SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *C.L.M. v. Nova Scotia (Community Services)*, 2018 NSSC 80

Date: 2018-03-15
Docket: No. 96482
Registry: Sydney

Between:

C.L.M. and P.M.

Applicants

v.

Minster of Community Services

Respondent

Restriction on Publication: s. 94(1) *Children and Family Services Act*

Judge:	The Honourable Justice Robert Gregan
Heard:	February 13, 14 and 15, 2018 in Sydney, Nova Scotia
Oral Decision:	March 15, 2018
Written Release:	April 3, 2018
Counsel:	TJ McKeough for the Applicant, C.L.M. Adam Neal for the Respondent, Minister of Community Services

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT s. 94(1) OF THE CHILDREN AND FAMILY SEVICES ACT APPLIES AND MAY REQUIRE EDITING OF THIS JUGEMENT OR ITS HEARING BEFORE PUBLICATION.

SECTION 94(1) PROVIDES:

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

By the Court:

Overview

[1] J.L.M., born [ ], was taken into care by the Minister of Community Services, in June of 2015. At the time, he was 3 years old. His two older brothers J and N, were also taken into care.

[2] J.L.M.'s older brothers were placed with family members. J.L.M. was placed in the temporary care of the Minister of Community Services.

[3] At the time that J.L.M. and his brothers were placed in care, their Mother had a chronic drug problem, as well as a number of other ongoing issues which made her life chaotic.

[4] Given J.L.M.'s young age, and that his Mother's problems were not likely to change in the foreseeable future, his Mother made the difficult decision and consented to J.L.M. being placed in the permanent care of the Minister of Community Services.

[5] At the time the decision was made to place J.L.M. in permanent care, everyone was hopeful that he would be placed with family members, T.M. and A.M., who wished to adopt J.L.M..

[6] J.L.M., who is now 6 years of age (having just turned 6 last week), has remained in permanent care of the Minister of Community Services, and was taken out of the home of T.M. and A.M. in August 2017. J.L.M. was removed because the Minister of Community Services says that A.M. and T.M. are unable to pass safety concerns and that after what is known by the acronym, of an SAFE assessment, do not qualify as foster parents.

[7] In light of the Minister of Community Services' decision, the Applicant, C.M., the Mother of J.L.M., applies to terminate the Permanent Care Order.

[8] The biological Mother, C.M., made an Application on December 1, 2017. The application was subsequently discontinued by way of filing a Notice of

Discontinuance on December 8, 2017. A new Application was filed by other counsel for C.M. on December 13, 2017.

Issue 1

[9] Is leave required for C.M. to file the Application seeking to terminate permanent care?

Position of the Parties

[10] Mr. McKeough on behalf of C.M. says that leave is not required because:

- His client did not instruct her former counsel to file a Notice of Discontinuance.
- C.M. was not aware that a Notice of Discontinuance had been filed and provided no instructions to do so.

[11] Mr. Neal on behalf of the Minister of Community Services says that:

- Leave is required, given that a previous application had been filed and subsequently discontinued.
- That the Act mandates leave being granted prior to the application being heard.

Appropriate Legislation

[12] The Order for Permanent Care and Custody regarding J.L.M. was put in place on October 5, 2016. I raise this point because the Order for Permanent Care and Custody predated the coming into force of the new *Children and Family Services Act*.

[13] The Applicant, C.M.'s, current application was filed December 13, 2017, after the coming into force of the new *Children and Family Services Act*.

[14] There are differences between the current Act and its predecessor legislation. I will therefore highlight them.

[15] Under the previous Act, section 48(1) read as follows:

> s. 48(1) An order for permanent care terminates when …

[16] Subsection 3 provided when an application could be made to terminate.

[17] Under subsection 6(c)(ii) however, there were exceptions:

> s. 48(6) Notwithstanding subsection (3), a party, other than the agency, may not apply to terminate an order for permanent care and custody
>
> (c) except with leave of the court <u>within</u> [emphasis added]
>
> (ii) six months from the date of the dismissal or discontinuance of a previous application by a party, other than the agency, to terminate an order for permanent care and custody, or
>
> …
>
> whichever is later; or

[18] Under the **new** Act, the wording is different and s. 48(6) says:

> s. 48(6) Notwithstanding subsection (3), a party, other than the agency, may not apply to terminate an order for permanent care and custody
>
> (c) except with leave of the court, **<u>after</u>** [emphasis added]
>
> (ii) six months from the date of dismissal of discontinuance of a previous application by a party, other than the agency, to terminate and order for permanent care and custody or
>
> …
>
> whichever is later [emphasis added]

[19] The change is the word “after” instead of the word “within”.

[20] Sections 48(7)(a) and (b) in the new Act states as follows:

> s. 48(7) The court shall hear an application
>
> (a) for leave to apply to terminate an order for permanent care and custody no later than thirty days after the application is made; and
>
> (b) to terminate an order for permanent care and custody no later ~~that~~ [than] ninety days after the application is made.

[21] The language of section 48(6) is clear that an application may only be brought 6 months after the date of the dismissal or discontinuance of a previous application.

[22] Section 48(7)(a) is also clear that the court shall hear an application under subsection (a) for leave to apply to terminate an Order for Permanent Care and Custody no later than 30 days after the application is made. Again the wording is clear.

[23] The court has been provided no statutory authority under the CFSA to grant leave beyond the deadline. The court must therefore look to the case authorities for guidance.

Issue 2

[24] What guidance is provided by the case authorities with respect to leave?

[25] In the submissions that were filed by Mr. Neal, on behalf of the Minister in this matter, various case authorities are cited with respect to the requirement for leave.

[26] In **Children's Aid Society of Cape Breton-Victoria v. L.M.**, [1999] N.S.J. No. 236, a decision of our Court of Appeal, the court stated at paragraph 68:

> The requirement for leave is a matter of substance. It is not merely a formality. Applications to terminate orders for permanent care and custody are not made as of right, and the court is not required to give the application his or her day in court, simply because an application and affidavit in some form have been filed.

[27] Also, referenced in the submissions by the Minister was comments of Judge Levy in **D.L.G. v. Family and Children's Services of Kings County**, [1994] 136 N.S.R. (2d) 131, also adopted in L. M. at paragraph 70:

> It is evident from the entirety of Section 48 that the Legislature intended that the Agency, on obtaining permanent care and custody, would have a six month "window" of time, free from court proceedings, to work with and possibly place children. That "window" is not to be interfered with unless a judge grants leave.
>
> An application to terminate a care and custody order of necessity interjects delay and uncertainty into an Agency's plan for children. It may well be that

> this delay and uncertainty would compromise the best interests of the children ….

[28] The court went on to indicate that the Act does not preclude altogether applications to terminate.

[29] I would also refer counsel to **N.L. v. Nova Scotia Community Services**, 2010 NSCA 84.

[30] In **N.L.**, the appellant sought to appeal a trial judge's decision denying an application to terminate permanent care. The issue before the Court of Appeal was whether or not the appellant should be permitted an extension to file the Notice of Appeal. At paragraph 9, Justice Saunders citing **Jollymore v. Jollymore**, 201 NSCA 116, set out the principles underlining applications for extensions of time:

> The general principles governing extensions were stated by Justice Saunders in Jollymore v. Jollymore, 2001 NSCA 116 (CanLII),:
>
> In this province, reference is often made to the so-called three part test for extensions of time in cases such as this. It is said that in order to qualify for such relief the court must be satisfied that:
>
> (1) the applicant had a bona fide intention to appeal when the right to appeal existed;
>
> (2) the applicant had a reasonable excuse for the delay in not having launched the appeal within the prescribed time; and
>
> (3) there are compelling or exceptional circumstances present which would warrant an extension of time, not the least of which being that there is

> a strong case for error at trial and real grounds justifying appellate interference.

[31] The court continued at paragraph 10:

> In CFSA cases, the third Jollymore principle, respecting the merits, is adjusted to conform with the statute's objective. In Nova Scotia (Minister of Community Services) v. S.E.L., 2002 NSCA 62 (CanLII), Justice Cromwell said:
>
> [10] In many civil cases, extensions of time are often granted quite readily especially where the delay is short and the party seeking the extension is not represented by counsel. However, extensions of time for appealing under the Act call for the consideration of at least two special factors.
>
> [11] The first is that, as in all proceedings under the Act, the best interests of the child or children are parA.M.ount. It is not a matter of doing justice simply between the appellants and the respondent, but of serving the best interests of the child who is the subject of the proceedings. Secondly, the Act makes it clear that time limits are important so that the child's sense of time is respected. Nowhere in the Act is this more clear than with respect to appeals. The Act has an extraordinary and virtually unique requirement that appeals must be heard by the Court of Appeal in 90 days, with the possibility of a 60 day extension, from the date of the filing of the notice of appeal. The time limit for hearing the appeal runs from the filing of the notice of appeal; it follows that any extension of the time for filing the notice of appeal in effect extends the time for hearing the appeal. In other words, extending the time for filing the notice of appeal accomplishes indirectly what the Act does not specifically provide for -- an extension of the time within which the appeal must be heard.

[32] The court then went on to apply these 3 principles from Jollymore and said as follows at paragraphs 13 and 14:

> [13] Clearly, Jollymore's first two principles are satisfied here. Within the appeal period, N.L. had a bona fide intent to appeal. The notice of appeal was filed a few days late because of an innocent error as to the calculation of the appeal period.

> [14] But, as stated in S.E.L., R.K. and C.O., in CFSA cases there is another determinative factor. To allow the extension, the chambers judge must be satisfied that the extension is in the child's best interest. That is not to say the chambers judge applies the same standard to the merits as the panel would apply if the appeal were to proceed. But there must be particulars of evidence, beyond mere conclusory allegations, on this application indicating that the potential consequences of an extension would be better for the child than the potential consequences of the extension's denial.

[33] I am cognizant this is not an appeal. It is a leave application.

[34] Nonetheless, in my view, because I am being asked to grant leave in a similar case, the same principles apply.

[35] Principle 1 of Jollymore - bona fide intention – I have no doubt C.M. had a bona fide intention to bring an application to terminate.

[36] C.M. filed the application to terminate twice. Once on December 1, 2017, and the second time on December 13, 2017.

[37] Principle 2 of Jollymore – reasonable excuse for delay / a rescheduled time period - C.M.'s new counsel says that he only became aware of the leave requirement when notified by the Minister on January 22, 2018.

[38] As to the reasons C.M.'s former counsel filed a Notice of Discontinuance [as opposed to amending the notice] is not determinative of this issue. Nor is this the appropriate forum to answer that question.

[39] The same is true for whether or not her former counsel had instructions to file a Notice of Discontinuance.

[40] The focus for this court is on the statutory objectives identified in **SEL** by Justice Cromwell and repeated by Justice Saunders in **N.L.**

[41] Those objectives apply equally to a leave application, given that the time frames of 30 days for a leave application and 90 days for hearing an application to terminate, mirrors those of an appeal.

[42] To grant an extension of time for filing leave would, as stated in **SEL** and adopted in **N.L.** accomplished indirectly what the *Act* does not provide for .

[43] I also find that an extension would not be in the child, J.L.M.'s, best interest.

[44] If I am incorrect in my analysis and conclusion regarding section 48(6)(c) that leave can only be granted after 6 months from the filing of Notice of Discontinuance, I must consider the merits of C.M.'s application to terminate.

[45] Mr. Neal, at the appearance on January 29, 2018, took the position on behalf of the Minister that C.M.'s leave application should not be dismissed and that evidence should be heard, and that if leave was granted, that evidence from the leave hearing would be used for the actual hearing.

[46] Mr. McKeough, on behalf of C.M., consented to this approach.

[47] This requires consideration of the third branch of the *Jollymore* test, cited in **NL** and whether or not:

> there are compelling or exceptional circumstances present which would warrant an extension of time, not the least of which being that there is a strong case for error at trial and real grounds justifying appellate interference.

[48] This is a leave application for termination of permanent care. Therefore it requires a modification of the third branch of the Jollymore test as cited in **N.L.** as it relates to an application to terminate permanent care. It requires consideration of the provisions of section 48(10) of *Children and Family Services Act*. Before making an order pursuant to subsection 8, the court shall consider (a) whether the circumstances have changed since the making of the Order for Permanent Care, and (b) the child's best interest.

[49] Both counsel have referred to **W. (K.) v. Nova Scotia (Minister of Community Services)** 2014 NSSC 346, a decision of Justice MacLeod-Archer.

There, in declining the mother's application to terminate permanent care, MacLeod-Archer, J., reviewed the appropriate case authorities and the test that is to be applied. The court said at paragraph 22 that:

> In considering whether or not K.W. has adduced sufficient evidence to show some reasonable prospect of success should an application to terminate the permanent care order be held, I must consider the relevant test under section 48(10) of the Children and Family Services Act for termination. In M.D. v. Children's Aid Society of Halifax (1993) 123 N.S.R.(2d) 94 Judge Daley stated:
>
> 11 Section 48(10) requires the court to consider whether the circumstances have changed since the making of the order for permanent care and custody and the best interests of the child. The section does not say that there must be proof of a change of circumstances, that a change of circumstances is necessary before making a Section 48(8) order nor that the change must be the basis of any change in the order as suggested in other statutes. See for example, Section 17(5) of the Divorce Act, 1985. Section 48(10) formalizes the policy applied by the court before the amendment. The court had taken the position that if there is no change of the circumstances of the person applying for termination or change of the circumstances of the child, then there are no grounds for terminating the permanent order. The change must be significant, relevant and a positive benefit for the welfare of the child to result in a termination order. The reference to the child's best interests takes the matter to Section 3(2) which requires the court to consider the relevant circumstances enumerated in Section 3(2). Section 48(10) is a two step process. First is the proof of a change of circumstances. This requirement is based on the assumption that the original order was made on proper grounds and was made in the best interests of the child, and should not be interfered with, except by appeal, unless the circumstances have changed. The second step is the application of the child's best interests rule to the change of circumstances. If it can be proven that the change has or will have a positive effect on the child, then the requirements have been met for the court to make an appropriate order. It is my view that a termination order requires proof of a change of circumstances before applying the best interests test.
>
> 12 In this application for termination then, the onus rests on the applicant-mother to prove on a balance of probability that there has been a significant, relevant and positive change of her circumstances or the child's circumstances. If she does that, then the next step is for her to prove that it is in the best interests of the child to be put into her care …

[emphasis added]

[50] I now apply this test to the evidence in this case.

Has there been a material change in circumstances and what is in the best interest of J.L.M.?

Has there been a change in C.M.'s circumstances?

[51] Here, C.M., represented by her first counsel [not present counsel] consented to an Order for Permanent Care with no access.

[52] At the time C.M. consented to permanent care and custody with no access, the court put the mandatory enquiry to CM under s. 41(4)(b) and (c) [confirmation that C.M. had received independent counsel and also that her consent was voluntary and that she had no medical or mental health issues that would prevent her from voluntarily consenting].

[53] In addition however, and of significance, the court also had C.M. confirm that she understood that although the plan was for family members to adopt J.L.M., that this was not guaranteed and C.M. would have no parental rights or control over that process.

[54] C.M. confirmed on the record that she understood.

[55] This is significant because C.M. in her Affidavit, and also in her evidence on the stand in this leave application, said that it was her understanding that J.L.M. would be adopted by T.M. and A.M., and that it was never explained to her that this was not guaranteed and that she would not have consented to permanent care if she had known that J.L.M. would not be adopted by T.M. and A.M..

[56] The court record from the appearance at the permanent care hearing belies this fact.

[57] This is also significant, as C.M.'s current application to terminate permanent care, seeks termination based solely on the fact that she wishes to have T.M. and A.M. adopt J.L.M.. This is exactly what was explained to C.M. as not being guaranteed when she consented to permanent care and custody, with no parental access.

[58] Also, there are no new grounds upon which C.M. is seeking to terminate. For example, she is not asking that the Order for Permanent Care and Custody be terminated because new family members have come forward, or that her circumstances have changed such that she is now able to care for J.L.M..

[59] There is no change in C.M.'s circumstances since the making of the Permanent Care and Custody Order.

T.M. and A.M.'s Circumstances

[60] Ms. McKeough says that there has been a change in T.M. and A.M.'s circumstances such that leave should be granted.

[61] Mr. McKeough, in his submissions, says that the issue or marijuana use was the key point at the hearing. Mr. McKeough also says that the Minister withheld approval for adoption because the Minister felt T.M. and A.M. were being untruthful, and that the Minister was unable to prove that T.M. and A.M. had a negative impact on J.L.M..

[62] The court disagrees.

[63] As stated in K.W, and referenced in D.M., the onus rests on the Applicant, CM, to show that the circumstances of T.M. and A.M. have changed, not on the Minister.

[64] The court also disagrees that the concerns of the Minister were solely based upon marijuana use, truthfulness and negative impact on the child.

[65] Exhibit 2 in these proceedings was an assessment carried out by Wendy Campbell. The assessment was of A.M. and T.M. as foster parents. A.M. and T.M. had been granted what was referred to by Ms. Campbell in her evidence on

the stand, as a conditional approval. The assessment under the traditions of the family program was for an SAFE assessment (the acronym I referred to earlier), to determine the final eligibility of A.M. and T.M. as foster parents.

[66] In Exhibit 2 and in her evidence on the stand, Wendy Campbell explained that:

- The assessment began in July 2016.
- For a number of reasons the completion of the assessment was put on hold.
- There was a period from July to October 31, 2016, where messages were left with A.M. to complete the assessment with Ms. Campbell. A.M. was asked to call Ms. Campbell back, but did not.
- In October 2016, there was an anonymous referral which triggered an investigation by the Minister of Community Services' intake unit.
- The assessment was therefore put on hold and resumed in January 2017.

[67] I also accept from the evidence that once the assessment resumed, the Minister of Community Services and Ms. Campbell had a number of concerns regarding the suitability of T.M. and A.M. as foster parents. These concerns are listed in Exhibit 2 and also were expanded upon the in evidence of Ms. Campbell

and Mr. McGrath (Supervisor to Ms. Campbell), and can be summarized as follows:

- Nondisclosure by A.M. and T.M. of the history of A.M.'s mental health issues.
- Failure by A.M. and T.M. to advise assessors of A.M.'s mental health episode which lead to 3 days hospitalization of A.M. in August 2016.
- Unclear diagnosis of A.M.'s mental health issues.
- Self-reporting by A.M. of daily cannabis use for approximately 2 years to Dr. Shulliah. A self-report that was contrary to information provided by A.M. to Wendy Campbell in the questionnaire.
- Concerns about the ability of both A.M. and T.M. to cope with stressors to the point where J.L.M. had to be taken from the home by T.M. during A.M.'s struggles with mental health.
- Lack of follow through by T.M. with counselling for anxiety and depression.
- Lack of candor by T.M. and A.M., telling Wendy Campbell that T.M. told her to lie about his relationship with his mother .

- T.M.'s changing account of his relationship with his mother.

- Disclosure by A.M. that she had lied to Dr. Shulliah or Dr. Shulliah had lied about her self-report of cannabis use (this evidence was not clear).

- Both A.M. and T.M. each reporting after the fact that A.M.'s mental health had deteriorated while J.L.M. was in their care.

- In addition, the health of both A.M. and T.M. had deteriorated according to the evidence of Ms. Campbell. In the case of A.M., to the point where her memory loss was for a significant period of time (from July to October), when she was unable to recall details regarding her mental health. In the case of T.M., to the point where he stated that because of his heart attack he had no recollection of the conversation he had with Wendy Campbell regarding counselling at the Wellness Center.

- A.M.'s lack of recall extended apparently up to and including the day she met with Dr. Shulliah on September 26, 2016, a full month after her hospital discharge and at the meeting on September 26, 2016, with Dr. Shulliah, A.M. was unable to recall telling Dr. Shulliah that she smoked cannabis the morning of that appointment.

[68] Of course, all of these concerns were the reasons why an assessment was being completed.

[69] It was also the reason why, when permanent care and custody was ordered, the Minister stated its position that it could not guarantee that J.L.M. would be placed with A.M. and T.M.. Significantly, that decision, whether or not to place J.L.M. permanently with A.M. and T.M., would be the Minister's decision alone. A point that was also explained to C.M. by the court following C.M.'s consent to permanent care.

[70] I have listened to the evidence of A.M. and T.M.. I find nothing from their evidence that would show that the circumstances from the time of the granting of the permanent care and custody order has changed because:

- The concerns raised in the assessment in Exhibit 2 remain, along with a number of unanswered questions.

- As an example, when A.M. said that she did not use cannabis, no rational explanation was given as to why she told Dr. Shulliah she was a chronic user for 2 years. No explanation was given as to why she told Dr. Shulliah that she used cannabis the day of her appointment. The diagnosis that was provided by Dr. Shulliah was of mood disorder psychosis induced by

cannabis, which has not been either proved or disproved and no further independent medical evidence has been called to resolve this issue.

- I do not accept as well, the explanation of T.M. that he gave up his spot at cardiac rehabilitation because he did not need it. I accept that counselling had been recommended and was available for T.M. for heightened anxiety and depression, and that he did not follow through with appointments at the Wellness Clinic that were available to him.

- There was no explanation from the evidence of either T.M. or A.M. as to why they did not disclose the above information to the assessor regarding mental health issues or stress during what was referred to by A.M. as her "dark period". Clearly, it was affecting A.M.'s health to the point that T.M. had to remove J.L.M. from the home, and yet there appears to have been no insight to tell the assessor and to discuss the possible effects of A.M.'s mental health on J.L.M.. Again, this fact was not confirmed by A.M. or T.M. until after the medical records were sought by the assessors for the foster care placement.

[71] Counsel for C.M. in submissions, says that the court as well, heard from A.M. and T.M.'s son, J.M., who testified how "great they were as parents and that

they continue to support him in anything he chooses to do". I accept this statement for the proposition that they were supportive and capable parents of J.M.. If however, it is asserted that I should infer that J.M.'s evidence provided independent proof that mental health issues or marijuana were non issues, I disagree.

[72] As stated by the Minister in submissions, I agree that from the evidence J.M. was not in a position to comment on whether or not marijuana was an issue or if mental health issues were negatively affecting J.L.M.. That is because I find, based on the evidence, that A.M. and T.M.'s son, J.M., was not only not residing in his parents' home while J.L.M. was in their care, he (J.M.) was residing, for some periods, in another City (Halifax), for some periods in another province (Ontario), and for periods, in other Countries (US and England). Also, as pointed out, J.M. conceded on cross examination that he was unaware of the events that led to his mother's hospitalization until after the event. This, despite the fact that according to his evidence, he Skyped with his parents every night since he was 18years old, if he was not home.

[73] I find therefore J.M. was either not at home to witness the level of mental health difficulties his mother was experiencing or his parents chose not to share

with him, the level of discord that was occurring in the home during Skype time with J.M..

[74] The same can also be said regarding the evidence of J.M., mother of T.M., who testified that although a frequent visitor, that she did not reside in the home.

[75] Therefore, as witnesses offered to provide independent evidence on issues of marijuana or mental health and lack thereof, I give little weight to their evidence on those points.

[76] I find there remains uncertainty of the placement of J.L.M. with T.M. and A.M., as a "forever home" as it was referred to in the evidence of Ryan Ellis.

[77] This uncertainly existed at the time of permanent care and custody was ordered and there has not been a change in circumstances regarding these uncertainties.

[78] In addition, as mentioned in the evidence of Mr. McGrath, Wendy Campbell's supervisor, there was a process for T.M. and A.M. to follow if they disagreed with the assessment that was carried out (Exhibit 2).

[79] I accept the evidence of Mr. McGrath wherein he said that he and Ms. Campbell would make themselves available to discuss the assessment if A.M. and

T.M. disagreed with it. Also, I accept his evidence that he told T.M. and A.M. that they could meet with his supervisor if they so wished. I A.M. also satisfied that Mr. McGrath told T.M. and A.M. that there was an appeal process should they wish to avail themselves of that process.

[80] Having been provided with that information, the only additional information provided to the Minister by A.M. and T.M. were two letters from doctors which were not introduced into evidence in these proceedings. They also did not avail themselves of the other processes.

[81] Instead, C.M. is now trying to review the Minister's decision as it relates to A.M. and T.M. as foster parents by way of this application. A decision with which this court has already made the determination and was a decision for the Minister to make.

[82] Two recent decisions of our Court of Appeal have underscored the importance of deference by the court to both the legislative scheme work and administrative decisions under the CFSA.

[83] In **A.C. v. Nova Scotia Community Services**, 2017 NSCA, in upholding a decision granting permanent care, Bourgeois, J.A., said at paragraph 35 that:

> A comprehensive analysis of the operation of s. 47(1) and (2) and the legislative intent informing the provisions was set out by MacDonald, C.J.N.S. in Children and Family Services of Colchester County v. K.T., 2010 NSCA 72 (CanLII):
>
> > [36] The CFSA comprehensively details the various specific options available to meet a child's best interests. These options vary with each stage in the process from initial agency involvement up to and including third party adoptions. In T.H., my colleague Fichaud, J.A. examined the various stages and how the legislative priorities changed with each. I will not repeat his comprehensive analysis except to highlight the Legislature's shift in priority when it comes to access.
> >
> > [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:

[84] Those comments were made in the context of the issue of whether or not access should have been granted post permanent care.

[85] These principles apply equally so, or perhaps more so, to a situation such as here, in my view, where post permanent care has been granted and the court is being asked to second guess and usurp the decision of the Minister regarding placement of the child.

[86] Guidance is also provided in **Nova Scotia Community Services v. Nova Scotia Attorney General**, 2017 NSCA 73. There, the court granted an appeal by the Minister. The issue was whether or not the Learnered Trial Judge erred in

requiring that a biological father be provided notice of adoption following the placement of a child in permanent care. At paragraph 45 the court cited D.T., which is referred to as D.T., 1992 NSJ 289, and the comments of Justice Chipman at paragraph 18, where it was said that:

> … **The paramount consideration in all proceedings under the Act is the best interests of the child. The courts must discourage attempts to disrupt or circumvent the statutory provisions which, in view of the machinery contained in them for the protection of all interests considered worthy by the Legislature, should be respected**. (Emphasis added)

Best Interest of the Child

[87] I turn now to the final branch of section 48(10) as referenced in **K.W.** and the **D.M.**; whether or not it has been proven that it is in the best interest of the child to be placed with A.M. and T.M..

[88] Despite all the turmoil in young J.L.M.'s life, I accept from the evidence that he is thriving. While I accept that in part some of the success can be attributed to A.M. and T.M., the emphasis is on J.L.M.'s best interest and not their best interest.

[89] J.L.M. needs a "forever home" that does not have unanswered questions as to how his parents, caregivers, or other family members will be in a stressful environment.

[90] Given the unanswered questions in A.M. and T.M.'s home, and J.L.M.'s needs, their home is not the home for him.

[91] A.M. and T.M., have, by not answering those questions, forfeited that right.

[92] As alluded to in the evidence of Mr. McGrath, the standards for a foster parent are extremely high, and with good reason. Children such as J.L.M. and other children in care, are particularly vulnerable and require stability and confirmation that there are no unresolved issues in the foster home. As an example, Mr. McGrath stated, when asked why A.M. was not tested for drugs, indicated that it was not the policy to test foster parents for drugs. This is sound policy given that the needs of children in care are such that one would not expect a foster placement would be approved for persons requiring drug testing.

[93] Also as stated in the SEL case, referred to previously in my decision, the sense of time for J.L.M. (and all children) is different under the **Children and Family Services Act** than it is for adults. J.L.M. and his best interests cannot wait.

[94] I accept the evidence of Mr. Power that there is presently a family/families, who are willing and able to provide J.L.M. with what he needs.

[95] If I grant leave it would require a further hearing. It is acknowledged by C.M.'s counsel that further evidence would be required.

[96] If I do grant leave and a hearing is held, upon a decision to terminate, the court realistically, would have two options under section 48(8). Either terminate the proceeding or grant a supervision order placing J.L.M. in the supervised care of A.M. and T.M..

[97] Termination is not an option because as I have already stated, there are too many unanswered questions regarding A.M. and T.M..

[98] Supervision is also not an option because to date, A.M. and T.M., have been unwilling and/or unable to cooperate with the Minister of Community Services.

[99] The court therefore has few to no options and there remains much uncertainty. This is not in J.L.M.'s best interest.

[100] It would also require J.L.M. to continue to remain in limbo.

[101] J.L.M. is already in limbo because a family did come forward in January of 2018 wishing to adopt J.L.M., but the screening process for that adoption application had to be put on hold pending this application.

[102] Counsel for C.M. had referred to the **M. (C.) v. Nova Scotia (Minister of Community Services)**, 2011 NSSC, 431. There, the child was taken into care by the Minister and placed with the paternal grandparents. The mother subsequently

consented to an Order for Permanent Care and Custody with a plan that the child would be placed with the paternal grandparents. The maternal grandparents, who had custody of the child's siblings, were not informed of the plan for permanent care. The plan for the child to be placed with the paternal grandparents was abandoned, and the Minister sought a plan for adoption with new foster parents. Wilson, J., found that there had been a change in circumstances and that it was in the child's best interest that the Permanent Care Order terminate and that the child be returned to the grandparents.

[103] In my view, M.C.S. is distinguishable from this case because in M.C.S., the maternal grandparents had not been provided with notice. Therefore, the Minister had not considered a plan involving them as caregivers and had not, to use the terminology in the Act, "considered whether or not it was possible to place the child with a family member".

[104] Here, J.L.M. was placed with family members, with the expectation that they would do what was required, but they did not. They were considered as part of the plan but ultimately, were rejected.

[105] In M.C.S, as well, another child had already been placed in the care of the maternal grandparents and there were no concerns voiced by the Minister or

objections. Here, while A.M. and T.M. have raised their own son, J.M., without issue, J.M. is not currently residing in the residence and based on the evidence, was not present when the concerns and issues arose with J.L.M. , while he was in the care of A.M. and T.M..

[106] I therefore find it is not in J.L.M.'s best interest to delay this matter any longer and therefore, C.M.'s application for leave is denied.

[107] C.M. may not bring another application as mandated under the **Act** for 6 months.

Gregan, J.