SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Nova Scotia (Community Services) v. J.M.*, 2018 NSSC 312

Date: 2018-07-17
Docket: Sydney Nos. 102043/107128/90691
Registry: Sydney

Between:

MINISTER OF COMMUNITY SERVICES

Applicant

v.

J.M. AND M.B.

Respondents

-AND-

Between:

W.B. AND M.A.B.

Applicants

v.

J.M. AND M.B.

Respondents

LIBRARY HEADING

Judge: The Honourable Justice Robert M. Gregan

Heard: April 30, May 1 and 2, 2018 in Sydney, Nova Scotia

Oral Decision: July 17, 2018

Written Decision: December 7, 2018

Issues: (1) Permanent Care & Custody

(2) Leave for Custody by Grandparents under MCA & PSA

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Written Release: December 7, 2018
Decision Delivered Orally - July 17, 2018

Counsel: Adam Neal for M.C.S.
Jill Perry for J.M.
Shannon Mason for M.B.
Alan Stanwick for W.B. and M.A.B.

By the Court:

Introduction

[1] In the 1970's there was TV series called "Eight is Enough". For those of us old enough to remember it, it featured actors Dick Van Patten and Betty Buckley and a host of other actors. Though indicated to be fictional, not many people know it was modeled after a real life father who was a newspaper columnist in Chicago and who was married and had 8 children. The series was billed as a comedy/drama series, because sometimes it dealt with light hearted situations and other times it dealt with subjects such as death, grief, or loss of family members. At times as well, the premise was also a mixed message. Parents with 8 children could find it difficult to manage and sometimes coping with difficult situations proved to be very taxing. Conversely, during difficult times, having a large family to lean on could also see the family through difficult times. Hence the duality of the enigma of the title, "Eight is Enough".

[2] I raise this because in these proceedings, the Minister says H.D.M-B. and H.M-B., the two children in these proceedings, should be placed in permanent care, and that this plan is best for these two children. The Minister says that the plan of M.A.B. and W.B., the paternal grandparents, to have H.D.M-B. and H.M-B. live

with their 4 children, and have the Respondents, J.M. and M.B., reside in the basement of their home, for a total of 8 persons, is too much.

[3] The Minister said it is not just about numbers, it is about the needs of the children already in their care, the needs of H.D.M-B. and H.M-B. and the dynamic of the relationship between M.A.B. and W.B. with J.M. and M.B. The Minister says those factors make the plan of 8 people residing in the home, not appropriate and not in the best interest of H.D.M-B. and H.M-B.

[4] J.M. and M.B. support M.A.B. and W.B.'s plan and say that 8 is enough and that it is in the best interest of H.D.M-B. and H.M-B.

[5] The issues that are before me have been described in various ways by the Minister and another way by the Respondents.

[6] From the court's prospective there is only one issue which has a number of sub categories.

[7] Is it in the best interest of H.D.M-B. and H.M-B. to be placed in the permanent care of the Minster, or should the **Children and Family Services Act** proceedings be dismissed with the children being placed in the custody of M.A.B. and W.B?

[8] Given the time lines under the **Children and Family Services Act** proceedings, these are the only options available to the court.

Background

[9] I will now review the history of these proceedings, which appear to be undisputed. That is that the two children that are subject to these proceedings are H.D.M-B., born [ ] and H.M-B., born [ ], whose parents are J.M. and M.B.

[10] The children have been in the care of the Minister since their birth and the matter has been before the court since that time.

[11] M.B. has 4 other children, M.R.M., and M.M. (whose Mother is J.M.), and J.B., and E.B. (whose biological mother is Ms. D.). All 4 children are in the custody of M.A.B. and W.B.

[12] J.M. has 6 other children who are not in her care.

[13] Of the 4 children in the care of M.A.B. and W.B., two of them, J.B. and E.B., were taken from the care of their mother, Ms. D. The other two children, M.R.M. and M.M. (the biological children of J.M. and M.B.), were placed in the care of M.A.B. and W.B., by the agency in Niagara Region of Ontario, both by consent.

[14] H.D.M-B. and H.M-B. are in the temporary care of the Minister of Nova Scotia and as indicated, the Minister's plan is for permanent care and adoption.

[15] The plan of permanent care is opposed by J.M. and M.B., who rely on the plan of M.A.B. and W.B. under the **Maintenance and Custody Act**.

[16] Also, undisputed, in that there is a long history of the Minister's involvement dating back with the Respondents to 2009, and as was indicated above, there are a number of children not in the care of J.M.

[17] M.B. and J.M. have been in a relationship since 2013. The children M.B. had with Ms. D. in Ontario were placed in the care M.A.B. and W.B.

[18] There have been previous court findings that J.M. lacked parental capacity.

[19] It is also not disputed that J.M. and M.B. returned to Cape Breton in August of 2013, and the child, M.R.M., was taken into care and placed at birth with M.A.B. and W.B.

[20] In 2014, the Respondents returned to the Niagara Region to be closer to the children and issues arose at that time between the Respondents and M.A.B. and W.B. J.M. became pregnant again and gave birth to M.M. in March 2015, and as indicated the child was taken into care and placed with M.A.B. and W.B.

[21] Difficulties arose again between the Respondents and M.A.B. and W.B., which resulted in the Respondents returning to Cape Breton again in April 2016. J.M. became pregnant with H.D.M-B. H.D. M-B. was taken into care at birth and the Minister commenced proceedings on August 17, 2016.

[22] The Minister again sought Parental Capacity Assessments, first in relation to M.B. and then for J.M. Exhibit 3 was the Parental Capacity Assessment. It was completed by Dr. Landry. Dr. Landry also testified. From the evidence, Dr. Landry determined that while the Respondents could assist in caring for the children, they lacked capacity to parent children unassisted.

[23] During the proceedings involving H.D.M-B., J.M. became pregnant and the child, H.M-B., was born on [ ]. H.M-B., was also taken into care at birth.

[24] M.A.B. and W.B. presently have 4 children in their care. These children have varying degrees of needs. Two of the children have significant needs and behavioural concerns. The Minister argues that the children currently in the care of M.A.B. and W.B. , require significant time and energy and says that placing two additional children in their care, H.D.M-B. and H.M-B., would create a strain and stress on the family unit and ultimately, place all children in the care of M.A.B. and W.B. at risk.

[25] The Minister also says that a plan that includes J.M. and M.B. residing basement of M.A.B. and W.B. and providing assistance to the children, would create a risk.

Review of Evidence

[26] I will now review the evidence in these proceedings. I have considered all the evidence and testimony and Exhibits, but will only highlight the evidence that relates to the issues that I have identified and to give effect to my decision.

[27] The hearing dates were April 30, May 1 and 2, 2018. At the conclusion of the evidence, the Parties agreed to adjourn for submissions. All parties agreed on the record that we were over the time limits by several months, however, owing to the Minister seeking the evidence of Dr. Landry, which all parties felt important for the court to have, the matter was adjourned over the time limits. It was also adjourned to attempt settlement, which was again by consent, and all agreed that it was in the best interest of the children to exceed the deadlines.

[28] As stated, I accept the evidence of Dr. Landry, which was not disputed (Exhibit 3), and the viva voce evidence that J.M. and M.B. lacked capacity to parent unassisted or provide primary parenting. Dr. Landry said that they can assist if provided guidance.

[29] I also considered the evidence of Dr. Kellogg, who is the pediatrician to H.D.M-B. and H.M-B. Dr. Kellogg testified in these proceedings, and her report was marked as an Exhibit. Dr. Kellogg indicates that there is a 75% chance that H.D.M-B. has autism and that he has been diagnosed as having microcephaly and that he also suffers from facial palsy and remains on a waiting list for an assessment of autism, which was hoped to occur in June of 218, but had not been completed at the time of the hearing.

[30] Significantly, because H.D.M-B. was not school age, the diagnosis for autism was not prioritized by the Nova Scotia Health Authority, which resulted in delays in H.D.M-B. being assessed. Regardless of the diagnosis of autism, H.D.M-B. suffers from a number of behavioural issues which were observed by Dr. Kellogg, as well as his foster care provider, Ms. C. All of which required that H.D.M-B. have a high level of care.

[31] H.M-B. also suffers from microcephaly, however to date, and also given her young age and differing behaviours, doctors and care providers are unable to determine whether or not, or the degree to which, H.M-B. has special needs.

[32] I also accept the evidence of Ms. C. that H.D.M-B. exhibited a number of behavioural concerns such as eating hair, tantrums and frustration at loud noises, delay in verbal skills, and delay in fine motor skills and balance.

[33] I also accept that Ms. C. was unwilling to commit to a plan that will require adoption of both H.D.M-B. and H.M-B.

[34] The plan of the Minister will now therefore require H.D.M-B. and H.M-B. to be placed in the adoption process, which will require moving the children to new adoptive parents once a home is found that will accept both children. It is clear that whatever decision the court makes, it will require a change in the residence for H.D.M-B. and H.M-B.

[35] That is the evidence I intend to rely on at this point. I will return later to evidence in my decision as it relates to the parties respective positions, however, at this stage it is important that a review of the legislative scheme and the case authorities that set out the approach should take.

[36] From the legislation and case authority, the following principles emerged relevant to the issues that I must decide.

[37] The paramount consideration in all family proceedings, including *Children and Family Services Act* ("CFSA") proceedings, is the best interest of the child (s. 2(2) of the CFSA).

[38] Under s. 3(2) of the CFSA, it also requires that I consider the following:

> *(2) Where a person is directed pursuant to this Act, except in*

respect of a proposed adoption, to make an order or determination in the best interests of a child, the person shall consider those of the following circumstances that are relevant:

(a) the importance for the child's development of a positive relationship with a parent or guardian and a secure place as a member of a family;

(b) the child's relationships with relatives;

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

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

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

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

…

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

…

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

…

[39] Also relevant is s. 42(3) of the CFSA which reads as follows:

(3) Where the court determines that it is necessary to remove the child from the care of a parent or guardian, the court shall, before making an order for temporary or permanent care and custody pursuant to clause (d), (e) or (f) of subsection (1), consider whether

(a) it is possible to place the child with a relative, neighbor or other member of the child's community or extended family with whom the child at the time of being taken into care had a meaningful relationship pursuant to clause (c) of subsection (1), with the consent of the relative or other person; and

...

[40] Both sections 3(2) and 42(3) read together require the court to balance competing interests of the plan of care of the Minister versus the plan put forward by M.A.B. and W.B. and in comparing those two plans, determine what is in the best interest of H.D.M-B. and H.M-B. It is also clear from the case authorities that the following principles be applied:

1. Although family placement and plans are to be considered, they are to be given no additional or greater weight than other factors that are set out in s. 3(2) (see **Children's Aid Society of Halifax vs. TD**, 2001 NSJ 225, a decision of the Court of Appeal, which was referred to by counsel).

2. Secondly, the burden of proving that the plan being put forward for placement with the family members rests with the family members (see **Children's Aid Society of Halifax vs. TD,** supra and **Syl Apps Secure Treatment vs BD,** 2007 3 SCR 83)**.**

3. Parental rights must be rejected and the integrity of the family considered in circumstances that will protect the child (see **Nova Scotia (Community Services) v. CKZ** v. 2016 NSCA 61).

[41] I will now review the evidence as it relates to these principles that I have set out and the issue I must decide in weighing the competing plans and best interests of the children.

[42] Regarding the Minister's plan, I have already highlighted some of the relevant evidence. I will now turn to other additional evidence which was proffered regarding the Minister's plan.

[43] Dr. Ellerker, the family doctor for H.D.M-B. and H.M-B., also testified. Dr. Ellerker testified as to the concerns that H.M-B. had in particular, in that at 2 months she was difficult to settled, that she arched her back during feedings, that she required a car seat for sleeping and she confirmed as well, the diagnosis of microcephaly and a referral to the pediatrician.

[44] On cross-examination, Dr. Ellerker confirmed that J.M. was diligent during pre-natal appointments.

[45] Ms. Aucoin, long term worker, also testified in these proceedings. She testified that she is opposed to the plan of M.A.B. and W.B. because they already are caring for 4 children, that there were concerns that two of the children were struggling with aggression and impulsive behaviors at school, concerns that J.B. struggled with speech delays and a lot of appointments were required for the 4

children and a lot of hard work that could lead to M.A.B. and W.B. becoming overwhelmed.

[46] Ms. Aucoin also confirmed a referral in Ontario against M.A.B. and W.B., in which the child, J.B., told a teacher that W.B. had put soap in M.R.M.'s mouth and would not permit the children to be interviewed alone by social workers.

[47] Ms. Aucoin also expressed concern that the plan of M.A.B. and W.B. included J.M. and M.B., given past family conflict. On cross-examination, Ms. Aucoin agreed that she was aware of the agency's position in Ontario that supported the placement of the 4 children in Ontario in the care of M.A.B. and W.B., and she agreed that the latest referral in Ontario regarding the soap, was not verified, which is terminology somewhat different than in Nova Scotia, which would be "not substantiated" under the legislation of Nova Scotia.

[48] Ms. Aucoin on cross-examination, also agreed that J.M. and M.B. could have a role of parenting if supervised and if the supervising person was the one making the final determination and setting limitations.

[49] Ms. Aucoin in her evidence, also expressed on behalf of the Minister, a number of concerns regarding the plan by the Respondents, owing to the evidence gathered from educators, social workers, and medical professionals, and I will detail what the professionals testified to later in my decision.

[50] I now return to the evidence of Dr. Landry. Dr. Landry's report (Exhibit 3) was a Parental Capacity Assessment completed on J.M. and M.B.. While the conclusions were not challenged, it is important to note that the report findings and recommendations were all in relation to J.M. and M.B. only. There is therefore, no expert evidence before the court on the ability of M.A.B. or W.B. to parent.

[51] The court did permit Dr. Landry to express an opinion generally on the topic of parenting of children with special needs as they relate to multiple children with special needs, and multi- generational parenting. However, the court limited Dr. Landry's comments to general opinion and not specifically to M.A.B. and W.B., as no Parental Capacity Assessment was completed on them and Dr. Landry was not retained to do so.

[52] I also note that Jane Moore, the long term care worker dealing with M.A.B. and W.B. and the children, who testified via video link, said that the local agency in Ontario that would oversee any of the concerns that the family had and who had investigated past concerns, said that the Minister in Ontario took no position on whether H.D.M-B. and H.M-B. should be either (a) placed in the home of M.A.B. and W.B. and the other children, or (b) no position on whether or not an assessment should be completed.

[53] Finally, as it relates to the plan of the Minister, I have also considered the evidence of Paul Moore, the adoption worker. Mr. Moore said that if permanent care and custody were granted, the adoption process would begin. It is his understanding that Ms. C., the current foster parent, is not willing to adopt and as I have indicated, I accept Ms. C.'s evidence on that point.

[54] Mr. Moore said that there are approximately 20 families on a list for consideration of adopting H.D.M-B. and H.M-B.. Mr. Moore said that the adoption process could take 6-8 weeks. Mr. Moore confirmed that the plan for adoption was that H.D.M-B. and H.M-B. would be placed in the same home. On cross-examination, Mr. Moore agreed that when the adoption consultation process occurred, it was done on H.D.M-B. and did not include H.M-B. and would therefore require an adoption consultation process, which would include both children. He also agreed that would need to be completed before the adoption occurred. He agreed that there is a screening period and transition period, once notice of proposed adoption was filed. He also agreed on cross-examination that if during the transition period of the proposed adoption, that the parents decided not to adopt, that the selection process would reconvene.

[55] That was the plan of the Minister.

[56] I will now review the plan of M.A.B. and W.B..

[57] J.M. and M.B. are not putting a plan to parent H.D.M-B. and H.M-B., or have H.D.M-B. and H.M-B. returned to their care. They oppose the permanent care and custody and instead proposed that the children be placed in the care and custody of M.A.B. and W.B., pursuant to the *Maintenance and Custody Act*, which has been filed by M.A.B. and W.B., seeking both leave and custody.

[58] As referenced in the legislation and court authorities stated earlier, the burden of proving that the plan of placement of H.D.M-B. and H.M-B. with family members, M.A.B. and W.B., rests with the family members proposing the plan.

[59] Here, through their counsel, both J.M. and M.B., as well as M.A.B. and W.B., are putting this plan forward. It is therefore their burden to establish that (a) the plan is viable, and (b) that the plan is in the best interest of H.D.M-B. and H.M-B.

[60] In addition, the Minister has voiced a number of concerns in stating its position that it opposes the alternative plan being put forward. Therefore, the Respondents and M.A.B. and W.B., must also clear the additional hurdle that satisfies me that using the terminology in **Nova Scotia (Community Services) v. CKZ,** supra, that their plan promotes the integrity of the family and should be

considered, and that in all the circumstances, they will be able to adequately protect the children and that parental /family rights should not be rejected.

[61] I will now review the evidence regarding the plan.

[62] I begin with the evidence of W.B., because he and M.A.B. are the ones who will be responsible for the care of the children if their plan is accepted.

[63] W.B. testified that he is 55 years of age. He lives in [town name], Ontario, near London, Ontario, with his wife, M.A.B. He testified that they have been together for 35 years, 14 of which were common law. He and M.A.B. are the parents of the Respondent, M.B. He described the home at [address], Ontario, and said it was 4 bedrooms with a separate basement apartment. He described it as having a backyard with a pool and swings and toys.

[64] W.B. and M.A.B. live in their home with the 4 children; E.B., who is 8, and has been living with them since she was 5-6 months old; J.B., who was 7 years old at the time of this proceeding, and has been living with them since birth; M.R.M., who is 4 years old and was taken into care and placed with W.B. and M.A.B.; and M.M., who is 3 years old and has been in their care since birth.

[65] The three eldest children (E.B., J.B., and M.R.M) attend the same school.

[66] In terms of the layout of the home, W.B. testified to the sleeping arrangements. M.M. has her own room with crib and; J.B. had his own room which contains bunk beds; and M.R.M. and E.M., share a room with a princess bed and bunk beds. W.B. testified that there were lots of toys.

[67] From the evidence, which I accept, it is a good home, both physically and emotionally, and the children's need are currently being met. This is not disputed and in fact confirmed in the evidence of Jane Moore, who described the home as a "lovely home" and that the interaction between W.B. and M.A.B. and the children was appropriate.

[68] I also find from the evidence, that W.B. and M.A.B. are employed full-time. Both worked long hours for very little pay. That job is 24/7 as parents to the 4 children. Their source of income is disability benefits and child tax benefit. There is not a lot of money to go around, but somehow they make it work.

[69] There is no evidence of inability to support the family financially.

[70] W.B. testified as to the daily routines of the children and how their needs were met. In my view, his evidence shows that W.B. and M.A.B. run a very well organized structured home with emphasis on details and routines. For example, he testified that usually the children awake between 6:00 am and 6:15 am, coffee at 6:40 am, the children eat between 6:45 am and 7:10 am, then the children are

washed and dressed by 7:45 am, then television and/or play until 8:10 am, and then they go to the bus for school. The bus stop is at the end of the driveway. W.B. indicated that M.A.B. stays at home with M.M. while he takes the older children to the bus stop. He then indicated that the bus returns the children off at approximately 3:26 pm.

[71] When asked what he did during the day when the children were at school, W.B. said that they would both attend to M.M., and various other routines in their day. W.B. said that at 3:26 pm when all the children are home, they come in and play until 5:00 pm, have a home cooked meal, and the odd time for treat they will go to a restaurant (e.g. – McDonalds) if they are out running errands and/or a reward for doing chores.

[72] W.B. also described his suppertime routine with a great amount of detail and discussion of division of labor.

[73] I also accept from the evidence that W.B. and M.A.B. are ones to plan ahead, and are proactive in their parenting plan to have H.D.M-B. and H.M-B. in their care. Two examples are (1) there were already planning to upgrade their vehicle that will fit all the children and (2) they already made plans for sleeping accommodations for H.D.M-B. and H.M-B. if they are awarded custody. As well,

they have also requested that their current pediatrician take on H.D.M-B. and H.M-B. as patients, and they have been proactive in that regard as well.

[74] It is not a situation where for instance, where the court sometimes sees where the proposed care giver would take a "wait and see" attitude and say 'we will wait and see what the court decides'. Here, I find that W.B. and M.A.B. have been proactive in making these plans in advance.

[75] I also listened to W.B.'s evidence regarding the medical needs of the children. In my view, he gave a detailed, insightful description of their medical difficulties and needs, and the steps that were taken to deal with their medical needs.

[76] W.B. was able to describe in great detail, the afflictions that the children had and what processes they require for medical attention. I note as well that Dr. Barr testified (the children's Ontario pediatrician), and, although he identified a number of the children's needs, he was equally clear that W.B. and M.A.B. were taking appropriate steps and followed through with their medical needs.

[77] Dr. Barr also confirmed that he would be prepared to take on H.D.M-B. and H.M-B. as patients if M.A.B. and W.B. were awarded custody. Dr. Barr confirmed he has other patients with autism and can make referrals to the resources in place for autism in the area. I note that this is not that different than what has been

occurring for plans for the children in Nova Scotia, and I have already mentioned that both H.D.M-B. and H.M-B. are on a waiting list in Nova Scotia, and at the time of hearing, were not prioritized because they were not school age children.

[78] Jane Moore also confirmed that during the course of the referral investigation that was ultimately closed by the Minister, that she contacted Dr. Barr’s office and was advised via voicemail that there were no concerns.

[79] W.B. and M.A.B. also provided Ms. Moore with details and insightful information in my view, on the children’s medical needs and how they were being dealt with.

[80] W.B. also testified that he and M.A.B. supported the school’s efforts to deal with the challenges of the children while in school, including W.B. going to J.B.’s class when he had behavioral problems, and taking him back home, and in my view, appropriately intervened and disciplined.

[81] There was also evidence with respect to how the children were disciplined and it was appropriate such as taking away electronics, and time outs which were age appropriate.

[82] In his direct evidence, W.B. also said that he and M.A.B. were committed to caring for H.D.M-B. and H.M-B. and I accept his evidence when he said that they were prepared to do "whatever it takes".

[83] I also accept that is not a situation where W.B. and M.A.B. are taking the "wait and see approach". I have given examples of them being proactive in arrangements for the children.

[84] The Minister says that W.B. and M.A.B. have not met the burden of overcoming the third obstacle as outlined in the case authorities; that they have not satisfied the court that the plan they rely upon will adequately protect the children. In support of that position, the Minister cites a number of concerns summarized as follows:

- That the addition of two more children will cause the family to become overwhelmed.
- That there was a referral in Ontario made against W.B. while these proceedings were ongoing. The referral included inappropriate discipline by placing soap in M.R.M.'s mouth.
- That past family conflict with M.B. and J.M. make W.B. and M.A.B.'s plan to risky.

- That W.B. and M.A.B. will not enforce the Order, in particular, as it relates it compliance by M.B. and J.M.

[85] With respect, I disagree with the Minister's position. I will now deal with each of these concerns in turn.

[86] The Minister's concern of W.B. and M.A.B. being overwhelmed, I accept that the evidence is to the contrary. As stated, W.B. and M.A.B. have a well-organized home. They have appropriate support structure in place. For example, they have been engaging with the school and supporting strategies. They have shown an appropriate level of insight into the children's needs, therefore, there is nothing from the evidence that the addition of two additional children would overwhelm them. The evidence of the Minister on this point is speculative at best. In fact, the evidence of the Minister in Ontario is that they take no position on this point and also that they took no position with respect to a Parental Capacity Assessment. I therefore dismiss this concern.

[87] With respect to the referral of the inappropriate discipline, the evidence of Ms. Morris was that there was a referral and the referral source was a teacher who reported that the child, J.B., reported that W.B. had washed M.R.M.'s mouth with soap as a form of discipline. This was investigated and W.B. and M.A.B. cooperated fully, but denied the allegation. The allegation was not verified, which

as indicated, equates to not substantiated in Nova Scotia's CFSA's proceedings. Ms. Morris said that she believed it was true. With respect that is not the appropriate test. Here, there was a thorough investigation and the file was closed. No court proceeding was held and no criminal investigation or charge laid, nor were the children taken into care. The children remained with W.B. and M.A.B. The school principal who testified in these proceedings, questioned whether the teacher, who was inexperienced, should have made the referral. Therefore, in my view, that concern would not rise to the level to be substantiated as a risk.

[88] With respect to the issue of past family conflict the Minster says that because the plan of M.A.B. and W.B. includes M.B. and J.M. living in the basement in a limited parenting role, that is also poses a risk because of the past conflict and the necessitated Department of Community Services and Police involved in charges against M.B. I reject this as well.

[89] It was W.B. who called Department of Community Services and the Police on all occasions. W.B. did not downplay with those agencies what occurred or try to justify M.B.'s behaviour.

[90] Significantly I am satisfied from the evidence that W.B. or M.A.B. will call the Department of Community Services and/or the Police and will remove J.M. and M.B. if their actions are not in the children's best interest. The Minister says

that because M.B. cannot articulate why he and J.M. cannot parent, that he lacks the insight as to what would result in risk to the children. With respect I disagree. W.B. and M.A.B., as pointed out by counsel, did not have access to the Parental Capacity Assessment or the file, because they were not parties to the proceeding and even if they cannot articulate what their inability to parent is, that does not in my view mean that they will not act accordingly and/or not comply with a court order.

[91] A similar argument was advanced and rejected in the case that was referred to by counsel **Nova Scotia (Community Services) v. AH,** 2011 NSSC 255 (with AJ and SJ as third parties). There, the court in paragraphs 21 and 43 referenced the position made by the Minister. In paragraph 21 the court says as follows:

> *The Agency evidence focused on the history of the paternal step-grandmother, S.J., with her own children and grandchildren. The Agency submits that the conduct of S.J. in returning her own granddaughter to her daughter after nine years of custody was "alarming". The Agency submits this past conduct is not indicative of a long-term, stable plan for J.T.*

[92] In paragraph 43 the court summarized the Minister's position in stating that:

> ...
>
> *- That the Agency has serious concerns regarding A.J.'s children, who have had significant behaviour difficulties, resulting in Child Services, through Kinaark Centre, which provides services to children in need of serious help.*

- That A.J. did not accept responsibility for his son's mental health issues, and minimized his son's behaviours.

...

[93] The Minster also says that applying that to this case, owing to the responses by J.M. and M.B., in particular regarding their insight into parenting capacity, they insist that this transposes into a risk that W.B. and M.A.B. cannot control. I have reviewed the evidence from the cross-examination as it pertains to these points raised in the Minister's argument.

[94] I agree that the responses to the questions posed to M.B. and J.M. by Ms. Perry in attempting to rehabilitate the evidence, casts much doubt, and in particular as it relates to not only J.M.'s evidence, but more so M.B.'s evidence in particular. However, I accept the submissions of Ms. Mason in that there was insight on behalf of J.M. in that she clearly indicated that she was aware of repeating the mantra of risk, but there were different concerns with respect to M.B. and as I have indicated, despite efforts of counsel to rehabilitate M.B., that there were some point of issue with respect to his evidence. I agree that those responses cast doubt on the veracity of M.B.'s evidence. In my view however, M.B.'s evidence was very unsophisticated and was a product of his limited cognitive challenges. This combined with the pressure of testifying were such that he would have agreed to anything, even if suggested, that for example, the moon was made of cheese, he

would have agreed; and while not helpful, it is not in my view, fatal to the plan of M.A.B. and W.B.

[95] If the plan was for M.B. and J.M. to parent or enforce the Order of the court, I would have serious concerns, however, I am satisfied from the evidence, that it will be W.B. and M.A.B. who will be enforcing the Order of the court and will follow same and an act in the children's best interest, even if the responses of M.B. or J.M. requires them to leave the premises or stop parenting.

[96] I am also satisfied that M.A.B. and W.B. will be able to enforce their plan, which includes J.M. and M.B. assisting them in a limited role and that this is in the best interest of H.D.M-B. and H.M-B.. This is in keeping with Dr. Landry's recommendations that M.B. and J.M. can parent for short durations by assisting with some guidance. From the evidence, those recommendations can be carried out under M.A.B. and W.B.'s plan and I am not persuaded that the risks associated with the plan would rise to the level to raise protection concerns as set out in **Nova Scotia (Community Services) v. CKZ,** supra.

[97] I am also satisfied from the evidence that there has been improvement in J.M. and M.B.'s ability to engage with the grandparents in taking direction and working with third party providers and being respectful. If I am incorrect in that

finding, I am satisfied that M.A.B. and W.B. will enforce the conditions of any Order.

[98] In **Nova Scotia (Community Services v. AH,** supra, at paragraphs 72 and 73, the court said as follows:

> *I have scrutinized the evidence with care, and I am satisfied that the evidence of the Agency is not sufficiently clear, convincing, and cogent to satisfy the balance of probabilities test. The Agency evidence is speculative at best, and the evidence before the Court does not support the submission that the past is the best predictor of future events.*
>
> *Quite the contrary, the alternative family placement offered by A.J. and S.J. is sound, sensible, workable, well conceived, and has a basis in fact. It is a far more superior and less intrusive plan than that of the uncertainties of permanent care offered by the Agency. A.J. and S.J. have met the onus placed upon them.*

[99] I find that the Minister has not met the burden of establishing that it is in the best interest of H.D.M-B. and H.M-B. to be placed in permanent care and custody.

[100] I find that the Minister's plan would require H.D.M-B. and H.M-B. being moved to a new adoptive home and the uncertainties of the ability to place both children with special needs in the same home is not in their best interest. I also find that it will take some time for an assessment to be completed as though the first assessment is completed, it did not include H.M-B. and was done on H.D.M-B. only.

[101] I find that the plan put forward by W.B. and M.A.B. is in the best interest of H.D.M-B. and H.M-B.

[102] I find that M.A.B. and W.B. have satisfied me to the requisite standards that the plan which includes family members, is not only in the best interest of H.D.M-B. and H.M-B., but also that the circumstances of the plan will adequately protect the children and is "reasonable and well-conceived" to use the terminology as was referred to in **Nova Scotia (Community Services v. AH),** supra.

[103] Counsel for the Minister made reference to **Children's Aid Society of Toronto v. NC** 2012 ONCJ 309. In my view, I considered what was said by Mr. Neal on that and despite his able arguments, I am of the view that case is distinguishable from the instant case, as in that case, the court did have the benefit of a Parental Capacity Assessment in assessing risk. At paragraph 51 the court went through a number of areas of concern that were identified in the Parental Capacity Assessment (transiency, instability, difficulties in past when grandchildren were in the grandmother's care, changes in family constellation, and a number of other issues as to the chaotic life, health issues and use of shelters by the grandmother, and the fact that the grandparent was a single parent , and other factors). In my view this case is distinguishable for that reason as there is no Parental Capacity Assessment to assist the court in its conclusion on risk and

therefore for the reasons as set out, I find that the Minister did not prove risk in this case. I relied upon the general assertions of Dr. Landry and I note as well there were other procedural differences in **Children's Aid Society of Toronto v. NC,** supra, in that the grandmother had applied for access and was denied access, and in my view there were some predeterminations that it was not in the best interest of the child to have access with the grandmother in that case.

[104] I therefore order that the Minister's application seeking permanent care is dismissed.

[105] I, pursuant to the *Maintenance and Custody Act* (s. 18(2)), grant M.A.B. and W.B. leave to seek custody of H.D.M-B. and H.M-B..

[106] Having granted leave, I order that M.A.B. and W.B. shall have sole custody of H.D.M-B. and H.M-B. and shall have sole decision making authority.

[107] J.M. and M.B. shall have parenting time solely at the discretion of M.A.B. and/or W.B.. During J.M. and M.B.'s parenting time, they shall not be given responsibilities or decision making as set out in s. 18(a) of the *Parenting and Support Act* (previously the *Maintenance and Custody Act).*

[108] J.M. and M.B. shall not be left alone in a child caring role of H.D.M-B. and H.M-B.

[109] J.M. and M.B. shall be entitled to all third party information regarding education, or medical information regarding H.D.M-B. and H.M-B. and may attend all medical appointments and/or school activities.

[110] This order is not be varied without approval of a court of competent jurisdiction.

[111] The Minister of Community Services in Nova Scotia, or such authority as designated by them, are to be provided with notice in writing of an application to vary this Order, and this Order may be registered in the Province of Ontario.

[112] M.A.B. and W.B. must notify the Minister of Community Services in Nova Scotia of any change in address.

Gregan, J.