SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Nova Scotia (Community Services) v. F.A., 2012 NSSC 147

Date: 20120621
Docket: SFHCFSA-072726
Registry: Halifax

Between:

Minister of Community Services

Applicant

v.

F. A. and M. D.

Respondents

-and-

C. D.

Third Party

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

Restriction on publication:

Publishers of this case please take note that s. 94(1) of the Children and Family Services Act applies and may require editing of this judgment or its heading before publication.

Section 94(1) provides:

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

Judge: The Honourable Justice Deborah Gass

Heard: April 2, 3, 4, 5, 10, 11, 12, 13, 16 and 18, 2012, in Halifax, Nova Scotia

Oral Decision: June 21, 2012
Written Decision: February 4, 2013

Counsel: Elizabeth Whelton, for the applicant
Nicole Figueira, for the respondent F. A.
Patrick MacMillan, for the respondent M. D.
Tammy Wohler, for the third party C. D.

By the Court:

[1] This decision is the result of an application by the Minister of Community Services for an order for permanent care and custody of the twin children of F. A. and M. D., namely M. (“X”)D. and M. (“Y”) D., born August *, 2010. The application is made pursuant to s. 42(2)(f) of the *Children and Family Services Act*.

[2] This decision comes at the conclusion of a ten day trial involving a number of parties, a significant number of witnesses and a substantial amount of documentary evidence.

[3] I will begin with outlining the relevant legislation that governs this phase of the proceeding and the considerations required in coming to a decision. I will not go through the sections word for word for the oral decision, but should it be rendered to writing those sections will be quoted.

[4] The provisions of s. 42 are the provisions under which the court is required to make its decision, and further the decision is also being made in consideration of the preamble to this legislation, and in particular I will just highlight some of those items in the preamble:

> ... 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 partially or entirely when all other measures are inappropriate. And whereas social services are essential to prevent or alleviate the social and related economic problems of individuals and families, and whereas the preservation of a child’s cultural, racial and linguistic heritage promotes the healthy development of the child ....

[5] There are a number of other equally relevant provisions in the preamble, but that is the umbrella, the framework under which the court makes its decision.

[6] The purpose of the legislation is set out in s. 2, which says that the purpose of this act is to protect children from harm, promote the integrity of the family and assure the best interests of the children. The paramount consideration in subsection 2 is that in all proceedings and matters pursuant to this Act, the

paramount consideration is the best interests of the child, and that trumps everything else in the court coming to a decision.

[7] Best interests of the child are considered in subsection 2 of section 3, which is the interpretation section. Some of those considerations that are of particular importance in this decision 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 family;
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> (b) the child's relationships with relatives;
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> (c) the importance of continuity in the child's care and the possible effect on the child of the disruption of that continuity;
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> (d) the bonding that exists between the child and the child's parent or guardian;
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> (e) the child's physical, mental and emotional needs and the appropriate care or treatment to meet those needs;
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> (f) the child's physical, mental and emotional level of development;
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> (g) the child's cultural, racial and linguistic heritage;
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> (h) the religious faith, if any, in which the child is being raised;
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> (i) the merits of the 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;
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> (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; and
>
> (m) the degree of risk, if any, that justified the finding that the child is in need of protective services, and any other relevant circumstances.

[8] There are some other considerations such as the effect of delay, the child's wishes, etc.

[9] Those are the governing provisions as well as those contained in the disposition proceedings under section 42, which state that at the conclusion of the disposition hearing the court shall make one of the following orders in the child's best interests, and in this case the options that the court has available and the only options are to dismiss the matter or that the child be placed in the permanent care and custody of the agency in accordance with section 47.

[10] In addition, the Minister is seeking the order for permanent care without access and that is governed by the provisions of section 47 of the Act:

> Where the court makes an order for permanent care and custody, 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 and the court will not make an order for access unless the court is satisfied that one of the criteria has been met under (a), (b), (c) or (d).

[11] That is the order that the Minister is seeking.

[12] This proceeding began by way of a protection application dated November 3rd, 2010. The babies had been born August *, 2010 extremely prematurely; they were born at 24 weeks gestation; they were very fragile and they remained in the neonatal intensive care unit following their birth, and for X., one of the twins, much longer than the time for Y..

[13] On November the 8th, 2010 an order was made for the children to be placed in the care of Ms. F. A., one of the respondents, under a supervision order, and at that time both children were actually in the hospital. It was anticipated that Y. would soon be released, but X. would remain in hospital where he was to the date of this hearing.

[14] When Y. was released on November 15th or 16th, he went with his mother, F. A., to the home of C. and W. D. in [...]. C. and W. D. are the paternal grandparents of X. and Y..

[15] Y. was released from the hospital to the care of his mother without the Minister's knowledge.

[16] Throughout this proceeding, and before, and when I say before, I speak about the previous proceeding regarding the other two children of Ms. A., the Minister had concerns about the nature of the relationship between Ms. A. and Mr. D., Mr. D. being the father of the twins. The issue arose in the previous proceedings, that is the proceedings involving N. and Na, where there were concerns raised about domestic violence and it seemed to arise when F. would express some fear of Mr. D. and then she would subsequently recant. This happened on occasions both during the previous proceeding and during this current proceeding.

[17] These issues of concern were a thread throughout the proceedings, but it is significant to note that when the workers visited Mr. and Mrs. D.'s residence when F. was living there with Y. shortly after he was released from the hospital, all seemed well.

[18] An interim hearing was completed on December 1st and the supervision order was continued. At that time, however, further concerns were raised by Tammy Shields, a family support worker at the Dartmouth Family Resource Centre, a person who was a very strong advocate for F. throughout. And those concerns were that there was ongoing physical abuse of F. A. at the hands of M. D. and her fear was expressed to Tammy Shields and plans were made to get F. and her son Y. out of the situation at the D. residence in [...]. The arrangements were made but then F. recanted and as a result of that and her denial that there was anything of concern, Ms. Shields had no choice but to report it to the Minister of Community Services. That, sadly, ended the relationship between Ms. A. and Ms. Shields; a relationship that was important in providing emotional support and advocacy for F.. She was one of the few external supports F. had at the time. As a result of Ms. Shield's reporting, Y. was removed from the care of Ms. A. on December the 2nd.

[19] The events surrounding that were described as being tumultuous, with emotions running very high and a somewhat threatening atmosphere for the worker who attended at the D. residence to take Y. into care. Prior to the actual taking into care there had been some phone conversations with the worker that were volatile in nature.

[20] The order then was varied on December 3rd, 2010 to a temporary care order for both of the children.

[21] C. D., the paternal grandmother, then put herself forward as a placement for Y. and both F. A. and M. D. initially supported this plan. Following a contested hearing, Y. was placed in the D. home in the care of C. and W. D. on February 16th, 2011. That placement, a third party supervision order, was made with certain conditions, two of which were that M. D. was not to reside in the residence and there were to be no dogs at the residence. One of the issues that gave rise to that condition is that there were dogs chained in the yard which posed a threatening presence for individuals who would be required to come to the home from time to time to check and ensure that Y. was being appropriately cared for. The provision in the supervision order was also that F. A. could stay at the D. residence and participate in the care of Y.. The worker at that time, Mr. Mansfield, removed himself from the file as he would not continue to attend at that residence given his past experience there, and the file was taken over by Ms. Lori Muise. Again, it is important to note that when Y. had been there previously with F. there were no concerns noted about the care that he was receiving, and it was essentially this issue with respect to the relationship with M. D. and the tumultuous nature of that relationship that gave rise to him being taken into care and then subsequently he was returned to the paternal grandparents under those conditions.

[22] The concern throughout was with domestic violence which both F. and M. D. denied, and of which Ms. C. D. and W. D. denied any knowledge. It is significant to note that subsequent to Y. being placed in the care of C. and W. D. in February that there were no concerns about the care he was receiving in that residence, and nothing noted until he was taken into care again in October of 2011.

[23] There was no admissible evidence that the child was at risk of harm in the care of Mr. and Mrs. D., and in fact the evidence before the court is quite to the contrary; he did appear to be happy and well cared for when visits did occur.

[24] In March of 2011, F. moved out of the D. residence and she made a complaint to the Minister at that time against C. D. and the motivation for that, from the evidence, was to have the child removed from her care. At that time she cited that C. D. breaks the rules all the time, letting M. be at the residence contrary

to the court order. She had wanted to leave the residence with the baby and the D.s would not let her do that. She was complaining because the rules seemed to be broken when it came to M. but she couldn't break the rules by leaving the residence with the baby. As I say, this happened on this occasion when she wanted to leave the D. residence with the baby and stay at her own apartment but C. D. refused to let her do that.

[25] It does appear around that time that F. and M. were together. Whether they were technically living together or not was one of the issues that came up in the evidence. It was questionable where he was actually living, because during this period of time he was supposed to be living at his uncle's, but the relationship between F. and M. was very much on again/off again and sometimes they held themselves out as a couple and other times they did not. It does appear that around that time they were essentially living together, although it may well be that F. had the residence in her own name but they were essentially together. And it was also around that time that M. was stabbed, apparently by F.'s brother when he and her aunt arrived at F.'s residence. There was an issue regarding bear spray or pepper spray and M. was stabbed. That was in and around that time when she wanted to leave the D. residence and take Y. to her own apartment.

[26] Then, in July of 2011, M. did attend at his parent's home, and this was as a result of a concern raised with respect to what appeared to perhaps be a bruise on Y.. M. came to the home quite agitated and upset about this and he was asked to leave. As a result of whatever happened there (and there are different versions of what happened on that occasion), C. D. did contact her brother to come to try to get M. to leave. She ultimately contacted the police, who did come to the residence and got him to leave. As I say, there are some discrepancies in the evidence about what actually happened at that time, but ultimately C. D. did call the police and had him removed. She indicated that it was her son that she was calling the police about and she was hoping that she could get him out with the help of some family members but that didn't work.

[27] Until October of 2011, Y. remained in C. D.'s care, and then F., through her lawyer, advised the Minister of Community Services that M. D. was continuing to see Y. at the D. home against the court order and she produced photos as proof of that. This prompted Ms. Muise to further investigate. She met with M. and he

showed her a multitude of photos of himself with Y. at the D. home, contrary to the court order.

[28] This does appear, from listening to the evidence of Ms. Muise, to be a somewhat disappointing turn of events because she was supportive of Mr. and Mrs. D. pursuing custody of Y.. Ms. Muise was pleased with the progress that Y. was making in their care; he was happy and well cared for and she was fully supportive of their plan. And then when it became apparent that the court order was not being honoured, she had to go back to her team and as a result Y. was taken into care again.

[29] The evidence as it came out in the hearing, and particularly the evidence of Ms. A., was that it was done to sabotage the placement of Y. with the D.s and it was done in the hope that the baby would be placed with her and M. D.. Apparently they were together again as a couple and wanted to have Y. placed with them. Coming forward with this information was an effort to sabotage his placement with his grandparents and have Y. placed with them. If that was their intention, it certainly backfired because as a result Y. was not only removed from the grandparent's care, but he was placed in the temporary care and custody of the Minister and put into foster care where he remains to this day.

[30] This incident occurred while C. D. was in [...] with her daughters and other family members on an annual shopping trip. She was not there when this occurred and there was extensive evidence about what happened and who knew what about who was caring for Y. while she was gone. There was some reference to "K.", Mr. B., and his wife looking after the baby, but in reality the evidence was that W. D. actually brought Y. to the agent when the actual apprehension took place. He was actually in the care of his grandfather at the time. At any rate, Y. was taken into care and has been there since October of 2011 and he is having regular access with his mother and grandparents under the supervision of the agency.

[31] With regard to X., his circumstances are substantially different in that he has significant health issues, which at times have been life threatening. However, he has survived and thrived and he remains in hospital, although he could be discharged to an appropriate home or care-giving arrangement, and more will be said about that.

[32] The Minister's plan is for permanent care and custody with adoption of both boys. Their evidence is that, notwithstanding the severe disability that X. has, there are adoptive homes where parents are willing to take on this kind of responsibility. The ultimate goal, the ideal goal, would be to have X. and Y. adopted together. This would be the adoption of a busy, healthy two year old and a severely handicapped, totally dependent two year old who requires eyes on and hands on care 24 hours a day, seven days a week in a one on one capacity. To that end, the Minister seeks an order without access to the parent(s).

[33] While it appears from the evidence of the Minister's witnesses that such an adoption is within the realm of possibilities, the evidence also was that it was impossible to find a foster home at this point that could take on the heavy responsibility of care for X. with his significant medical needs. The evidence of Dr. Chowdhury, at least one of the medical witnesses, was that this could be very challenging; that is the adoption of a very dependent child along with meeting the needs of a very busy healthy two year old, again not outside the realm of possibilities, but it could be problematic. It was also noted though that X. could benefit from contact with other children, and in particular that it would be important for him to have contact with his brother. The evidence was, however, that at the various team meetings that took place at the hospital, that finding a foster home in the meantime was problematic and, in fact, there was one possibility but it was determined that the needs of X. were too great for the foster family to take on, and that was just with taking X. into foster care.

[34] So that is the proposal of the Minister and it is speculative.

[35] The parents, F. A. and M. D.'s, plans have changed significantly from time to time throughout the course of these proceedings. More significantly Mom's plan has varied because M. D. has not really participated in any meaningful way in these proceedings. Although the parental plan has changed from time to time, it is clear that the Minister's application for permanent care and custody of both children is opposed.

[36] Mom supports a dismissal of the Minister's application and the placement of Y. in the care of his paternal grandparents, C. and W. D., under a *Maintenance and Custody Act* order. She does not support the Minister's plan for X., which is permanent care and custody without access with a plan for adoption, and as things

evolved, with temporary placement at [...], of which I will speak more later. Although F. has not formally put forth a plan for X., she is seeking a dismissal of the Minister's application.

[37] This raises an interesting question as well because she didn't put forth a plan for X.. In her evidence, it was her belief or understanding that she really wasn't in a position to put forward a plan but she certainly was not in agreement with permanent care and custody with no provision for access. She was very concerned about this plan that was evolving for him to go to [...] , which is a long-term care facility, even on the short term because of the distance from the city and her inability to have access. She would be wanting access even if the court did order permanent care and custody. She would want access even in the face of adoption. She gave evidence herself about how she felt that any loving potential parent willing to take on the care of a child with the significant needs that X. has, would surely in their heart want Mom to be involved, as a person who has significant training and involvement with the child. Anybody who would want to take on that role would surely want to have her assistance and involvement.

[38] At any rate, ultimately the representations put forward on her behalf supported a dismissal of the Minister's application, notwithstanding the fact that she does not have a plan herself.

[39] The time limits have been met in this case, and exceeded by consent to accommodate the completion of this hearing, so the only options available to the court in this case are permanent care and custody, or a dismissal.

[40] I will deal first with F. A., who is the mother of these two children. I have presided over numerous proceedings involving F. A. and her children, and with F. herself as a child. This latest proceeding regarding Y. and X. is set against a lengthy and complex historical backdrop. I will not go into detail about F.'s history except where it is relevant to choices she has made, or the absence of choices available to her. Suffice it to say, F. is no stranger to child welfare proceedings, or child protection proceedings. She herself was found to be a child in need of protective services, along with her brother, shortly after they arrived in Canada as refugees from [...] in the company of two women who purported to be their aunts who came to Canada under a special refugee program for women at risk. Little is known about what F. A. may have endured in [...], but her history in

Canada has been far from ideal. Indeed one would describe it as dysfunctional and chaotic. She was ultimately removed from the care of her aunts and placed in the [...] Centre, where she lived for a number of years. She was in a number of foster homes, with considerable effort made on the part of the Minister to find culturally appropriate homes, and she was connected with people from the [...] community and of the Muslim faith with varying degrees of success or failure.

[41] F. is the mother of two older children, N. and Na., who were placed in the permanent care and custody of the Minister and who have been adopted together under an openness agreement subsequent to that order. F. has had other pregnancies and ultimately gave birth to the twins who are the subject of this proceeding. It should be noted that there were lengthy and protracted proceedings involving the two older children, N. and Na., resulting initially in a disposition order that would see the children being gradually returned to the care of the mother under the supervision of the Minister while she was living at Adsum Supportive Housing. Sadly, this plan could not materialize as her high risk pregnancy required her to be hospitalized until the birth of the twins, which happened in August of 2010. Thus the plan for the gradual return of the children N. and Na. could not be carried out within the timeframe left under those proceedings, resulting in a permanent care and custody order and their ultimate adoption.

[42] Throughout this and the prior proceeding, F. had the support and advocacy of Tammy Shields and Dr. Kiran Pure. I have already summarized to some extent the history of what has happened since the commencement of these proceedings, and I intended to summarize it in more detail but have misplaced the actual chronology. I want to focus now on F. herself, and not F.'s relationship with M. D., who is the father of these children.

[43] Throughout this and the prior proceeding Ms. A. has presented herself as a very capable and resourceful young woman, albeit with some significant deficits. While she has perhaps demonstrated poor judgement in her social and external affairs, she has always been shown to be a very capable mother with a natural nurturing instinct when it comes to parenting her children. Her difficulty has always been the lack of family support and the complex history which has no doubt contributed to her inability to respond appropriately to the supports that have been provided to her from time to time. The apparent disconnect, and I think

that was referred to by Dr. David Cox in his report and as well by Ms. Smith, a family skills worker, that seems to arise that is difficult to comprehend is one of the issues that leaves the court troubled by F.'s circumstances and her ability to move forward in her life. The breakdown of some of her placements, however, were completely understandable. Sometimes she was living outside the city and she was a young woman who wanted to have a life. Some of the placements she found to be too strict and rigid, and she faced a number of challenges as a young woman in her late teens with children and trying to make her way in the new world, in a new country, separated from those who purported to be her family, dealing with cultural and language issues, etc. She had a lot of obstacles in her path, notwithstanding the significant efforts that were made by the Minister to find her culturally appropriate placements and to connect her with families who could be of some assistance to her.

[44] The mystery for everyone in this case is, of course, the severance of her ties with people who were truly looking out for her, such as Tammy Shields and Dr. Pure. Dr. Pure gave evidence in this proceeding about the lengths to which she went to assist F. in assisting her with an apartment and actually paying the rent and enlisting the support of a number of friends, having showers for her, buying her the furnishings for an apartment and setting her up with a view to assisting her in getting her children back, and the significant financial extent to which she went in signing a lease and paying her rent. None of this appears to be acknowledged in any meaningful way by Ms. A.. This leaves the court with the same question about her ability to make the connection between what happens to her by what she does and what the consequences are of what she does. An example is her reporting to the Minister about M. breaking the rules and Mrs. D. breaking the rules, with the understanding that that would sabotage the placement and that Y. would therefore be returned to her. That disconnect between actions and consequences, as well as the disconnect between her relationship with people who truly were supportive of her and were advocating for her and then the ultimate breakdown of those relationships, is troubling and problematic.

[45] Having said that, when it comes to her children she has always been appropriate. Especially when it comes to X., who has such profound needs, she has impressed all those professionals who have observed her with him over the past two years. As for her parenting skills, the evidence was that F. demonstrated that she really did not need assistance in that regard. The areas in which she

needed help were with her life skills, the challenges of work, dealing with her personal health issues, keeping appointments, trying to be self-sufficient, demonstrating a commitment to her children, all of those things which were overwhelming to her. But not her parenting skills. According to Anita Smith, she really needed no help in that regard, but she did have three deficits: finding resources in the community, that is with regard to medical assistance; finding coverage for prescriptions etc. to meet her medical needs; establishing a stable living environment, and decision making. Those were the areas where F. encountered considerable difficulty. And those three deficits continue to occur to this date, but it does significantly impact on the decision and the unique circumstances of this case, particularly as they relate to the needs of X..

[46] Certainly on the whole of the evidence, notwithstanding absences from the hospital, and notwithstanding misjudgment and poor judgment from time to time, Ms. A. has demonstrated on the whole of the evidence a commitment to her children.

[47] She has two little boys whose needs were very different, but both who had significant needs. She virtually moved into the hospital to help care for X.. There was some question raised by the Minister about that commitment because there were times when she wasn't there and not able to be reached. However that was addressed by personnel who work in the hospital on a daily basis. Dr. Shay indicated that she would not judge somebody who was not in the hospital all the time and did not sleep over, because sleeping in the hospital was equivalent to sleeping in a bus station. It's also noted that F. also had her own medical issues to be addressed; she was holding down a job, sometimes two jobs at a time; and she had a medical procedure done just around the Christmas time. Again, it was also noted that people need respite from the hospital, that parents aren't expected and not judged if they're not in the hospital 24/7, and in fact she was there more than most.

[48] She did as well during this time, recognize the need for the children to have time together and demonstrated an ability to address the needs of both of the children when they were together during their times that Y. visited in the hospital.

[49] Anita Smith, and I'll speak a little more about Anita Smith because she was involved in family skills work. She spoke of F.'s need to tap into outside community resources and commented on her lack of follow through. She was concerned about her lack of home stability but she was also mindful of the fact that F. had an extremely heavy schedule and often there were times that it was hard to connect with her. F. was working; she was keeping appointments as best she could; she was at the hospital, and she was having her access with Y.. She had to change jobs because she couldn't work the hours that they wanted her to at [...] and she changed to the [...]. She had her own health issues and there was concern that she was wearing herself out. On top of that, she had this on again/off again relationship with M. D. which appears to have been volatile. In December she indicated that they had broken up and then subsequently she was seen with him or involved intimately with him. She testified that it was hard to break the ties with him. He is the father of her children and they had contact with each other because of their contact with the children and it was difficult to break that relationship.

[50] As I've already indicated, she had medical issues herself and she underwent a procedure in December. She had complications from that and that also impacted on her ability to spend time with X. in the hospital.

[51] There was a lot of discussion about problems with communication and follow up but those can, to some extent, be accounted for by the fact that when she was in the hospital she couldn't have her cell phone on. She would use the phone at the nurses' station and the nurses were often the conduit for passing back and forth information. As well she had a telephone plan that had limited minutes and there were only certain hours that the phone could be used, otherwise it would be very expensive. All of that was completely understandable considering her limited income. But it did result in difficulties in communication with the agency and sometimes confusion.

[52] Anita Smith also noted that at times she herself was confused because she wasn't always told if and when the agency's plan was changing. The agency had a plan for permanent care and custody all along, but at the same time Anita was working with F. in encouraging her working towards a return of the children. That was noted as well with Ms. Muise when she took Y. back into care in October of 2011 after meeting with M. and then focussed again on M. and F. working towards trying to present a plan for the children. So there was still always the talk of

return, and that's a double-edged sword. The agency can sometimes be criticized for the theory that once they put a plan of permanent care and custody, they refrain from doing as much to continue to help with the family, but in this case they did continue with what was available under the circumstances while still pursuing a plan for permanent care. So sometimes the agency gets criticized for doing one thing one way and then gets criticized for doing it the other way, and it is a no-win situation when they are trying to work towards what is in the best interests of the children.

[53] At any rate, there was concern expressed by Ms. Smith about F.'s ability to "get it". She spoke of the disconnect and the flow of real life logic that seemed to be lacking for F.. However, in spite of all that, F. was keenly involved in the most difficult care issues for her son X.. She was able to master those most difficult care requirements. She was able to interact with entire teams of medical personnel both in the neo-natal intensive care unit and in the pediatric unit. She was described as someone who asked questions, who sought advice and advocated for her son without fanfare, and she demonstrated that she was appropriate with her children. She learned and obtained the highest level of trachea care for her son X.. X. has a tracheostomy tube which enables him to breathe and it is also necessary to keep his airways open because his trachea is not stable and without the tube in it, it would collapse, so it has a dual purpose. It requires regular cleaning and care and has to be changed on a weekly basis. It's a very complex procedure and requires a certain, the word "stomach" was used, to do it. Not everyone, even highly skilled practitioners are able to administer to this need. Details were given in evidence about the training required to master these procedures. Not only does he breathe through the tracheostomy, but he is also fed through a J-tube, which again requires care.

[54] In spite of the challenges of everyday living for F., including her own health issues, her age and her lack of consistent support, some of which was of her own making, she has always shown herself to be a good, caring and capable mother. Perhaps the most problematic aspect of her life is her relationships, and particularly in this case her relationship with M. D.. They have clearly had an on again/off again and tumultuous relationship.

[55] M. D. has been essentially absent from this process, and that has been a matter of considerable concern, particularly as it relates to the proposed plan of his parents seeking custody of Y. if this proceeding is dimissed.

[56] The court has not been at all impressed with M. D. during the few appearances he's made in court and it has created a real obstacle for the court. Little is really known about M. D.. One positive note, however, from the evidence, was that although he was not the biological father of N. and Na., who were the subject of previous proceedings, he was very supportive of F. in her efforts to retain care of them. His role in the lives of his twins appears to be minimal. He took a back seat to F. in their care, but he did help when asked and he also took the training for trachea care, although not to the same level that F. has achieved. He did not attend supervised access with Y. after Y. was removed from his parent's care the last time and it is believed by the Minister that is because he was having access with him at his parent's home on a regular basis contrary to the order.

[57] Throughout this proceeding a considerable amount of time and evidence has been taken up with the issue of truthfulness. It became somewhat of what could be described as a "cat and mouse" game that seemed to have occurred with F., M. and M.'s parents, particularly when it came to issues about M. attending at the D. home when he wasn't supposed to. Truthfulness in regard to the ongoing relationship between F. and M. was an issue: were they together or not? Truthfulness was an issue as it relates to incidents of violence that were alleged on the part of M. against F. and as it relates to F. and M. undermining the parenting of C. and W. D. as a placement for Y..

[58] On the issue of M. being able to have access with Y. thereby breaking the rules, the Minister's evidence was that often when a parent isn't having access in the supervised setting it is because they are having access "under the table" or on the side without the agency's knowledge or consent, and that's a theory based on the Minister's experience in other cases. There was considerable evidence with respect to him seeing Y. without the agency's knowledge. The question then became was he seeing Y. without the knowledge of C. and W. D.? There was considerable evidence about that, and the circumstances of M. being at the residence even when Ms. Muise was there. Evidence was heard from M.'s two sisters, A1 and A2 with regard to that. It appeared from the evidence that A1 was

softer; she didn't have the force to evict M. from the home when he came there and she was allowing him to see the baby when her mother wasn't around. The other sister, the older one whose 30, is tougher and was able to get M. to leave. However, they agreed that they wouldn't let their mother know because that would create too much pressure on her and too much stress. Their evidence was that C. D. was not aware of the amount of time that M. was actually having at the home. Ms. D. did testify with respect to him coming in July and the steps that she took to have him removed, difficult as that was for her because she personally did not feel or did not "buy into" the suggestion that M. presented a threat or danger to the child.

[59] So, while M. appears to have been very much around outside the court proceedings, he has been absent from the court proceedings, and frankly when he was present he did not leave a very good impression with the court.

[60] The court is satisfied, notwithstanding the fact that F. has recanted on occasion, that M. has behaved inappropriately and abusively towards her and that he has done so not just towards her but towards others, so that is consistent with the conclusion that the court reaches that in fact he has not treated F. in a respectful way, and he has not treated a number of other people in a respectful way. This conclusion is based on other evidence, not just the reports of F. which she subsequently recanted. There was evidence given in the previous proceedings with respect to his conduct in the Pavilion when the children were in the hospital. I can't remember the exact details, but the incident at the Pavilion in the hospital involved Lori Muise. He called her a f-ing bitch and said "F you" on several occasions. And there was inappropriate conduct at the Point Pleasant Lodge where he was rude and behaving in an inappropriate and aggressive way. There was evidence from other witnesses where he appeared to lack respect for anyone. There was the evidence of Mr. P. when he was assisting F. in getting set up in her apartment. She expressed her fear to Mr. P. and asked him to take her directly to the Legal Aid office, which he did. They were followed by M. D. at that time. Then there was the report to Tammy Shields as recently as December when Ms. Shields had to report the matter to the Children's Aid. This related to F.'s allegations of abuse and her fear of M., which she later recanted. So, on the whole of the evidence, I accept that M. has been abusive in his relationship with F. and, in fact, has been verbally abusive to any people who seem to stand in his way of doing what he wants, or getting what he wants. However, when he was around the

children there was nothing untoward observed about his conduct towards them. He interacted with both of them, although he somewhat took a back seat. He was very quiet, but when he was asked to participate, he did. I do accept that their relationship has been off and on, that it has been volatile. Both F. and M. have not been truthful about it, but in my view, although they have denied violence, there is enough evidence before me to satisfy me that F. has been afraid from time to time and was justified in her fear.

[61] The court therefore concludes that this relationship has not been a healthy relationship and that individually and as a couple they showed poor judgment from time to time. They were young; they were 19 when these proceedings were well under way; they both experienced the loss of F.'s older children, which would have a traumatic effect on them. It is however more likely than not that there's been domestic violence and F. has been the victim of domestic abuse, both physical and emotional. It is also clear that she really lacks insight into these issues of domestic violence in that she did indicate that he had never struck her. However according to the evidence of Ms. Shields F. had indicated that M. did beat her up. There was some suggestion that she lied about that to sabotage whatever arrangements were being made, and all of that leaves the court with a lot of questions.

[62] In spite of concerns with respect to the nature of the relationship between M. and F., it is understandable why it would be a relationship towards which she would gravitate. Apart from Ms. Shields and Dr. Pure, both with whom the relationship is terminated, F. really had no one else and M.'s extended family would have been the closest thing to family to her. She stayed with the D.s and they provided a home for her and her child.

[63] On the other hand, the D. family bond is very strong and F. would also feel in a vulnerable position with respect to M.'s family in the absence of a relationship with M.. He would be the connection, and they were living there initially as a couple with Y. when he was released from the hospital. Then Y. was apprehended following the allegations of violence. Subsequently F. went to live with the D.s and Y., with the condition that M. not reside there. Then she left, claiming that the D.s were breaking the rules. Then she and M. were together away from the D. residence and they sabotaged Y.'s placement by asserting that M. spent a lot of time with the baby, at his parents' home, contrary to the order. This resulted in Y.

being taken into care again. Whether true or not, or whether it was a story fabricated to sabotage Y.'s placement with his grandparents, it demonstrates poor judgment in every respect.

[64] With regard to C. and W. D., who have put themselves forward as a placement for Y. should the matter be dismissed as it relates to him - and I apologize for being somewhat repetitive and all over the place in this but this has been a very lengthy proceeding with copious amounts of evidence, both documentary and oral evidence, and sometimes it is repetitive.

[65] In turning to the D.s, Y. has lived in the paternal grandparents' home on two occasions since his birth. He was removed twice: once as a result of Tammy Shields reporting her concerns about F.'s safety, and the second time after Ms. Muise received information which disclosed that M. had been at the D. home on many occasions contrary to the court order.

[66] It is evident from the evidence that C. D. is the matriarch of this family and that it is a strong family that tends to "circle the wagons" when the family is under threat. That can be intimidating to outsiders, as it certainly was to Mr. Mansfield. Ms. D. does not believe that there has been violence between her son and Ms. A., although she did acknowledge that he behaved in a volatile manner when he was at her home. She said he was very angry about allegations of some bruising on Y.. She denies knowing that M. was at her home except on the occasion where she took the action of calling the police. She does not believe that M. poses a threat to the child either. She did indicate that she called the police on her son in July and they became involved. It is also clear from the evidence that apart from that, there were no child protection concerns when Y. was in her care. She has raised her children and she has other grandchildren living in the home. Mr. W. D. was in the process of putting an extension on the house in order to accommodate Y. living there when it all fell apart in October.

[67] A2 D., the 30 year old older sister who works at the QEII gave evidence. She is one of the two daughters who are living in the home, and she has two daughters who live there with C. and W. and her sister A1. She described Y. as a happy little boy in the home, adored by his cousins, her two daughters. She became aware that M. was in the home through A1 in the fall and was urged not to tell mother so as not to stress her. She was told that A1 tried to get him to leave

but he refused. A2 indicated that she was the stronger of the two and that she could expel him from the home because she was tougher on him. She said that she would supervise M.'s contact with Y. if that were something to be ordered and that she would contact her parents if he came when he wasn't supposed to, or she would call the police. She said he is young and hard-headed and gets into trouble.

[68] Anita Smith met C. D. on an occasion when she went to pick up Y. from her. She described Ms. D. as being very concerned about Y., and in particular she was concerned about whether Ms. Smith had the proper car seat. She indicated in her evidence that Y. was reluctant to leave C. D. when she brought him for the access and that when she brought him back, Mrs. D. greeted them. Her observations were that the baby's father, M. D., was quiet and interacted well with both the children with what little interaction he did have.

[69] As I have indicated, a lot of time and evidence was spent on dealing with the question of truthfulness of F. and M. and C. and W. D. and the extended family. The Minister contends that they are all lying essentially and that the evidence supports that. Certainly the court is left with some concerns about credibility, but there are also some explanations which are equally credible as to why things unravelled the way they did. As I say, despite the denials, I have concluded that there has been violence towards F. at the hands of M. and that he has been abusive to her and to others. Whether C. D. or anyone is aware of that or is in denial of that really is not a matter of concern to the extent that I find that that did occur. The parties have not been truthful in this regard.

[70] Whether or not C. D. does or does not acknowledge the possibility of violence or whether she does or does not acknowledge that M. was at her home without her knowledge, or was there with her knowledge, the court has to decide whether there is a probability that Y. would be a child in need of protection if this proceeding was dismissed and he was placed in the care of the D.s. Again, I am repeating myself, but Y. was in his grandmother's care following the hearing from February to October and he was at her home when he was released from the hospital with his mother. In September of 2011 he was seen and assessed by the Perinatal Follow Up team and although he was chronologically over a year old at that time, his corrected age was nine and a half months. He was seen with his grandmother, his mother and his father were present. This was after eight months of living with grandmother and it was observed that he was growing well; he was

a happy baby with no major neurological deficits, no behavioural concerns, meeting his milestones developmentally and doing very well in all respects. That is in the medical report of September 6, 2011. Observations were made on October 13, 2011 at the home of C. and W. D., that Y. continued to do well in their home. On October 21st as a result of M.'s admission and the photographs he showed to Lori Muise that the baby was removed from the home. M. D. told her details of being at the home and said that it was noted that Y. was "daddy's boy" and that he looked after Y. if his mother went out. I poured through the recordings and the oral evidence and I could not find in any specific place where it was said that M. was in the home with his mother's knowledge when she was there. It is hard to say that he was actually there with the full knowledge and consent of his mother, although it would appear that he certainly was in the home at the same time as the mother was, and was actually there when Lori Muise visited. He did speak of wanting to care for the boy because after all he looks after him all the time when mom goes out. Again, that doesn't mean that mom left Y. in her son's care, but that when she wasn't there, M. was there and looked after him.

[71] So it is difficult to say whether he was there without his mother's knowledge and whether he was there only with one sister's permission. It does appear that there was a lot of "cat and mouse" and game playing in the D. residence during this period of time, and frankly it was very difficult if not impossible to ascertain the truth with respect to that. Certainly M. told Lori that he was there a lot and he showed her the pictures. The court has to wonder if it was a big secret that C. D. was in on, why she would have allowed him to take pictures. This therefore would lead the court to conclude that it's quite possible that all of that happened when she wasn't there. And certainly the whole incident occurred when she went off to [...]. Then there was a question about her leaving him with other people without letting the Minister know that this is what she was doing. However, that evidence was very confusing too as to whose actual care he was in, because at the time of the apprehension, W. D. did have Y. with him.

[72] Clearly for Ms. Muise this would have been a disappointing turn of events. The evidence suggested that for Ms. Muise it was almost a creepy revelation that M. D. had actually been in the house while she was there visiting and checking up on Y., and it was the fact that the rule had been broken that prompted the removal.

[73] When one looks at the principles of the *Children and Family Services Act* and the preamble of the legislation and the factors to be taken into consideration, truthfulness does not determine the outcome of proceedings. It is a tool that one uses to address facts that are in issue when it comes to making those kinds of decisions, but liars do not necessarily lose custody of children. If C. D. was lying to cover up for her son, does that lead the court to conclude that she and W. should not have custody and that it would not be in Y.'s interests to be in his grandparent's care under a *Maintenance and Custody Act* proceeding? If every person who lied in court was denied custody of children there would be a number of children in the care of the Minister because of the untruthfulness of their parents. On the whole of the evidence, there were never any protection concerns revealed regarding the care of Y.. There was no history of child protection involvement with C. and W. D. and their children or their grandchildren who live there. They were making a home for him and were in the process of expanding the home for him and he was doing well there. Since he was taken back into care the evidence would indicate that they have been faithful in their visits with Y. and that he has a bond with his grandparents and they have been entirely appropriate in their interaction with him. It is clear from the evidence that they haven't been as involved in supporting sibling access as they should be. Mrs. D. spoke about that how difficult it is to see X., who has these significant disabilities. Certainly promoting sibling access is a very significant factor for the court to take into consideration. But I have to look at the Minister's plan, which is for permanent care and custody with adoption, in the context of the possibility of a dismissal of that plan and the application of C. and W. D. for custody.

[74] The Minister's plan is speculative. It would probably be no problem at all to find a suitable adoptive home for Y., but in terms of finding one that would place him in an adoptive home with his brother, while within the realm of possibilities, does appear to be more remote and problematic.

[75] Y. is a child with a complex genealogical background. His best chance for a relationship with his mother, his father, knowledge of his background and his brother can best be met while in the care of his paternal grandparents. They have demonstrated that they have been able to provide a home for him and that he was happy and healthy and thriving in that environment.

[76] Therefore, when it comes to Y., it is the conclusion of the court that under all of the circumstances, he would not be a child in need of protective services were the matter to be dismissed and he be placed in the care of his grandparents. Therefore I am going to dismiss the Minister's application for permanent care of custody of Y.. Following that I am placing Y. in the care and custody of C. and W. D. on the conditions that M. D. not reside in the residence and that access by F. A. and M. D. be supervised by C. or W. D. or an adult person designated by them. F. A.'s access shall be expanded to include unsupervised access and access outside the D. home and community on terms to be agreed upon, and all access by the parents is to be reviewed in six months. No change in this order or any application to change custody or access shall be made without notice to the Minister. Upon review the parties will provide their affidavits to the Minister for their information no later than six weeks before the review date.

[77] This plan is, in my view, in keeping with the preservation of the integrity of the family if it is in the best interests of a child to do so. It preserves some cultural and racial bonds. Although the D. home is a Christian home and F. A. is of the Muslim faith, it does enable F. to have some influence with regard to that. It also enables the D. family to expose him to the Faith of his paternal side of the family. Thus there is an opportunity for him to benefit from both of his parents' religious backgrounds and her access will enable her to share her faith with him. It also offers, in my view, the best hope for sibling access even though Mr. and Mrs. D. have not encouraged it as much as they should have. However it will be a condition of this custody order that they will facilitate Y.'s access with his brother X..

[78] With regard to X., apart from the extensive evidence about Y.'s living situation since his release from hospital, little else is known about Y. except that he was by all accounts doing well. No so much for X.. The majority of the evidence relating directly to the children focussed on X. and his significant health needs. The court heard from Dr. Chowdhury, Dr. Shea, Kelly Carmody and a number of other professionals who have been involved with F. and who have observed X. in the IWK Children's Hospital. The court was provided with considerable documentary evidence with respect to X., his condition and his care. Dr. Chowdhury has been X.'s pediatrician since he was released from the intensive care unit. Dr. Shea is a developmental pediatrician who has been

involved in his care and Kelly Carmody is a physiotherapist specializing in neuro-developmental physiotherapy.

[79] The court notes that a report to Dr. Chowdhury who was the supervisor in charge of his care, by the pediatric medical team, describes the significant number of medical issues that X. has which are outlined in page 1 of the report that was dated January 17, 2012. The issues including "hyperbilirubinemia requiring exchange transfusion, presumed kernicterus (choreoathetoid cerbral palsy and auditory neuropathy), mild intraventricular haemorrhage, seizures, respiratory distress syndrome with pulmonary haemorrhage, bronchopulmonary dysplasia requiring dexamethasone to wean from ventilatory support, tracheostomy for severe tracheomalacia, a surgically ligated ductus arteriosis, gastroesophageal reflux and feeding intolerance necessitating jejunal feeds, repaired bowel obstruction" which required surgery, and a number of other difficulties that are described in detail on page one of that January, 2012 report. He has significant issues with respect to his hearing and his vision. He had previously been seen in September at nine and a half months corrected age and at that time he had evidence of severe global delay, persistent abnormalities of tone and movement consistent with his diagnosis of a form of cerebral palsy. He continues to have these difficulties. And while X. is an inpatient at the IWK all appropriate services are presently involved, and should he be discharged or transferred it would be important to ensure that all of these necessary services are provided.

[80] The lengthy list, as I say, of issues that he has to contend with are spelled out in that report and in all of the medical reports that were filed and formed part of the evidence.

[81] The court also notes, in Exhibit 10, the team meeting on February 27, 2012. These are some of the most recent medical notations in the evidence before the court, and this was a team meeting in which Dr. Chowdhury was present, Dr. Shea, Ms. Carmody, Lori Muise, Ms. Piddick, a social worker, Bev Brewer, Department of Community Services, Blue Team Clerk L. Clark, and a summary was given of that meeting. Dr. Chowdhury reviewed X.'s medical needs and care, noting that he will require 24 hour supervision eyes on care by someone who is "trach" trained and trained in X.'s other care needs, that is feeding and "J-tube" care. He also noted the need to have at least two people in a home environment. His J-tube was also noted to have created trouble. Dr. Shea spoke of X.'s multiple delays,

which layer on top of each other, which impact each other and which can be intensified with multiple caregivers. Dr. Shea noted the importance of one or a small group of people to bond with X.; people who understand how his disabilities interact; how hearing and speech impact his motor restrictions, and how to manage these. She noted that X.'s caregivers would need the flexibility to be able to get down on the floor to engage in his physio routines. They would need access to specialists and without primary caregiving he could become very underdeveloped. Kelly Carmody noted that X. is a different child in the play garden, parent room etc., outside the institutional hospital setting; and that the rhythm of a household would help him develop. Ms. Carmody noted that X. needs physiotherapy routinely. She indicated that he does suffer separation anxiety when people he knows well such as his mom leave. He smiles, laughs and makes choices when appropriately positioned, as to which toy to play with. Ms. Muise noted the agency's question about whether there would be a cost to other children in a household to have X. in the family. The team noted that another toddler would be difficult to care for at the same time as X. and it could not be a family with multiple children who needed to be cared for. However, respite to support a family to balance the other child's activities and supports for siblings of children with special needs and assets that come from having a sibling with special needs were noted. All of this was premised on the need for 24 hour trained supervision in the home and two people, either staff or family member. [...] as overnight respite was also noted as a possibility as well as other respite potential through the Department of Community Services and the Department of Health. Ms. Muise noted that in looking at permanent care planning for X. thought has been given to maintaining the sibling relationship and staying within two hours of the city for foster placement. The Department of Community Services noted the struggle to find a foster placement and hoped that adoption might be more successful. The IWK team noted that meeting X. in a non-medicalized environment may be helpful for potential foster/adoptive parents, though confidentiality may be an issue. The team also asked if, considering some of the positive things seen in the hospital and the positive impact that Ms. A. has on X., there was a way to support X. to stay with his mom. The Department advised the team that this was not possible at this time in their view, adding that the judge may determine otherwise, and trial dates had been set. These comments summarize the note from the team meeting in February.

[82] The court heard extensive evidence about the care needs of X. and how F. was equipped and trained to meet them. It was the conclusion that it was best for him to be in a home environment if at all possible, but that 80 hours of respite care would be required. The court was confused whether he needed a total of three trained people or four trained people in his life, including respite care and [...[or respite care at [...].

[83] The court heard evidence about the [...] Home for Special Care. The children's wing, the youth wing, which is the children's centre has 19 beds. The five or six young adults who are somewhat older residents in that wing are grand-fathered in as they had been there for most of their lives. The court saw photos of the establishment which was very pleasant and the court was presented with a general routine that is in place at the children's centre. There are two beds in the children's centre for respite care. The person who would be in charge of coordinating care arrangements for X. should he go there gave evidence. She went to the IWK and met X.. It was her evidence that they would have to hire more staff and she suggested that they would have to hire two more people to ensure that he received the one on one 24 hour care he requires. The current ratio of staff to patients or children in the facility is one to four. She described the daily routine and the pleasant environment that they try to provide and that they do provide. They have accommodation for family members to come and stay. The additional staff would have to be hired and all of the staff who would be working with X. would have to be trained in the trach care he requires. It was unclear from the evidence whether the [...] people were aware that it was the Minister's plan that this would be a temporary placement until an adoptive home could be found or whether this was going to be a long-term placement. But at any rate, an adoptive home would also require trained primary caregivers and would also require trained respite caregivers to either come to the home, or respite trained caregivers to be available at [...] should X. go there for the respite. The evidence was that [...] was about an hour and fifteen minutes to an hour and a half from the IWK and that it was important for X. to be within two hours of the IWK or an equivalent specialized facility. The evidence was that there was no funding approval yet for X., because of course his future was up in the air, so there was no funding approval for him yet to be accommodated at [...]. The evidence was that they are not set up presently to accommodate a child with the significant care needs that X. has. The evidence was that Mom could go there and stay in the family accommodations from time to time and could help with his care, but she

could not live there nor could she be hired to be one of his caregivers even though she has the training necessary to provide for his care unsupervised. She does not carry the kind of credentials that are necessary to hire her as an employee. She is not a licensed practical nurse or does not have any kind of credentials.

[84] It is significant to note at this time that it is the intention in the Minister's plan that placement at [...] was to be a temporary plan or a respite plan. It was not intended to be a full-time long-term plan. On the other hand, with the uncertainty with respect to whether or not a suitable adoption placement could be found, it could turn into that. The evidence was as well that there was difficulty in finding a foster placement for him. It was hoped that there would be more luck with an adoptive placement and there was evidence with respect to an adoption fair that was to take place in the month of June where he could be presented, should an order for permanent care be made. But there was also consideration given in the evidence to the possibility of having to look to potential adoptive placements that had previously been rejected but could be considered for this specialized kind of adoption. Consideration would also be given to looking outside the Maritimes or the Atlantic Provinces, and perhaps looking nationally for an adoptive home for the child. Regardless of what were to happen, adoptive parent or parents would be required to have the necessary training that F. A. now has to provide the necessary care for the child. As well there would have to be supports put into place to provide respite care, either by trained personnel going into the home wherever that home would be, or by the child being taken to a facility for respite care. So no matter what, even with the Minister's plan for adoption, there would be the necessity of training a number of people to meet his significant health needs.

[85] It is important to consider all of that evidence as it relates to X.. The Minister's evidence and the medical reports reveal the concerns of the health care providers regarding the needs of X. and the demonstrated ability on the part of the mother to meet those needs. Dr. Shea spoke of the issues that X. faces. She indicated that it is hard to assess his cognitive level because he has visual and hearing impairments. Because he can't produce language, has limited muscle control, sometimes it is easy to underestimate his thinking. She also testified that hospitalization, institutionalization impairs development. He does have an understanding of cause and effect; he can show disappointment; he shows preferences for people he likes; he smiles; he laughs; he looks excited; he scowls at strangers and warms up slowly to them. The team generally are of the view that

he needs a home environment and that a lot of different caregivers is not good for him. They have concerns about him being understimulated and concerns about institutionalization versus a home environment. Dr. Shea testified about the importance of bonding and secure attachment and trusting relationships for his well-being. She has had experience with children with significant needs such as X. going home to families of origin and she described the work that goes into that process, the funding necessary for equipment, the funding necessary for respite care, etc. She indicated that it involves a team approach. She is not the coordinator of that but she is involved in the planning of such releases of children to their family of origin. In looking at [...] as an optional place of temporary placement until a placement could be found she testified that she has a lot of respect for the institution, the place and the work that is done there. She is concerned about transitions for X.. Change for him is problematic; he has a lot of needs; he's not easy to understand and it takes a while to get a handle on his needs. She has significant concern about his emotional well-being in being exposed 1) to transition, and 2) to a number of different caregivers. Taking him to [...] on a temporary basis, moving him from the hospital to [...] and then from[...] to a home, whether it's a foster home or an adoptive home, involves a number of changes. She testified to his attachments with his mother and his mother's ability to provide hands-on care. She saw the mutual connection between them and how he can be calmed by being given something that belongs to his mother when his mother is not there. In asking her about home arrangements, she said that she has seen home placements put into place that involve the Department of Community Services in supporting the housing arrangement. She said that she came to court with no agenda and that her concern was for X.. She said she was not aware that although he's medical stable and moving to the point of discharge, she's aware of the plan for permanent care and custody, she doesn't know of a home at this moment. She says families are integral - and this is from my notes - families are integral in making such plans work. Whoever is going to act in the best interests of the child has to shake this out and be creative. She said that a home environment where people live their lives, not where they're being paid to be there, is the sort of arrangement that would be more in X.'s best interests. He needs the support of his primary emotional attachment. She spoke at great length about the difficulties for a parent being in the hospital on a full-time basis. It is difficult to stay there 24/7; it is noisy and there is a lot of coming and going. She was aware that as well as the difficulties for Mom staying there 24/7, F. also had to deal with the bus strike during this period of time as well. She says she admires the dedication of parents who stay the night there and that she doesn't judge people who don't sleep there overnight. There are lots of reasons for not staying overnight. She felt that [...] as a placement for respite care, while it does happen, is usually with older people. It is not common with children and she was not aware of a child of that age being there, but she had a great deal of respect, as I say, for the Institution and what it does provide.

[86] Kelly Carmody gave evidence as well, being a neurodevelopmental phsyiotherapist in a highly specialized field. She is part of the team but she does more than physiotherapy. She integrates everything: sensory, cognitive issues, visual issues, hearing strategies, the whole issue of cause and effect is all integrated into her handling of X.. She works with him five days a week. She was impressed with how Ms. A. works with him and how relaxed he becomes. She says Ms. A. appreciates how he handles and feels and she has impressed some very cynical people in the health care system with her level of commitment and her ability to work with her son. She has received level three trach training to the extent that now she can be left alone with him. She noted that she knows all the levels of trach care, and learned quickly. She has the flexibility to work with him, to lift him up and down, to be on the floor with him. X. tends to be a different child when she is with him. He demonstrates a flat affect when he's depressed and he lights up when his mother arrives. When he is outside of the hospital he is a different child and Mom is able to take him outside. She has the training and she knows even the physiotherapy routine. She outlined the process for when a child of those needs is discharged, to a home. Ms. Carmody also has experience with [...] and she is not familiar with a child of X.'s age going there, but she says they do great work. However she has not had experience with a child going there as an infant. She described how integration into a home takes place for a child with special needs. The first trip home goes for an hour and the child is brought by Ms. Carmody usually. She gets to see the residence and is consulted on the necessary arrangements to be made to accommodate the child. She has seen children discharged to single parents, children who need 24 hour care and the care of a licensed practical nurse from time to time. Supports for the family are put into place and in fact public housing has been made available for single moms in placing children out of the hospital. The Department of Health has a significant role in the discharge planning in developing the plan and proposing a budget. All the data is collected for the needs of the child. Another person collates all that and Rebecca Earle coordinates all the physical needs. Funding is sought. A global

effort is made to move a child into a home with lay caregivers and other people coming in and out of the home. Then at home the child's needs become incorporated into the rhythm of a family whereas in an institution it is part of a structured plan. Ms. Carmody indicated that Mom is capable of meeting the child's physiological needs and that notwithstanding the fact that she's aware of many other obstacles that F. faces, there are systems in place that can assist in that regard. There was detailed evidence about the training that everyone working with X. requires, and that Ms. Carmody herself requires the specialized trach training and she has to be certified annually in front of an educator. The first level of this course is the reading of the manual and getting information and instruction from the manual. The second level involves helping and assisting with the changing of the tube. This is very complex, and daunting. The educator challenges the caregiver in this process. The third level is when one achieves the ability to actually do this on one's own. One has to be willing and able to do that, either as a lay person or a medical person and not everyone has the stomach for it. She also mentioned in her evidence that it is necessary to have two caregivers off the hospital grounds with X. because of liability issues while he is a patient there.

[87] Kelly Carmody also testified that she sees F. at the hospital with her son more than most families who have children with special needs. She testified that F., like everyone else, needed some relief from the hospital and it is normal not to be in the hospital all the time. She spoke with F. on the telephone during the bus strike. She spoke at great length about how the IWK helps the family develop a plan. She denied being an advocate for F. A. when she was challenged on that and said that she was an advocate only for X.. She said in her evidence that she has seen the spectrum of socio-economic circumstances for children and parents in this situation. She acknowledged that it would certainly be bad for a child to go into a home where there was domestic violence. She indicated that the bottom line here was that the love and support and loving handling of the child are what counts here and that trumps other concerns. It was her view that the resounding voice of the team would be that [...] would not be an appropriate placement, although certainly everyone expressed respect for the place. In fact efforts were going forward to pursue a placement at [...] if a foster placement was not available and it became very apparent that a foster placement was not available. It was suggested in fact that perhaps they would even consider keeping X. at the IWK until a permanent placement was found, but that would be something that would have to be considered depending on the outcome of the proceedings.

[88] The Minister's plan here, is an order for permanent care with adoption. The evidence I heard indicated that there was no appropriate foster placement as a temporary placement for him until he could be adopted; so it did appear that [...] was the most realistic option for him until such time as an adoptive home could be found. There was also evidence about looking farther afield to find an appropriate home for him. It was clear from the evidence that [...] would have to hire more people to look after him and have them trained at the IWK. Logic would flow from that that an adoptive placement would also require training, that one or both parents would have to be trained and that there would have to be trained respite people involved. And applying that to the various levels of training that were required: it would appear that training time per person would have to involve of necessity about seven weeks each. I say that because the first level was reading the manual and getting oral instruction; then there were the weeks involved in watching and helping with trach care. The tracheostomy is not changed except once a week, so it would have to involve at least two weeks of watching and helping with that over a two week period, because you couldn't practice on the child on a daily basis. The trach removal was a once a week ordeal and from the evidence the court heard, it sounded like it could be an ordeal. Then there is the next phase, which is actually taking out the tracheostomy under supervision - or the trach tube under supervision. Again this is only done weekly so you couldn't subject the child to practice by a variety of people, so that would be another couple of weeks for each individual. And then there would be the next couple of weeks of actually putting the trach tube in. So just flowing from all of the evidence before the court, it would appear that it would take probably at least seven weeks per person to obtain the training and any foster parent or adoptive parent or person working at [...] is going to have to have that kind of training.

[89] F. already has this training. F. in her own evidence said that surely anyone inclined to take care of her son would welcome as much help and support as possible and would surely welcome her involvement, where she already knows how to do that and can be an integral part of his caregiving. So what does it come down to? If the court orders permanent care and custody, the Minister is asking for permanent care and custody with no order for access. The Minister would provide access on an informal basis. This would be a case where clearly if the court were inclined to order permanent care and custody an order for access would be appropriate. There is absolutely no doubt in my mind that it is in the best

interests of X. to have ongoing contact with his mom, both emotionally and physically. This would be one of those unique circumstances that would demand the continuity of care that the mother can provide while X. is going through these various transitions which would in and of themselves be detrimental to him emotionally and physically. So then I have to ask, is the Minister's plan for permanent care and custody, a plan that's in the best interests of X. at this point? Is this a plan that is in his best interests considering the numbers of transitions that will be required; the probable institutional care that is going to be required at least in a short term and possibly in the long term; and the idea of moving him back and forth from one environment to the other and potentially moving him a significant distance away?

[90] In looking at all of this evidence and examining the dynamics, I have to conclude that X. D. is no more a child in need of protective services than any other severely handicapped, totally dependent child, who is totally dependent on others for his survival. He is a child who needs constant care 24 hours a day, seven days a week, and he always will. And he is no different than any other child who requires that kind of care, that is dependence on other people for his survival. F., even with her deficits, and she has many; there is no question that F. has many deficits, but she stands, when it comes to X., not in a significantly different place than any other parent who is faced with the daunting prospect of the discharge of a severely handicapped child for whom planning is required because of the fragility of that child. Even an ideal family, comprised of two parents with significant income and lots of resources, would still have the same challenges in planning and preparing for bringing their child into the home. The training that would be required for those parents; the altering of the home to accommodate the child; the need for specialized equipment to accommodate the child and the need for extra caregivers, would be the same. Most people are not in the privileged situation to provide and pay for the kind of care that this child needs. This child is going to need the supports of the system, that is the Department of Health and possibly the Department of Community Services, who would naturally be involved in any release care plan for this child. So, yes, he is in need of protective services, but he is need of protective services as any child would be, where the parents are generally unable, without support, to provide and meet the significant needs of this child.

[91] F. has already demonstrated that she meets his emotional needs and that she can meet his intense physical care and medical needs. Other supports are clearly necessary and it is obviously in those other areas such as housing and support from within the community where F. does have issues. Her own psychological state as described by Mr. Cox, her lack of insight into the fact that she has been in a domestically violent relationship, her dependence on inappropriate relationships and the fact that M. D. has been threatening and intimidating, disrespectful and inappropriate are of great concern. She has been in an unhealthy and controlling relationship and doesn't perhaps recognize it. She has her own physical health challenges and her challenges in dealing with the system. But the kind of parenting that X. needs at this time requires a lot of support, and she has demonstrated an ability to focus on his needs even in the face of all of the other challenges. He is a child who has different care needs than perhaps Y. has. Others' assistance and supports are going to be necessary for X. regardless of the outcome. She can, if the matter is dismissed, work towards release from the hospital with the help of those service providers and together they can decide what is doable for X.. It is a different parenting plan, a different responsibility and a different challenge.

[92] In my view, X.'s best interests under all of these circumstances, even with the significant challenges that F. herself has, would be to dismiss this proceeding. This would then enable the Department of Health and the mother to collaborate on a release and care plan, which in all probability will eventually and necessarily involve the Department of Community Services, but perhaps not under a child protection proceeding. This is something that may or may not work, but the child deserves and is entitled to every effort being made to maintain this most important relationship and caregiving role. There is a better chance for indefinite contact with the mother, whether on a full-time basis or on a regular basis; a better chance for sibling contact and the maintenance as best it can be of the integrity of the family. The emotional well-being of this child would be severely compromised by putting into place the plan of the Minister. Ms. A. will be able to help decide with the guidance and support of the health care professionals the way forward. If it does not work, the system is there to step in. The important thing is that if it doesn't work, Ms. A. will be in a position to see that it's not going to be workable. If she is not able to see it on her own, with the help of those people she trusts in the health care system it will become apparent to her. Some decisions may ultimately be made that aren't ones that she would like, but they would be made

voluntarily. So there are a lot of people involved who can look out for the well-being of this child, can see if issues arise, report those issues and then in the event that it doesn't move forward on a voluntary basis the system can still step in. X. requires time for people to get on board, whether it's to be in Mom's care with support people, whether it's to be in [...] with support people, or in someone else's care. They are essentially medical decisions.

[93] F. has persevered with her son and he has benefited from that, and it is my view that he needs her in his life. At the very least, Ms. A. had said that she had hoped to have continued contact with her son and maybe that's how it will end up anyway. She may not be a primary caregiver but she will have continued contact with him, and that could happen without a permanent care and custody order. She will be able to participate in this process with the Department of Health. The decision making may not result in him being in her care, or it may involve him being in her care, or perhaps in someone else's care with her consent and her ongoing involvement.

[94] This has been a matter that the court has struggled with because of it's very, very unique circumstances, and when the court considered the permanent care order with no access it was very apparent throughout the proceedings that that would not be in the best interests of this child based on all of the evidence. But then really looking at the plan in its entirety, it seems to me that the dismissal essentially leaves Mom back in a position - there's no *Maintenance and Custody Act* Order in place - if one speculates beyond the dismissal, and perhaps it's dangerous to do that, but it seems to me that this is not a situation where there would be a dispute between Mom and Dad over custody. This is a defacto situation where X. is in the hospital now and requires now a very focussed approach to how he's going to be released. That planning can now be undertaken without it being under the shadow of protection services which eliminates the mother's role, or has the effect of eliminating her role. She can work towards implementing a plan. I am not satisfied that either of the children are in need of protective services, as I say, with a dismissal for Y. being in the care of the D.s. X. really is in the same situation as any other severely handicapped child facing the prospect of being released from the hospital, which is a daunting prospect for any parent. So I am dismissing both applications.

J.