SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Nova Scotia (Community Services) v. K.H.,* 2021 NSSC 140

Date: 2021-06-01
Docket: SFHCFSA-114956
SFHCFSA-118046
Registry: Halifax

Between:

Minister of Community Services

Applicant

v.

K.H. and K.K.

Respondents

Judge:	The Honourable Justice R. Lester Jesudason
Heard:	December 3 and 17, 2020 and January 25, 2021
Last Submission:	May 6, 2021
Oral Decision:	May 31, 2021
Written Release:	June 1, 2021
Counsel:	Elizabeth Whelton, Q.C., for the Minister of Community Services Lola Gilmer, for K.H. Raymond Kuszelewski, for K.K. Louis A. d'Entremont, for P.G. Neil D. Robertson, for T.H.

RESTRICTION ON PUBLICATION:

Pursuant to subsection 94(1) of the *Children and Family Services Act*, there is a ban on disclosing 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 a relative of the child. This decision complies with this restriction so that it can be published.

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.

By the Court:

1.0 Overview

[1] The Minister of Community Services has applied for permanent care and custody of three girls, J.K., (age 7), A.K., (age 6) and I.K. (age 1). The Minister claims that the evidence establishes that:

- The children would remain at a substantial risk of physical harm, emotional abuse, neglect and exposure to domestic violence if left in either of their parent's care as referenced in the *Children and Family Services Act*, S.N.S. 1990, c. 5, ("*CFSA*"). Allegations have also been made that J.K. was the victim of sexual assault and sexual interference by her father.

- There are no reasonable services to provide to the parents which are adequate to protect the children.

- The circumstances placing J.K. and A.K. in need of protective services have persisted beyond the maximum time limit allowed under the *CFSA*.

- The circumstances placing I.K. in need of protective services are unlikely to change within a foreseeable period of time before the maximum time limit is reached under the *CFSA*.

- There is no less intrusive option available in the children's best interests to have them placed with a relative, neighbour or community member.

- It's in the best interests of the children to be placed in the Minister's permanent care and custody.

[2] Ms. H and Mr. K are the children's biological parents. They do not seek to have the children returned to their care and do not contest that doing so would place the children at a substantial risk of harm. Instead, they seek to have the children placed with family members. Specifically, Ms. H supports the children being placed with her sister, T.H., or, in the alternative, placed with their paternal

great aunt, P.G. Mr. K also supports either of those placements although he prefers to have the children placed with P.G.

2.0 Background/History of Proceeding

[3] J.K. and A.K. were taken into the Minister's care on June 27, 2019. The child protection proceeding involving them was started on July 3, 2019. They were found to be in need of protective services on September 13, 2019. They have remained in the Minister's care and custody throughout this proceeding.

[4] I.K. was born after the proceeding involving her older sisters had started. She was taken into care on March 24, 2020. She was found to be in need of protective services on June 19, 2020, and has remained in the Minister's care and custody all her life except for briefly being in the hospital following her birth.

[5] The final disposition deadline for the proceeding involving J.K. and A.K. was December 5, 2020. The final disposition deadline for the proceeding involving I.K isn't until September 2021. However, all parties have agreed that it is in all three children's best interests that I determine their future placements now.

[6] On November 16, 2020, P.G. and T.H. filed separate applications under the *Parenting and Support Act,* SNS 2015, c.44 (*PSA*), seeking to have the children placed with them. P.G. lives in Shelburne County, Nova Scotia. T.H. lives with her common law spouse and children in British Columbia.

[7] The scheduling of the final disposition hearing in this matter warrants some discussion as it has resulted in delay in having the children's futures determined. I don't intend to recount all of the details. For the purposes of any record, I rely on the discussions and exchanges between the Court and counsel which occurred from September 15, 2020, forward. I summarize some of these as follows:

[8] At an appearance on September 15, 2020:

1. The Court confirmed that the outside date for final disposition for the two older girls was December 5, 2020.

2. The outside date for final disposition for I.K. was confirmed to be in September 2021. The Minister requested a first disposition order for I.K. as opposed to a final disposition order.

3. None of the parties, including the Minister, requested that a final disposition hearing for the older girls be held by December 5, 2020. Instead, all requested a settlement conference and agreed to one being scheduled on November 4, 2020, with a return date to the Court of November 10, 2020, if it wasn't successful.

4. In recognition of the outside final disposition timeline for the older girls, the Court nevertheless offered to schedule hearing dates by December 5th. Again, however, all counsel confirmed that no hearing dates need be booked before the parties returned on November 10th.

5. When the Court inquired of counsel as to whether any planning had been done for a hearing, all confirmed that they had not yet had any substantive discussions in relation to the preliminary issues necessary to plan a hearing. Specifically, counsel advised that they had no discussions with respect to witnesses, the amount of trial time required, any accommodations for witnesses, or any of the planning issues for a hearing particularly in light of the pandemic. The Court therefore directed counsel to have those discussions so that all parties, and the Court, could appropriately plan for any hearing which was needed. Each counsel was directed to file a pre-conference summary providing this information before the November 10th appearance.

[9] After the September 15, 2020, appearance:

1. The parties and T.H. participated in a settlement conference before another judge on November 4th. Unfortunately, no agreement was reached.

2. None of the parties requested any hearing dates before coming back to Court on November 10th.

3. In advance of the November 10th appearance, none of the parties provided the information which was directed to be provided in a pre-conference summary. The Court was advised for the first time on November 10th that

the Minister was now seeking that a final disposition hearing be held in relation to all three children by December 5, 2020, even though the outside timeline for final disposition for I.K. wasn't until September 2021.

No exhibit books or briefs had been filed for a hearing and counsel still had not discussed the parameters of the hearing such as who needed to be called as witnesses, time required, etc. While the Minister had been aware that P.G. and T.H. wished to have the children placed in their care, neither of those family members had formally filed a *PSA* application although T.H. participated in the settlement conference.

Thus, after a lengthy discussion, it was agreed that if either P.G. or T.H. were still seeking to have the children placed with them, they would file a *PSA* application as soon as possible.

4. On November 10th, the Court agreed to find time to bring the matter back for further discussions. Based on counsel's availability, an appearance was booked on November 19th during the lunch break. All counsel were directed to file pre-conference summaries with their respective suggestions on how to proceed. They were also directed to advise of any days when they would be unavailable to conduct a hearing before December 5, 2020.

5. On November 16, 2020, P.G. and T.H. both filed separate applications under the *PSA* seeking leave to apply for custody of all three children and to have the children placed with them.

6. Counsel subsequently advised of the dates when they were not available to conduct a hearing before December 5th. Based on their responses, there were no full days before December 5th when all counsel were available.

7. When the parties appeared on November 19th, there was no agreement as to how to proceed. The Minister took the position that P.G. and T.H. were required to make a formal standing application to be added as a party in the *CFSA* proceedings in order for the Court to consider them as placement options and that the only plan properly before the Court was the Minister's plan for permanent care and custody of all three children. The other parties

disagreed. There was also no agreement on the amount of hearing time required to determine the contested issues.

8. The Court pointed out that because all of the parties, including the Minister, did not accept the Court's invitation to set hearing dates back in September, the Court was now placed in the difficult situation of trying to sort out, on very short notice, all the issues being raised by the parties before the December 5th timeline was up in relation to the older girls. This was made particularly difficult given that the Court continued to operate in a pandemic which required significant planning for any in-person hearings to ensure they are run efficiently, fairly and with the safety of all participants and Court staff in mind.

9. Based on counsel's unavailability, it became clear that it wasn't possible to conduct a fulsome hearing before the December 5th date even if the Court's schedule could be cleared. I asked counsel to advise in writing whether they would be willing to do a hearing between Christmas and New Year's and to also advise of any dates when they weren't available to do a hearing in January or February.

10. The Court indicated that, given these circumstances, the final hearing would be started on or before December 5th and that further hearing time would need to be set to deal with any contested issues including the preliminary issue of whether P.G. and T.H. required standing in the child protection proceeding for their plans to be considered and the final determination of where the children should be placed. A further appearance was therefore booked on December 3, 2020.

11. When the parties appeared on December 3rd, the Minister maintained that the Court couldn't consider P.G. or T.H. as placement options for the children absent a formal standing application being made by them to be made a party in the *CFSA* proceedings. The other parties disagreed. The Minister suggested that a standing hearing would be required. The final disposition hearing was therefore formally started to comply with the maximum statutory timeline for J.K. and A.K. and the parties agreed to make written arguments on the preliminary issues including standing. A

return date was booked for December 17, 2020. Deadlines were given for those written submissions.

12. Not all parties filed their written submissions in accordance with the deadline given for the December 17th appearance. However, when the parties appeared on December 17th, it was agreed:

    - The Court would be given time to review the parties' written submissions and render a decision on the preliminary issues;

    - All parties waived the right to cross-examine every other party and witness and that all the evidence filed could be considered by the Court for both the preliminary issues as well as the final disposition hearing in relation to all three children.

13. On January 25, 2021, all parties appeared to answer questions on their written submissions. I then rendered an oral decision that day on all the preliminary issues. I dismissed the Minister's objection that the Court couldn't consider the plans of P.G. and T.H. when determining the Minister's application for permanent care and custody of the children. I also granted leave under the *PSA* to P.G. and T.H. to apply for custody of the children and indicated that I would consider their alternate plans when considering the Minister's plan for permanent care and custody. I rely on my reasons given that day which I will not repeat but should form part of the record.

14. On January 25, 2021, I also raised the issue about what would happen if I decided to order that the children be placed with P.G. or T.H. under a *PSA* order given that P.G. resided in Shelburne County and T.H. resided in British Columbia. I queried whether the parties had turned their minds to the practical issues associated with coordinating the delivery of the children during the pandemic in the event I decided to placed them with either of those family members. It appeared this issue hadn't been fully considered and all counsel advised they would discuss it with their clients and each other and provide the Court with an update as to whether there was agreement on what would be done.

15. No further update was provided to the Court for several weeks. On April 28, 2021, my Judicial Assistant sent an email to counsel seeking an update. This, in turn, prompted a series of responses from counsel and a reply from me. I will not reference all of that exchange but will highlight some of it. When doing so, I will not be using the name of my Judicial Assistant or counsel but will refer to them by their respective positions.

16. Both counsel for T.H. and Ms. K responded on April 28th. In a letter dated April 28, 2021, counsel for the Minister stated, amongst other things:

> I do recall that in January, 2021, the Honourable Justice Jesudason spoke of possible outcomes if His Lordship made a decision which placed these children in the care of individuals who reside outside of the Halifax Regional Municipality and in particular in the care of parties who reside in British Columbia. Counsel were to discuss that possibility.
>
> I have not provided anything further to the Court.
>
> The parties agreed that this matter could be determined on the basis of the evidence before the Court and with a waiver of cross examination. The parties had closed their respective cases and the Court reserved its decision.
>
> It is respectfully submitted that providing further information would be tantamount to provide the Court with fresh evidence…[Emphasis added].
>
> …
>
> I am in receipt of [counsel for T.H.'s] correspondence and [counsel for Ms. H's] email. I object to the correspondence and email being before the Court, as I believe it is tantamount to 'fresh evidence" and should not be before the Court without leave. In the event that this Honourable Court exercising [sic] its discretion and allows this fresh evidence to be part of the Court's deliberations, the Minister would seek leave to provide the Court with a sworn affidavit updating the Court in regard to the children.

17. On April 30, 2021, I wrote a letter to counsel which stated, amongst other things:

> I thank counsel for the recent responses to [my Judicial Assistant's] email sent on April 28th…

At this time, I don't intend to wade into all the issues raised in [counsel for the Minister's] letter. This should not be taken as any indication that I necessarily accept the positions of the Minister as outlined in that letter. Furthermore, while I have not had chance to go back and listen to the Recording from January 25, 2021, I do have a recollection that some or all counsel indicated that they hadn't turned their minds to the issue I raised and advised that they may need to seek instructions from their clients. All then indicated they would discuss the issue with their clients, confer amongst each other, and then provide some update to the court even if that update was to simply advise whether they had reached some agreement on what to do in the scenario I posed even if the court wasn't provided with the specific details. Hence, [my Judicial Assistant's] follow up was sent when no update was received. Again, however, I'm going by my memory and stand to be corrected and defer to what was stated on January 25th.

In any event, as you know, we spend a significant amount of time dealing with the preliminary objection raised by the Minister as to whether I could properly consider the PSA applications of [P.G.] and [T.H.]. This required multiple court appearances, discussions, written and oral submissions and an oral decision from me. With respect, I don't want to now see these young children's fates delayed even further by having to deal with more preliminary issues. Thus, I am not inviting, as [counsel for the Minister] suggests, any party to provide "new evidence" including a possible further affidavit from the Minister. Rather, I was simply looking for the update I understood (perhaps incorrectly) would be forthcoming [Emphasis added].

At this juncture, unless any of you feel otherwise, I don't require any further response to [counsel for the Minister's] letter or feel any need to review the attachments sent by [counsel for T.H.]. Rather, to avoid delaying matters for these children by dealing with more preliminary issues, I suggest we proceed as follows:

1. I will aim to render my decision on May 31st. I'm not sure if it will be an oral decision or a written one. It may be both.

2. Subject to following all the necessary health protocols, all clients and their counsel should be present in Nova Scotia to receive my decision. Given the current restrictions in allowing in person gatherings at our Court, any oral decision will be delivered over the phone…[Emphasis in original].

3. The anticipated delivery date for my decision of May 31st should give all parties adequate time to make whatever arrangements are necessary so that all can be present in Nova Scotia. I am currently booked with two half-day matters on May 31st but, if this date will work for all, I will seek to reschedule

> at least one of those other matters so that I have adequate time to deliver an oral decision if I decide to do that as opposed to just giving a written decision…
>
> Please advise immediately (and no later than the end of Monday, if possible) if this is agreeable since, as I indicated, I will have to do some rescheduling to make this work.
>
> I thank all counsel and the parties in advance for their anticipated cooperation.

18. All counsel subsequently confirmed their agreement to proceed on this basis. I therefore booked the afternoon of May 31st to give my decision based on counsel's availability.

3.0 The Law

[10] The purposes of the *CFSA* are to protect children from harm, to promote the family's integrity and to assure children's best interests: subsection 2(1).

[11] In *CFSA* and *PSA* proceedings, the children's best interests are paramount. Both *Acts* provide circumstances or factors to consider in relation to best interests. For example, under s. 3(2) of the *CFSA*, when considering the "best interests of a child", I am directed to consider the listed "circumstances that are relevant" which I broadly group into five general areas: the child's existing relationships; the child's present needs; the child's preferences if they are reasonably ascertainable; future risk; and other relevant circumstances.

[12] This is an application for a final disposition order. With respect to the older girls, the maximum statutory time limit has already been exceeded. In the case of the youngest girl, her placement is being determined several months before the maximum statutory time limit is reached. I have extended the maximum time limit for J.K. and A.K. in their best interests to allow me to hold a hearing in relation to the preliminary issues raised by the Minister and to make a final decision on the long-term placements for all three children.

[13] Given that the parents are not seeking to have the children returned to their care, the options available to me now are:

(a) Place the children in the Minister's permanent care and custody;
(b) Place the children in the care and custody of P.G.; or
(c) Place the children in the care and custody of T.H.

4.0 Burden of Proof for Permanent Care and Custody

[14] For the children to be placed in the Minister's permanent care and custody, the Minister bears the burden of establishing on a balance of probabilities that the children continue to be in need of protective services and that a permanent care order is in their best interests: *Catholic Children's Aid Society of Metropolitan Toronto v. MC,* [1994] 2 S.C.R. 165 at paras. 37-38.

[15] None of the parties dispute the Minister's assertion that the children would continue to be in need of protective services if returned to the care of their parents. I agree. I will therefore consider the plans of P.G., T.H. and the Minister's plan for permanent care to determine what placement is in the children's best interests.

5.0 P.G.'s Plan

[16] P.G. is the children's paternal great aunt. In her affidavit sworn on November 13, 2020, she states:

- After J.K. and A.K. were taken into the Minister's care, she moved in with the parents around October 2019;
- From October 2019 to November 2019, she would be present with the parents when they visited the children at the Agency's Office;
- From November 2019, she acted as an approved supervisor by the Minister during the children's visits at the parents' residence;
- During the 2019 Christmas Holidays, she would pick up the children from their foster home and bring them to the parents' home.
- She continued to supervise the parents' visits with the older children in their home until the end of January 2020.

- At one time, she put forward herself as a placement option for J.K. and A.K. and filed an affidavit dated August 27, 2019. A placement hearing was contemplated but did not go forward because she moved in with the parents.

- About three weeks before filing her current *PSA* application, she moved out of the parents' home into her own residence which she rents in Shelburne County. That residence is a complete house with three bedrooms, one bathroom and all the conveniences of modern living.

[17] Having carefully considered P.G's plan, I conclude that placing the children with her isn't in their best interests. I come to this conclusion largely for the following reasons:

- Prior to the proceeding involving J.K. and A.K, commencing on June 27, 2019, P.G., it appears she had little direct involvement with the children. It appears she visited them on three occasions, the first of which occurred after the family moved to Nova Scotia in February or March 2019.

- P.G. lived with the parents in their home during the time Mr. K is alleged to have sexually assaulted J.K. P.G. says she is "mindful of the alleged incident of sexual assault and that the parties including the parents are in need of counselling". She then goes on to say that, "I am willing to care for the children and willing to keep them together <u>until the parents are able to care for them on their own</u>" [emphasis added].

  Thus, P.G.'s plan suggests that she would care for and keep the children until they could possibly be returned to the care of their parents in the future. Returning the children to their parents' care could again potentially place them at a substantial risk of harm which would not be in their best interests.

- In my view, P.G.'s plan lacks the details to provide me with comfort that it is a long-term and stable placement for the children. These children deserve permanent and stable placements. With respect, P.G.'s plan doesn't persuade me that she can provide a stable and long-term placement for the children.

6.0 T.H.'s Plan

[18] T.H. is the children's maternal aunt. In her affidavit sworn on November 16, 2020, she states:

- She resides in British Columbia with her common law spouse, three sons, aged 12, 7 and 6 and their nephew, S, who is 12. S is Ms. H's biological son and is the half-brother of J.K., A.K. and I.K.

- Her family has always been actively involved in the lives of the two older girls;

- Before moving to British Columbia in April 2019, she and her family lived in Saskatchewan as did Ms. H, Mr. K, S, J.K. and A.K.;

- In 2018, Saskatchewan Child Protection Services became involved with the parents and S came to live with her family;

- In October 2018, she was granted temporary care of J.K. and A.K. while Saskatchewan Child Protection Services investigated Ms. H and Mr. K in relation to concerns about the cleanliness of their family home;

- S was added to the temporary care and custody order so that all three children resided with her family until Ms. H and Mr. K addressed the Agency's concerns and the children were returned to their care.

- Ms. H and Mr. K moved to Nova Scotia with S, J.K. and A.K. in January 2019 and her family moved to British Columbia shortly thereafter. She and her family video chatted with the children daily;

- In February 2019, S requested to come live with her family in British Columbia. Her family paid both S's and Ms. H's airfare to travel to British Columbia and S has been living with her family ever since.

- Her family later made an uncontested application for custody of S in early 2020.

- She was aware of the current child protection proceedings and learned through Ms. H in April 2020 that Mr. K was being investigated by the Agency for sexually abusing J.K. She found this revelation extremely upsetting and was determined to help and protect the children.

- She and her spouse decided that they did not wish to see the children end up in "foster care" permanently and decided that they would make efforts to seek custody of all three children after first assessing that they had the ability to do so. They purchased a bunk bed for the older girls and a crib for the youngest girl.

- In June of 2020, she was contacted by British Columbia Child Protection Services and spoke to an employee, Mr. Kruger, who advised that he would be assessing her family and home to see if it would be a suitable place for the children to live.

- On July 8, 2020, Mr. Kruger attended their home and advised her that Child Protection Services had concerns regarding an incident that she had previously voluntarily disclosed which occurred in 2019 between her and her then seventeen-year-old step-daughter.

- Prior to meeting with Mr. Kruger, she had fully and voluntarily disclosed to Nicole Slaunwhite, an employee with Nova Scotia Child Protection Services, and another employee with British Columbia Child Protection Services, the details of the incident which included:

    - She helped raise her spouse's daughter. The daughter frequently became easily emotionally dysregulated and was generally very rebellious as a teen.

    - The teenager had always had a short temper and would often curse and swear at her with minimal provocation.

    - On this particular occasion in 2019, when the daughter was seventeen years old, the daughter became intensely angry with her when she told the daughter to use a lead when walking her dog.

- The seventeen-year-old swore at her and spat directly in her face.

- She reacted reflexively to being spat on and responded by slapping the seventeen-year-old once on her face with the flat of her hand. She immediately regretted doing this and continues to regret it to this day.

- She knew she was in the wrong in that instance. She had never reacted in that way before or since with a young person in her care.

- The step-daughter and she have since rekindled their relationship, and the incident remains an uncharacteristic and highly regrettable one-time occurrence.

- On July 23, 2020, she received a telephone call from Child Services and was advised that the Agency would not support placing the children in her care and custody.

- She understands that the Agency's decision was principally based upon the slapping incident and the fact that there were already four young boys in her household.

- This was devasting news to her family and she was saddened that the Agency would seemingly base their decision on a single, uncharacteristic episode that she had voluntarily disclosed to them.

[19] In that same affidavit, T.H. outlines her plan of how she and her spouse would look after the children if placed in their care. She states, amongst other things:

- Rather than facing the uncertainty of "foster care", the children would be in a place of safety with a loving, stable family that has known and loved them since they were born.

- If the children were placed in her care, they would be kept together in a single household, and would be able to live with their older brother, S.

- Their family home, which they moved into on October 1, 2020, is already uniquely equipped to accommodate a large number of children.

- Their home has six freshly renovated bedrooms, three bathrooms, two living rooms, two kitchens, two laundry rooms, a double car garage, and a large, fenced yard for the children to play in and enjoy.

- The three girls would have their own bedroom, separate from the boys.

- All smoke detectors and fire alarms in the home are well maintained and fully operational. The home has two fire extinguishers and one escape ladder.

- They have housing inspections every two months to make sure their home is safe, clean, and in great living condition.

- While someone unfamiliar with her family may assume that adding three young girls to four young boys would be too many children for a single household, she and her spouse are experienced parents and caregivers who have raised children of all ages. They are more than capable of raising the girls with the supports they have in place.

- J.K. and A.K. had already previously been in their care and custody on a temporary basis pursuant to a Court order when they lived in Saskatchewan. They experienced no issues caring for six children at that time.

- She and her spouse are self-employed as flooring installers. Their work schedule is dependent on whether or not they have been contracted to complete a project. When they are working, it is typically from 8:30 a.m. to 4:00 p.m.

- Their combined gross income through self-employment was approximately $110,000 based upon their 2019 Income Tax Returns. They additionally receive $1,290 per month in tax-free Canada Child Benefits (CCB) and $1,290.00 per month through income assistance which they were required to apply for due to the downturn in business they experienced as a result of the Covid-19 pandemic.

- When they are working, childcare is provided in their home by a Certified Community Support Worker/in-home child care provider who attends their household a minimum of three times per week.

- During summer vacation, she is a stay-at-home parent and is available to assist the Certified Community Support Worker with childcare.

- If the children were placed in her care and custody, she intends for the Certified Community Support Worker to continue assisting her with in-home childcare on weekday mornings and after school care for the older children.

- She and the worker would care for I.K. throughout the day while the other children attend school.

- She has looked into schooling arrangements and plans for J.K. and A.K. to attend an elementary school which has 240 students from kindergarten through to fifth grade.

- She has already discussed enrolling the older girls at the school with the principal. Based on her conversation with the principal, she believes the girls could be enrolled at the school without any difficulty.

- She is aware of the child protection concerns with respect to Ms. H and Mr. K and, if the children were placed in her care, she would strictly respect and enforce any term of an order that prohibits Ms. H and Mr. K from having any contact with or associating in any way with the children.

[20] The Minister opposes T.H.'s plan and asserts that it's in the best interests of the children that they be placed in the Minister's permanent care and custody.

[21] The Minister relies on evidence including the affidavit of the primary social worker, Nicole Slaunwhite, sworn on September 11, 2020. In that affidavit, Ms. Slaunwhite says, amongst other things:

- The Agency contacted the child protection authorities in British Columbia and requested that an assessment be done in regard to T.H. and her common

law husband. The Agency understood that a full adoption assessment would take up to a year to complete so requested that a "lesser assessment", a Kinship Assessment, be completed.

- The Kinship Assessment was started and Mr. Kruger was the person asked to do it.

- Mr. Kruger met with T.H. and her common law husband on June 16, 2020. He described them as being "eager and willing to get the assessment underway".

- Mr. Kruger noted a number of concerns based on his initial work. They include, but are not limited to:

    - The slapping incident involving the teenager which Mr. Kruger said was not disclosed to him.

    - Two of T.H.'s children presented behavioural challenges with one of the children being assessed for autism.

    - The home had three medium-sized dogs in it;

    - He expressed concerns to T.H. about the level of responsibility required of having 7 children in the home including two of her own children who have special needs including ADHD.

    - He understood that T.H. and her common law husband had a combined income of $40,000 which he did not feel could support some of the possessions owned by the couple such as the home, a boat, motorhome and three motorcycles.

    - He had concerns about the front and back of the home being "unkempt". For example, he noted that the fenced backyard had an old spring trampoline without a net and a newer above ground pool (about 4 feet deep) with a ladder but no secure cover.

[22] Ms. Slaunwhite goes on to state in paragraphs 25-26 of her Affidavit:

- Mr. Kruger advised that, given the concerns raised in his initial meetings, the position of his office was that they would not assess the placement of the children in a cursory way but would require a full adoption assessment. He advised that if there was previous child protection involvement a supervisor would be required to approve an ongoing assessment be continued. A full adoption assessment could take a year to be completed.

- Ms. Slaunwhite noted that, in light of the red flags and concerns noted, her office would not seek any further assessment of the home.

[23] Similarly, in the Affidavit of Geoffrey Hood (Ms. Slaunwhite's supervisor) sworn on November 19, 2020, he again references the "red flag" concerns outlined in Ms. Slaunwhite's Affidavit and says that the Minister has determined that a placement with T.H. would not be supported.

[24] Finally, in the Minister's brief of November 24, 2020, the Minister says that red flags raised during the course of the assessment done in the summer of 2020 led to a determination that the Agency would not support the children being placed with T.H.

[25] I have carefully considered the reasons why the Minister doesn't support the children being placed with T.H. and her spouse. I have done so in the context where all parties, including the Minister, were content for me to simply receive hundreds of pages of evidence without cross-examination or the parties making any fulsome submissions on credibility or what weight I should place on any of that evidence. I have therefore considered the evidence on that basis and, as part of my overall gatekeeping role, have appropriately discounted any evidence which I believe should be inadmissible or of limited weight.

[26] Having done so, I don't agree with the Minister that placing the children with T.H. and her spouse shouldn't be supported largely because the Minister believes "red flags" have been raised based on Mr. Kruger's preliminary assessment during his initial meetings with T.H. I come to this conclusion for the following reasons:

- Beyond expressing Mr. Kruger's concerns over possible "red flags", the Agency has, at no time, suggested that the children would be placed at any substantial risk of harm if placed with T.H. and her family. In my view, the evidence doesn't establish on the balance of probabilities that the children would be at any significant risk of harm, let alone a substantial risk of harm, if now placed with T.H. and her family.

- By waiving cross-examination of T.H. on her affidavit, the Minister hasn't directly challenged much of T.H.'s evidence. Furthermore, no affidavit evidence was filed by Mr. Kruger challenging any of T.H.'s evidence. While Mr. Kruger raised the initial red flags, he didn't say that the children wouldn't be safe if placed with T.H.'s family. Rather, according to Ms. Slaunwhite, Mr. Kruger advised her that a supervisor would be required to approve an ongoing assessment which would take time to do. The Agency then determined that it would not seek any further assessment of the home.

- While I respect the Agency's decision not to seek further assessment of T.H.'s home based on the initial red flags and concerns noted (para. 26 of Ms. Slaunwhite's affidavit sworn on September 11, 2020), my role isn't to make decisions for these children simply based on "red flags". Rather, my role is to make decisions which consider the children's best interests as determined by what the evidence shows, and the law requires.

  Here, I'm satisfied that T.H. has shown a clear willingness to provide a safe and nurturing environment for the children should they be placed in her care. Indeed, she has shown to be responsive to concerns raised by Mr. Kruger. For example, in paragraphs 39-40 of her affidavit, she says that after Mr. Kruger noted that the trampoline had no safety net, she disposed of it the day after his visit. Similarly, after concerns were expressed by Mr. Kruger about the above-ground pool, the family disposed of it in a further effort to create a safe environment for young children.

- While I can certainly understand why the Agency would have concerns over the slapping incident involving T.H.'s 17-year-old step daughter, it appears to be an isolated incident where the context included a responsive reaction to the 17-year-old spitting directly in T.H.'s face. While I don't diminish T.H.'s physical response (which she acknowledges as being wrong), this

isolated incident occurred in 2019. T.H.'s uncontradicted evidence is that she has never before or after had any physical incident with any children in her care and that she and her now likely adult step-daughter have rekindled their relationship after this uncharacteristic and highly regrettable one-time occurrence. There is no evidence that there is any ongoing child protection involvement or that any child protection agency has placed any restrictions on T.H.'s ability to parent her children in the home.

- I don't accept that adding the three girls to T.H.'s family is by itself a red flag which rises to the level where it would cause any significant risk from a child protection perspective. Having large families doesn't equate to children being placed at a risk of harm. Judges shouldn't arbitrarily sanction any stereotypes based on family size or conclude parents or adult caregivers cannot appropriately care for children simply by engaging in a mathematical counting exercise based on the number of children in a home. Each case must be examined on its unique facts. Here, the Minister has failed to persuade me that T.H. and her spouse couldn't adequately and appropriately manage the addition of the three girls to their home. To the contrary, T.H. has presented a viable plan which includes the assistance of a Community Support Worker to assist with childcare of the girls if they were placed in the home.

- I am not prepared to speculate, as Mr. Kruger apparently did, how T.H. and her family are able to afford their home and the other items in their possession based on what he concluded was a combined income of $40,000. Not only do I think this is unwarranted speculation but, as noted, earlier, T.H. says that her family income in 2019 was approximately $110,000 through self-employment plus they also receive the Canada Child Benefit and income assistance. I also note that in the Case Recording Notes dated July 9, 2020, Ms. Slaunwhite notes having a conversation with Mr. Kruger where he acknowledged that T.H. did clarify that the family income was $110,000, not $40,000 [Exhibit 2, Page 194].

- Mr. Kruger apparently didn't expressly state or conclude that the girls shouldn't be placed with T.H. Again, as noted in Ms. Slaunwhite's Recording of July 9, 2020, what Mr. Kruger indicated was that there were many "red flags" and advised that a full Safe Study for adoption would be

> more rigorous and would be more appropriate for the family [Exhibit 2, Page 194]. Ms. Slaunwhite notes that she decided this would be discussed with her supervisor, Mr. Hood. While the Agency apparently subsequently decided not to proceed with any further assessment, this is a far cry from any well-founded conclusion based on the evidence that the children shouldn't be placed with T.H. and her family if it's indeed in their best interests to do so.

7.0 What placement is in the children's best interests?

[27] Simply because I have not dismissed T.H.'s plan based on the "red flags" which were identified, this doesn't mean that the children should be placed with T.H. under a *PSA* order. The paramount consideration for me to consider under both the *CFSA* and the *PSA* is the children's best interests.

[28] Section 42(3) of the *CFSA* states:

> 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, neighbour 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…

[29] Since I have determined that J.K., A.K. and I.K. should be removed from their parents' care, and that P.G. hasn't presented a viable plan of care for them, I must now determine whether it's in the children's best interests to be placed in the Minister's permanent care and custody or be placed with T.H. and her family. I have to consider the so-called relevant "best interests" circumstances or factors as enumerated under the *Acts* (e.g. s. 3(2) of the *CFSA* and s. 18(6) of the *PSA*). I have done so and will not go through each of those circumstances or factors individually.

[30] Having carefully considered all the evidence and the law, I conclude that it's in the children's best interests that they should be placed with T.H. and her family. I come to this conclusion largely for the following reasons:

- As noted in paragraph 35 of Ms. Slaunwhite's affidavit of September 11, 2020, the Agency's plan is that the three children be eventually placed in

adoptive homes with the hope that they all can be adopted together. If that isn't possible, the plan is for J.K. and A.K. be placed together and that I.K. be placed in a separate adoptive home and that the sibling relationship between the three be maintained.

- Plainly, the Minister acknowledges that the Agency's plan for these children involves some uncertainty and unknowns. While the Agency's hope is to secure one stable and secure long-term placement for all children, as Ms. Slaunwhite has candidly stated, this may not be possible and that the children may have to be placed in separate homes.

  On the other hand, T.H.'s plan involves placing all the children together in the same home where they can all grow up together with their older half-brother, S, and other family. They would be placed with biological family who clearly love them. T.H. has satisfied me that she and her spouse can provide these children with a loving and stable home. Their home appears to not just have all the basic amenities, but seems to have additional comforts or luxuries such as a boat and motorhome. With respect, the Minister has not persuaded me that the red flags identified would create any significant risk to the children. Furthermore, even if I shared those concerns, I find they are outweighed by the known tangible benefits that would be realized by placing the children with T.H. and her family.

- When I consider the needs of the children and the capacity of T.H. and her common law husband to meet them, I'm satisfied that the evidence supports that T.H. and her spouse have a viable plan that will help ensure that the children's needs are met in a positive way. T.H. has presented a well-thought out plan which includes details for childcare, schooling and taking necessary steps to ensure that they will be provided with a stable home life. I note that T.H. says that she and her spouse looked after the older girls in the past without any issues despite there being six children in the home.

- The Preamble to the *CFSA* recognizes, amongst other things that children and their families have a right to the least invasion of privacy and interference with freedom that is compatible with their own interests and of society's interest in protecting children from abuse and neglect. It also recognizes and that preservation of children's cultural, racial and linguistic

heritage promotes their healthy development. Through s. 42(3), the *CFSA* recognizes the desirability of keeping children placed with family or other individuals who have a meaningful relationship with them and that such placement shall be considered before placing a child in permanent care and custody. Here, T.H. has presented me with a viable plan in the children's best interests where the children can be immediately placed with family who love and care for them.

- There is a well-known expression that "justice delayed is justice denied". I believe this to be particularly true when it comes to determining the fates and futures of children. Sadly, these children have lived in uncertainty for far too long in their young lives. For J.K. and A.K. it will be two years in June that they have been in the care and custody of the Minister. In I.K.'s case, she has been in the Minister's care since leaving the hospital shortly after her birth.

  Considering all the circumstances, I believe that it is desirable that these children receive stability and certainty now. In my view, T.H. has presented me with the best option for their futures consistent with their best interests. She has satisfied me on the balance of probabilities that her plan is the best option available to me which will help ensure that the children will have stable and secure futures where their needs can be met in a positive way. This option allows all three children to be placed together with family including their older half brother and first cousins. When I weigh all the evidence, and consider the law, I find it to be more in accordance with the children's best interests than the Minister's plan for permanent care and custody.

[31] Finally, in light of the child protection concerns which have been identified and the unresolved allegations of sexual abuse and sexual interference by Mr. K towards J.K., I accept that any contact by Ms. H or Mr. K with the children at this time would not be in the children's best interests. Thus, as agreed to by T.H., I order that she will not permit any contact between the children and Ms. H or Mr. K. I also order that if, in the future, any party seeks to vary the terms of this order, notice must be provided to the Minister who I assume can, should the Minister wish, notify any other relevant child protection authority.

Conclusion:

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

[33] I dismiss P.G's application under the *PSA* to have the children placed in her care.

[34] I grant an order under the *PSA* which places the children with T.H. I find doing so to be in the children's best interests. It will allow them to grow up together in the same home with their older sibling, young cousins and family who love them. After a long period of turmoil and uncertainty, I conclude this placement is the most appropriate one which will help ensure they have the stable and bright futures that these young children very much deserve.

[35] T.H. will have sole decision-making authority for the children and that there will be no contact between Ms. H and Mr. K with the children. Furthermore, should any party seek to vary this Order in the future, notice must be given to the Minister.

[36] I would ask counsel for the Minister to prepare the appropriate form of *CFSA* dismissal order and counsel for T.H. to prepare the appropriate form of *PSA* order which reflects my decision. Both orders should be provided to me by the end of this week, if possible. I also reserve the jurisdiction to deal with any implementational issues arising from my decision.

Jesudason, J.