shown:

(a) on the balance of probabilities;

(b) that it is in the best interests of the child, H. H.;

(i) as there are no reasonable services which B. H. could benefit from;

(ii) as no family placement is before this Honourable Court; and

(iii) as the circumstances of B. H. are unlikely to change in the reasonably foreseeable future;

(c) that an order for permanent care and custody should be granted;

(d) with no provision for access as;

(i) permanent placement in a family setting is planned fro the child;

(ii) the child is four years age;

(iii) the plan is for the child to be adopted; and

(iv) there are no special circumstances justifying an order for access; and

(e) the Minister of Community Services will consider the best interests of the child in selecting the most appropriate adoptive placement.

RESPONENT'S SUBMISSIONS

[44] The Respondent submits by way of written submission dated February 4,

2013, as follows:

- That at the time of apprehension the Respondent, while at work, had left her roommate, D. C., to care for the children H. H. And L. B. while in the presence of J. H.

- That the Respondent was unaware that D. C. had left the residence while W. H. was present.

- That when W. H. phoned the Respondent, she immediately called home at which time D. C. was present.

- That the Respondent was not concerned since J. H. and the children were being supervised by D. C..

- That the Respondent sustained tremendous stress in her life through the death of her husband and the mental illness of her daughter, J. H..

- That the Respondent had sufficient insight to seek help in the form of grief counselling on two distinct occasions.

- That the Respondent sought professional help for her daughter to gain control of her mental health issues.

- That the Respondent experienced conflict with the Minister because she disagreed with the Minister's expectations for child care.

- That the Respondent is mature and has experience as the mother of two children.

- That the Respondent has the ability to keep the apartment clean and a safe environment for young children.

- That there is no concern about the Respondent's having contact with her granddaughter, H. H. , evidenced by the continuation of visits, even after the second apprehension.

- That the issue raised by the Minister, regarding H. H.'s lack of routine by being permitted to stay up late and thus late for morning day care is an effort by the Minister to "grasp at straws" and are not risks to the safety and health of the child H. H. as alleged by the Minister.

- That other “so called” issues involving ash trays; smoking in the home; the selling of a grocery card and clutter at the home are unsubstantiated.

- That the conflict became the focus instead of the Minister offering services to assist the Respondent in assuring J. H. would not left alone with the children.

- That despite the conflict between the Minister and the Respondent, access increased and day care continued.

- That all the issues raised by the Minister are centered more with the difficulty between the Respondent and the Minister, rather than any threat of harm to the child.

- That J. M. and B. B. are no longer in the Respondent’s life.

- That reports regarding the Respondent’s “attempted suicide” are exaggerated and not supported by hospital records.

- That the Minister acknowledges that the Respondent’s daughter health has improved and that she appears to be following her treatment plan.

- That the Respondent has excellent insight into J. H.’s mental health issues.

- That the Respondent “can anticipate” when J. H. will be having good or bad episodes.

- That the Respondent can tell when J. H. is not stable and will protect the child H. H. if such were to happen.

- That the Respondent’s short term plan is to have H. H., and J. H.’s daughter, L. B. live with her and J. H..

- That long term the Respondent’s plans to move to Ontario where she has family connections and work is more plentiful.

- That the Respondent would like her daughter S. H. to move from Alberta to Ontario to further address her drug issues.

- That eventually and conditional upon S. H. resolving her drug issues the Respondent would like S. H. to have contact with her daughter, H. H..

- That the Respondent has responded to the Minister's concerns and has demonstrated insight by addressing her own mental and physical issues.

- That the Minister has failed to discharge the burden of proof.

- That it is now safe to return H. H. to the Respondent.

- That the Permanent Care Application should be dismissed.

BURDEN OF PROOF

[45] A proceeding pursuant to the *Child and Family Services Act* is a civil proceeding **NS.(MCS) v DJM** [2002] N.S.J. No368 (NSCS).

[46] The burden of proof is on a balance of probabilities which is not heightened or raised because of the nature of the proceeding. **F.H. v McDougall** [2008], 3 S.C.R. 41, the Supreme Court of Canada held a paragraph 40:

> 40 Like the House of Lords, I think it is time to say, once and for all in Canada there is only one **civil** standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the serousness of the allegations or consequences. However, these considerations do not change the standard of proof. ....

And further at paragraph 45 and 46.

> 45 To suggest that depending upon the seriousness, the evidence in the **civil** case must be scrutinized with greater care implies that in less serious **cases** the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all **cases**, evidence must be scrutinized with care by the trial judge.
>
> 46 Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently

> clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

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

TEST ON STATUTORY REVIEW

[48] The Supreme Court of Canada set out the test to be applied on statutory review hearings in child protection proceedings in the **Catholic Children's Aid Society of Metropolitan Toronto v C.M.**, [1994] S.C.J. No. 37 (SCC), where the Court held that at a status review hearing it is not the Court's function to retry the original protection finding, but rather, the court must determine whether the child continues to be in need of protective services. Writing for the majority, L'Heureux-Dube, J. stated as follows at paragraphs 35; 36; and 37:

> 35 "It is clear that it is not the function of the status review hearing to retry the original need for protection order. That order is set in time and it must be assumed that it has been properly made at that time. In fact, it has been executed and the child has been taken into protection by the respondent society. The question to be evaluated by courts on status review is whether there is a need for a continued order for protection...
>
> 36 The questions as to whether the grounds which prompted the original order still exist and whether the child continues to be in need of state protection must be canvassed at the status review hearing. Since the *Act* provides for such review, it cannot have been its intention that such a hearing simply be a rubber stamp of the original decision. Equal competition between parents and the Children's Aid Society is not supported by the construction of the Ontario legislation. Essentially, the fact that the *Act* has as one of its objectives the preservation of the autonomy and the integrity of the family unit and that the child protection services should operate in the least restrictive and disruptive manner, while at the same time recognizing the paramount objective of protecting the best interests of children, leads me to believe that consideration for the integrity of the family unit and the continuing need of protection of a child must be undertaken.
>
> 37 The examination that must be undertaken on a status review is a two-fold examination. The first one is concerned with whether the child continues to be in need of protection and, as a consequence, requires a court order for his or her protection. The second is a consideration of the best interests of the child, an important and, in the final analysis, a determining element of the decision as to the

> need of protection. The need for continued protection may arise from the existence or the absence of the circumstances that triggered the first order for protection or from circumstances which have arisen since that time.

LEGISLATION

[49] The Court must consider the requirements of *Children and Family Services Act*, S.N.S. 1990, c. 5 in reaching its' conclusion. I have considered the preamble which states:

> AND WHEREAS children are entitled to protection from abuse and neglect;
>
> AND WHEREAS parents or guardians have responsibility for the care and supervision of their children and children should only be removed from that supervision, either partly or entirely, when all other measures are inappropriate;
>
> AND WHEREAS children have a sense of time that is different from that of adults and services provided pursuant to this *Act* and proceedings taken pursuant to it must respect the child's sense of time;

[50] I have also considered Sections 2(1) and 2(2) which provide:

> **Purpose and paramount consideration**
>
> 2(1) The purpose of this *Act* is to protect children from harm, promote the integrity of the family and assure the best interests of children.
>
> 2(2) In all proceedings and matters pursuant to this *Act*, the paramount consideration is the best interests of the child.

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

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

parent or guardian and a secure place as a member of a family;

(b) the child's relationships with relatives;

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

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

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

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

(g) the child's cultural, racial and linguistic heritage;

(h) the religious faith, if any, in which the child is being raised;

(i) the merits of a plan for the child's care proposed by an agency, including a proposal that the child be placed for adoption, compared with the merits of the child remaining with or returning to a parent or guardian;

(j) the child's views and wishes, if they can be reasonably ascertained;

(k) the effect on the child of delay in the disposition of the case;

(l) the risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent or guardian;

(m) the degree of risk, if any, that justified the finding that the child is in need of protective services;

(n) any other relevant circumstances.
[Emphasis added]

[52] Section 22(2) of the *Children Family and Services Act* states:

s. 22 (2) A child in need of protective services where

(b) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (a)

> [clause (a) states: the child has suffered physical harm, inflicted by a parent or guardian of the child or caused by the failure of a parent or guardian to supervise and protect the child adequately.]

[53] Other relevant sections include sections 42(2); (3) ;(4), which provides as follows:

> (2) the Court shall not make an order removing the child from the care of a parent or guardian unless the Court is satisfied that less intrusive alternatives, including services to promote the integrity of the family pursuant to Section 13,
>
> (a) have been attempted and have failed;
>
> (b) have been refused by the parent or guardian; or
>
> (c) would be inadequate to protect the child.
>
> (3) Where the Court determines that it is necessary to remove the child from the care of a parent or guardian, the Court shall, before making an order for temporary or permanent care and custody pursuant to clause (d), (e) or (f) of subsection (1), consider whether it is possible to place the child with a relative, neighbour or other member of the child's community or extended family pursuant to clause (c) of subsection (1), with the consent of the relative or other person.
>
> (4) The Court shall not make an order for permanent care and custody pursuant to clause (f) of subsection (1), unless the Court is satisfied that the circumstances justifying the order are unlikely to change within a reasonably foreseeable time not exceeding the maximum time limits, based upon the age of the child, set out in subsection (1) of Section 45, so that the child can be returned to the parent or guardian.

LAW AND ANALYSIS
ISSUE # 1 - PERMANENT CARE

[54] I have reviewed and considered the evidence together with the plans and submissions of the parties. Although I may not have specifically commented on all of the evidence in this decision, I have nonetheless considered the totality of the evidence in reaching this decision.

[55] I have applied the burden of proof to the Minister. There is only one standard of proof and this is proof on a balance of probabilities, a burden which must be discharged by the Minister.

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

[57] According to the legislation which I must follow, the Court has only two stark options available at this time: (1) order permanent care or (2) dismiss the proceeding and return the child to the Respondent.

[58] There is no middle ground. As noted by the Nova Scotia Court of Appeal in **G.S. v Nova Scotia (Minister of Community Services)** [2006] N.S.J. No. 52 (NSCA) at paragraph 20:

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

[59] The need for protection may arise from the existence or absence of the circumstances that triggered the first order for protection, or from circumstances which have arisen since that time **G.S. v Nova Scotia (Minister of Community Services)** [2006] N.S.J. No. 52 (NSCA) .

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

[61] I have scrutinized the evidence with care and I am satisfied that the evidence of the Minister is sufficiently clear, convincing, and cogent to satisfy the balance of probabilities test. The contention that the Respondent poses a substantial risk of harm or real chance of danger to the child, H. H. has been proven on a balance of probabilities.

[62] I find the order requested by the Minister is the appropriate one having considered the totality of the evidence. I agree with and accept the Minister's submissions. The child H. H. continues to be in need of protective services. It is in the best interests of the child to be place in the permanent care of the Minister

pursuant to S. 42 (1) (f) and S. 47 of the *Act*. I cannot return H. H. to the Respondent, B. H.

[63] I reject the plan put forth by the Respondent, B. H. It in no way addresses the long term needs of the child and I find the child, H. H. , would be placed at substantial risk of harm if returned to her grandmother's care.

[64] The Court is satisfied, on a balance of probabilities, that the Respondent lacks total insight into her parenting deficiencies .

[65] The Respondent's plan to live with her daughter, J. H., on a balance of probabilities, will subject the child, H. H., to continued risk of harm. The child therefore remains in need of protective services. The Court, thus, cannot dismiss the proceedings **(G.S. v. Nova Scotia (Minister of Community Services)** [2006] N.S.J. No. 52 (NSCA)).

[66] The Court has considered all of the concerns of the Minister and the position of the Respondent in reply. The Respondent has addressed some but not all of these concerns. The Court can understand, to some extent, why the Respondent became confrontational with the Minister as there were some concerns of a minor nature, for example, allowing the child to wear pyjamas pants to pre-school. Unfortunately, this conflict, escalated to the point that it affected the Respondent's ability to work cooperatively with the Minister. This appears to have been to her detriment. There is now not sufficient time available, pursuant to the legislation, to provide further remedial services.

[67] This result is unfortunate and speaks to the need for Respondents, such as B. H., to have access to independent advice and counsel whether legal or service based, to assist them in understanding the role of the Minister of Community Services in terms of child protection. Such an approach may have eliminated the conflict which unfortunately occurred in this instance.

[68] In consideration of all the evidence, the uncertainty surrounding the mental status of J. H. stands out as an issue of great concern for the Court . This uncertainty, in of itself, is a sufficient basis for the Court to consider a permanent care order. The Court has grave concerns about the Respondent's failure or

refusal to accept or understand the Minister's position regarding the Respondent's plan to continue to live with her daughter, J. H.

[69] J. H.'s history of suicide attempts is a red flag which the Court cannot ignore. The Court has received no medical evidence to support the Respondent's contention that J. H. is doing well and is responding well to her current treatment regime.

[70] This is a speculative assessment made by the Respondent, upon which the Court can place no reliance. I am satisfied that the child, H. H. would not be safe and free from risk of harm if placed back into the environment where J. H. lives. If that were to occur there is a real danger that H. H. would be left alone unsupervised in the care of J. H. As stated by the Respondent:

> ...I know if she is fine that I would have no problem leaving J. H. alone [with the children] for five minutes

[71] The Respondent assures the Court that she has the ability to predict the state of mind of J. H. She testified that she can provide H. H., the level of protection that she needs. Once again, the Court can place no measure of reliance upon these speculative assurances regarding the safety of H. H.

[72] This would create a dangerous and unsafe environment for the child, H. H. The Court must ensure the child is protected from the likelihood of this occurring.

[73] Another issue of concern raised by the Minister is the alleged attempted suicide by B. H. B. H. denied she attempted to take her life and stated that her daughter, J. H. was mistaken in her belief that the Respondent had overdosed when she called 911.

[74] The evidence is not sufficiently, clear, convincing and cogent to establish, on a balance of probabilities, that B. H. attempted suicide. The explanation put forward by B. H., that she was tired and needed to rest is reasonable given her commitment to the Minister that H. H. would not be left alone unsupervised in the presence of J. H.

[75] B. H.'s need for rest is understandable in the circumstances. Nonetheless,

B. H. exercised poor judgment by not taking reasonable and necessary steps to ensure that H. H. would not be left alone in the unsupervised care of J. H. Alternative arrangements should have been made by B. H. to have a reliable supervisor in place so she could acquire the rest she needed, while at the same time, ensure that H. H. was not placed at risk. This further demonstrates B. H. 's lack of insight into her parenting deficiencies.

[76] The Respondent has also testified she has plans to potentially re-unite the child, H. H., with her mother, S. H., a recovering drug addict. Under the circumstances this can not be permitted to occur.

[77] The Court would require clear, convincing and cogent evidence to even consider such a possibility. The Respondent's plan, although tentative, in this regard, again demonstrates her lack of insight into the potential risks to H. H. I fear the consequences for H. H. should such a decision be placed entirely in the discretion of the Respondent.

[78] The Respondent is a mature, intelligent, 52 year old woman. She has had experience as a mother in raising two children. The Respondent cannot be faulted for the fact that both her daughters have real and difficult issues to deal with.

[79] Nonetheless, upon a careful review of the evidence the Court is satisfied, on a balance of probabilities, that the Respondent lacks insight into the potential risk of harm she will expose H. H. to, if permitted to implement her plan. The Respondent's intentions are laudable, but not reasonable in terms of H. H.'s best interests.

[80] H. H. is entitled to be in a stable long term and permanent environment. The child, H. H. requires a stable environment which, in addition, to being loved and nurtured, will require dedication and devotion to maintain her on going health; safety and happiness. Based upon my assessment of the evidence this is best achieved by allowing her to remain with her current foster parents who intend to adopt her.

[81] This is the environment which best meets the requirements of the *Children and Family Services Act* and it is clearly in H. H.'s best interests to be placed and remain there.

[82] The Court, thus, concludes that the Respondent is not capable of assuming the demanding role of parenting. It is not safe to return the child to her care. H. H. remains in need of protective services.

[83] I find the circumstances justifying this order are unlikely to change within a reasonable, foreseeable time. The permanent care order is therefore granted.

[84] Care and custody of the child, H. H. shall thus be placed with the Minister in accordance with section 47 which states as follows:

> "47 (1) - Where the Court makes an order for permanent care and custody pursuant to clause (f) of subsection (1) of section 42, the Agency is the legal guardian of the child and as such has all the Rights, Powers and Responsibilities of a parent or guardian for the child's care and custody."

ISSUE #2 - ACCESS

[85] In view of the above finding I must now consider the issue of access under the pre-conditions enumerated under S. 47 (2) of the *Children and Family Services Act* which states as follows:

> "47(2) Where an order for permanent care and custody is made, the court may make an order for access by a parent or guardian or other person, but the court shall not make such an order unless the court is satisfied that
>
> (a) Permanent placement in a family setting has not been planned or is not possible and the person's access will not impair the child's future opportunities for such placement;
>
> (b) the child is at least twelve years of age and wishes to maintain contact with that person;
>
> (c) the child has been or will be placed with a person who does not wish to adopt the child; or
>
> (d) some other special circumstance justifies making an order for access.

[86] The Nova Scotia Court of Appeal has held that the onus to show access be

granted under an Order for Permanent Care and Custody is upon the person requesting the right of access. In **Children's Aid Society of Cape Breton-Victoria v. A.M.** [2005] N.S.J., No. 132 (C.A.), Justice Cromwell noted that the access decision contemplated in S. 47(2) of the Act is a "delicate exercise that required the Judge to weigh the various component of integrity of the child". Cromwell, J. Further commented that the court must consider the importance of adoption in the presented circumstances of the case and the benefits and risks of making an order for access. At paragraph 36 he stated:

> "36 These submissions must be considered in light of three important legal principles. First, I would note that **once permanent care was ordered, the burden was on the appellant to show that an order for access should be made**: s. 47(2): *New Brunswick (Minister of Health and Community Services) v. L.(M.)*, [1998] 2 S.C.R. 534 at para. 44 and authorities cited therein. Second, I would observe that, as Gonthier, J. Said in L.M. at para. 50, the decision as to whether or not to grant access is a "...delicate exercise which requires that the judge weigh the various components of the best interests of the child." It is, therefore, a matter on which considerable deference is owed to the judge of first instance for the reasons I have set out earlier. I would note finally that, in considering whether the appellant had discharged her onus to establish that access ought to be ordered, the judge should consider both the importance of adoption in the particular circumstances of the case and the benefits and risks of making an order for access." [Emphasis added]

[87] The Nova Scotia Court of Appeal has recently considered S. 47(2) of the *Act* in **Children & Family Services of Colchester County v. K.T.** [2010], N.S.J., No. 474 (Application for Leave to Appeal to SCC dismissed) at paragraphs 39-41 as follows:

> "39 Therefore, from my reading of s. 47, three conclusions relevant to this appeal are clear. First, the Agency effectively replaces the natural parents. This puts the onus on the natural parents (or guardian) to establish a special circumstance that would justify continued access. Second, by virtue of ss. 47(2)(a) and (b), an access order must not impair permanent placement opportunities for children under 12. Section 47(2) (c) is consistent with this. It provides that if no adoption is planned then access will be available. This highlights the importance of adoption as the new goal and the risk that access may pose to adoption. **Third, for children under 12, the "some other special circumstance" contemplated in Section 47(2)(d), must be one that will not impair permanent placement opportunities.**

> 40 Therefore, to rely on s. 47(2)(d) as the judge did in this appeal, the (special) circumstances must be such that would not impair a future permanent placement. When then would s. 47(2)(d) apply? Consider for example a permanent placement with a family member which will involve contact with the natural parent. Presuming that the adopting parents would be content with that arrangement, the adoption would not be deterred. See Children's Aid Society of Cape Breton Victoria v. M.H., 2008 NSSC 242 at para. 34.
>
> 41 In short, **access which would impair a future permanent placement is, by virtue of s. 47(2), deemed not to be in the child's best interest**. This presents a clear legislative choice to which the judiciary must defer."

[88] This position is further highlighted by the comment of Chief Justice Michael MacDonald in **K.T.**, supra, at paragraphs 37 and 38:

> "37 Before the issuance of a permanent care order, the legislative focus is on preserving the family unit. This would understandably mean that when the children are in temporary Agency care, parental access is to be encouraged so as to hopefully rehabilitate the family. However, with a permanent care order, the focus shifts. Any hope of preserving the family within the legislated time limits is presumably lost and the focus becomes a stable alternate plan. Thus, upon securing a permanent care order, the Agency under the *CFSA* effectively becomes the parent:
>
> > 47(1) Where the court makes an order for permanent care and custody pursuant to clause (f) of subsection (1) of Section 42, the agency is the legal guardian of the child and as such has all the rights, powers and responsibilities of a parent or guardian for the child's care and custody.
>
> 38 This provision suggests the termination of the natural parents' relationship with the children. However, in special circumstances, post-permanent care access is possible although given the stark change in focus, such circumstances are rare and limited to those that would not jeopardize the new focus, namely an alternate stable placement. Thus, it is not surprising that the provision allowing for such access is highly restrictive."

[89] Justice Fichaud in **Nova Scotia (Community Services) v T. H.,** 2010 NSCA 63 also comments at paragraph 46 therein that after a permanent care order has been issued, there is a de-emphasis on family contact and instead priority is assigned to long term stable placement.

[90] Justice Oland in **Mi'kmaw Family and Children's Services v L.(B.)** 2011 NSCA 104 nonetheless reminds us as follows at paragraph 42:

> ....Section 47 (2) does not impose a blanket prohibition against access. Rather, a Judge must consider factors such as the likelihood of impairment of opportunities for permanent placement and whether there are special circumstances which would justify making an access order.

[91] The Minister has confirmed its plan to seek permanent placement for H. H. through the process of adoption with no provision for access. In my view the awarding of access to the Respondent would impair the contemplated long term permanent placement and thus by virtue of Section 47 (2) I find that access is not in the best interests of the child. H. H. is entitled to continuity and stability in her life. Permanent care with no provision for access will achieve this purpose.

[92] Therefore the requested access order by the Respondent is denied. The Respondent has not discharged the burden upon her.

CONCLUSION

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

[94] Ms. B. H. is not up to the task of parenting and I foresee the continued involvement of the Minister should the child be returned to her.

[95] The Court has an obligation to ensure this child's best interests are protected and that is best achieved by placing H. H. in the permanent care of the Minister with no provision for access.

Order Accordingly,

_____

Justice