

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Nova Scotia (Community Services) v. NL, WM*, 2022 NSSC 45

Date: 20220210

Docket: No. 123165

Registry: Sydney, NS

Between:

Minister of Community Services

Applicant

v.

NL, WM

Respondent

Judge: The Honourable Justice Pamela A. Marche

Heard: December 15, 2021 and January 6, 2022 in Sydney, Nova Scotia

Written Release: February 9, 2022

Counsel: Tara MacSween for the Applicant
Alan Stanwick for the Respondent NL
WM self represented

By the Court:

Overview

[1] This is a decision about whether Ab is in need of protective services. Ab was born September *, 2010 and is 11 years old. WM is Ab's father and NL is Ab's mother. Ab's parents have a long history with child protection due to issues of substance abuse and violence.

Background and Procedural Facts

[2] The Minister is seeking a protection finding under s. 22(2)(b) (risk of physical harm). Throughout the course of this proceeding NL was represented by counsel and WM represented himself.

[3] A Notice of Child Protection Application was filed on August 31, 2021. The 5-day Interim Order was granted September 1, 2021. On September 14, 2021, WM indicated he did not agree there were reasonable and probable grounds that Ab was in need of protective services. The interim hearing was scheduled for October 7, 2021. Shortly thereafter, the presiding judge declared a conflict of interest and the file was reassigned.

[4] Upon consultation with the parties, this Court rescheduled the contested interim hearing to October 6, 2021. On October 6, 2021, WM indicated his consent to the interim finding but not to a protection finding. Dates for the contested protection hearing were scheduled for mid November 2021 and the Court directed the matter would proceed by way of cross-examination of affidavit evidence.

[5] In the week prior to the scheduled protection hearing, counsel for the Minister requested an adjournment for medical reasons. The Respondents objected. The protection hearing was adjourned to December 15 and 16, 2021 to allow counsel for the Minister, who had significant experience with the substantial history of the file, to continue as counsel.

[6] A *voir dire* was held on December 15, 2021 to determine admissibility of out of court statements made by Ab. The Court gave an oral decision on December 15, 2021 that permitted comments made by Ab during an interview with child protection workers Shepherd and Lovett on August 9, 2021 to be entered as evidence.

[7] On December 16, 2021 the Minister sought to have two witnesses give *viva voce* evidence. Both WM and NL objected to the Minister proceeding in this

manner given the clear direction of the Court that affidavits were to be filed in advance of the hearing on dates set by the Court.

[8] There can be practical difficulties associated with obtaining affidavits from witnesses testifying in their professional capacity and *viva voce* evidence may be the more practical approach in those circumstances. In this case, however, the witnesses were Ab's sisters, MD and MKM. The Minister had previously signalled an intention to rely on these witnesses and had ample opportunity to prepare affidavits but did not do so.

[9] Given the circumstances, WM was presented with the option of continuing on the basis of *viva voce* evidence from MD and MKM or adjourning so the Minister could file affidavit evidence. WM reluctantly elected to have the proceeding adjourned and the hearing was scheduled to continue on December 23, 2021.

[10] By December 23, 2021, the Court had adopted an essential services model due to the rampant spread of the Omicron variant of the COVID-19 virus. Neither WM, nor counsel for NL, were prepared to proceed virtually on December 23, 2021. The Court, in consultation and with the agreement of the parties, adopted a hybrid model for the hearing that was continued on January 6, 2022. WM

participated in person. To ensure access to the equipment necessary to facilitate participation, as well as compliance with safety guidelines, NL and her counsel participated virtually from an adjacent courtroom. Witnesses testified via videoconference from a separate location within the Sydney Justice Centre. The Minister participated via videoconference from a separate office building.

[11] The Minister relied on the evidence of child protection worker Alyssa Shepherd (formerly Ferguson) as well as MD and MKM, the daughters of NL and WM respectively. WM was the deponent in two affidavits dated September 23, 2021 and November 10, 2021. WM also relied upon affidavit evidence of his neighbour, MP.

[12] NL did not offer evidence and did not cross-examine child protection worker Shepherd, apart from cross-examination during the *voir dire*.

Issue

[13] Is Ab in need of protective services?

Position of the Parties

Position of the Minister

[14] The Minister's position is Ab is at substantial risk of harm due to ongoing substance abuse and violence issues pertaining to WM and NL. The Minister contends WM was not able to properly care for Ab. The Minister asks the Court to infer WM's incapacitation resulted from the misuse of prescription drugs. The Minister argues that even if the Court does not find WM was abusing drugs, WM placed Ab at risk of harm by failing to properly attend to his medical needs. The Minister further claims WM's resumed cohabitation with NL presents a substantial risk of harm for Ab, given NL's serious substance abuse issues.

[15] In affidavit evidence filed to support the initial intervention, the Minister alluded heavily to substance abuse by WM largely due to WM's presentation. In final submissions, however, the Minister conceded an inability to prove, on a balance of probabilities, that WM's concerning appearance and affectation were the result of misusing drugs given WM's illness at the time. Instead, the Minister asked the Court to infer that WM was misusing drugs based on the evidence of Ab, MKM and NL.

[16] The Minister further argues that even if WM was not abusing drugs, WM placed Ab at risk of harm by failing to adequately address his medical needs and allowing his health to deteriorate to the point where he was unable to properly care for Ab.

[17] The Minister rejects the proposition advanced by WM that he had made appropriate arrangements with his neighbours to care for Ab, arguing the neighbours did not assume care for Ab during WM's incapacitation and have not advanced a plan of care for Ab with the Minister.

[18] The Minister argues that Ab was exposed to conflict in the home referencing altercations between WM and other individuals.

[19] The Minister contends that WM's resumed cohabitation with NL, who continues to seriously struggle with substance abuse, places Ab at substantial risk of harm.

[20] The Minister argues WM's credibility is suspect given he was vague, sarcastic, and combative during cross-examination and in light of inconsistencies with the evidence of other witnesses.

Position of WM

[21] WM argues that the Minister has not met the burden of proving substantial risk of harm.

[22] WM acknowledges that he was very ill in the summer of 2021 and that he was heavily medicated during that time. WM points out that his mother, BM, with

whom he and Ab resided, had died in July 2021. WM maintains that he deferred attending to his own medical needs in order to be present during his mother's final days and to participate in family matters in the aftermath of BM's passing.

[23] WM argues he had made appropriate arrangements with his neighbor, MP, to ensure proper care for Ab. WM contends his plan of care for Ab was circumvented when the Minister placed Ab in MD's care.

[24] WM denies misusing prescription drugs or any other form of substance abuse.

[25] WM argues Ab does not want to be in the care of MD and wishes to be returned to WM's care.

[26] WM acknowledges he now resides with NL but claims he would protect Ab from any risk of harm in relation to NL. WM points to prior examples of having done this as indicative of his ability to do so in the future.

[27] WM denies the Minister has established, on a balance of probabilities, any current protection concerns that would constitute a substantial risk of harm to Ab. WM argues the child protection application should be dismissed and Ab should be returned to his care.

Position of NL

[28] NL supports the position of WM. She did not refute any evidence concerning her substance abuse issues. She did not offer any evidence of having addressed her addiction.

Applicable Law

[29] The applicable legislation is the Nova Scotia *Children and Family Services Act*, S.N.S. 1990 c. 5 (the *Act*). Section 40 of the *Act* calls for a determination whether the child is in need of protective services.

[30] The *Act* must be interpreted according to a child-centered approach. Factors to be considered when making a decision in a child's best interests are non-exhaustive and the definition of best interests is multi-faceted. The Court must "consider various factors unique to each child, including those associated with the child's emotional, physical, cultural, social, and developmental needs and those associated with risk of harm": **Nova Scotia (Community Services) v. R.M.N. and M.C.**, 2017 NSSC 270, paragraph 20.

[31] Section 40 (4) states that the Court shall determine whether the child is in need of protective services as of the date of the protection hearing.

[32] Section 22(2) sets out the grounds for making a protection finding:

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

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

[33] Except for findings under s. 22(2) (a) and (c), which have the result of placing a parent or guardian on the Child Abuse Register, a protection finding is not made against a parent or guardian. Rather it is the circumstances of the child which places them at risk. **Nova Scotia (Community Services) v. CKZ & GLP**, 2016 NSCA 61, at paragraph 47 states:

Nowhere in s. 22(2) is the protection status of a child linked to the specific **attributes** of his or her parent or guardian. It is, however, clearly linked to the actions, failure to act, or inability to act of the adults responsible for the child's care. Whether a child is in need of protective services is based upon the real life, lived experiences of the child. Nowhere in that definition, or elsewhere in the *Act*, is the status of a child as being in need of protective services informed by the reason **why** their parents acted, failed to act, or have the inability to act in a particular manner.

[34] The Court is obligated to consider whether there are facts that support a protection finding under any of the grounds in s. 22(2), regardless if they are pleaded. **Children's Aid Society of Halifax v. H.A. & Z.A.**, 2002 NSCA 94.

[35] The Minister is assigned the burden of proof and it is the civil burden of proof. **F.H. v. MacDougall**, 2008 SCC 53. The Minister must prove its case on a balance of probabilities by providing the Court with "clear, convincing and cogent

evidence.” **Nova Scotia (Community Services) v. C.K.Z.**, *supra*, paragraphs 38 and 50..

[36] “Substantial risk” is defined in s.22(1) of the *CFSA*. It means a real chance of danger that is apparent on the evidence. When deciding whether there is a “substantial risk,” I must only be satisfied that the “chance of danger” is real, rather than speculative or illusionary, “substantial” in that there is a “serious harm or serious risk of harm” (**Winnipeg Child and Family Service v. KLW**, 2000 SCC 48, paragraphs 104 and 117) and it is more likely than not that this “risk” or “chance of danger” exists on the evidence presented. **CR v. Nova Scotia (Community Services)**, 2019 NSCA 89, paragraphs 11 and 14.

[37] As noted in **MJB v. Family and Children’s Services of Kings County**, 2008 NSCA 64, at paragraph 77, in relying upon “substantial risk” the Minister need only prove that there is a real chance that the future abuse will occur and not that future abuse will actually occur.

[38] The Minister in this case is relying on past history. In relation to past parenting history, Justice Forgeron states at para 38 of **Nova Scotia (Community Services) v. LD and DD**, 2021 NSSC 99:

... Although “[t]here is no legal principle that history is destiny”, past parenting is relevant as it may signal “the expectation of risk”: **D.(S.A.) v. Nova Scotia**

(Community Services), 2014 NSCA 77, para. 82. The court is concerned with probabilities, not possibilities. Therefore, where past parenting history aids in the determination of future probabilities, it is admissible, germane, and relevant: **Nova Scotia (Community Services) v. L.M.**, 2016 NSSC 80.

[39] The Minister in this case is also asking the Court to make an inference. “An inference is a conclusion reached when the probability of its likelihood is confirmed by surrounding, established facts” and “reasonableness is the gauge by which we evaluate the strength of the conclusion reached through our reasoning.”

Jacques Hometown Dry Cleaners v. Nova Scotia (Attorney General), 2013 NSCA 4, paragraph 31.

History of Proceedings

[40] WM and NL have three children together: Jo, Ab and Ja. Both Jo and Ja were placed in the permanent care of the agency due to protection concerns related to substance abuse and violence.

[41] WM has two other children: MKM and R. MKM was also a witness in this proceeding. NL has three other children: J, MD and G. Both J and G were placed in the permanent care of the Minister. MD was ultimately placed in the care of her biological father. MD was a witness in this proceeding and is a kinship foster placement for Ab for this proceeding and the previous proceeding.

[42] The child protection history in relation to WM and NL is laid out in **Nova Scotia (Community Services) v. NL**, 2014 NSSC 201 and **Nova Scotia (Community Services) v. BM**, 2015 NSSC 145. I have reviewed both decisions closely.

[43] This is the fourth court proceeding in which the Minister has been involved with WM and NL in relation to their child Ab.

First Proceeding – September 2010 to January 2012

[44] Ab was taken into care upon her birth in September 2010. Protection concerns related to substance abuse and violence. These concerns were viewed within the context of a significant history with such issues in relation to Ab's older siblings.

[45] In May 2011, NL reported that she had overdosed and was suicidal. The Minister originally sought permanent care of Ab but agreed to terminate involvement upon Ab being placed in the custody of her paternal grandmother, BM. WM and NL's parenting time with Ab was to be supervised.

Second Proceeding – July 2013 to May 2015

[46] Ab was taken into care again in July 2013 due to protection concerns related to substance abuse and violence. NL, struggling with addiction, did not put forth a plan to parent Ab but supported W's position to have Ab returned to his care.

[47] The Minister's contested motion for permanent care was dismissed in May 2015. I have carefully reviewed the decision of **Nova Scotia (Community Services) v. BM**, *supra*, which outlines Justice Forgeron's thoughtful analysis and thorough explanation for placing Ab in the primary care of WM upon strict limitations of NL's parenting time.

[48] Justice Forgeron found protection concerns in relation to NL who, despite having made some progress in dealing with her addiction, had ongoing substance abuse and anger management issues that placed Ab at risk. Justice Forgeron was satisfied that WM had sufficiently addressed his issues of violence and substance abuse, but she was concerned about the nature of the relationship between WM and NL potentially posing risk of harm. WM and NL were not living together at the time but maintained a connection. Ultimately Justice Forgeron determined that WM's relationship with NL did not place Ab at substantial risk of harm, so long as NL's parenting time with Ab was strictly restricted. An order reflecting this arrangement was issued under the *Parenting and Support Act*, S.N.S. 2015, c. 44 (previously referred to as the *Maintenance and Custody Act*).

Private Proceeding

[49] In January 2017, a Consent Variation Order was granted allowing NL unsupervised parenting time with Ab. The Minister contends they were not aware of the variation application and consequent consent order until the third protection hearing involving Ab was commenced in October 2019.

Third Proceeding – October 2019 to April 2021

[50] Beginning in July 2019 the Minister began to receive protection referrals related to WM's use of alcohol and related incidents of violence. Over the span of four months, WM had been involved in four separate violent encounters: with his mother, BM; with NL's daughter J; with his son R and with his mother's friend, JR.

[51] The Notice of Child Protection Application was filed October 2, 2019. In November 2019, NL acknowledged to child protection workers that she had suffered a relapse. WM contested the interim finding and sought to have the Minister's application dismissed and Ab returned to his care. In December 2019, after hearing evidence, it was determined that there were reasonable and probable grounds that Ab was in need of protection and Ab was placed in the supervised care of her sister, MD.

[52] In March 2020, it was discovered that WM was no longer living in BM's home and was residing with NL. In April 2020, NL and WM consented to a protection finding and to the ongoing placement of Ab in MD's supervised care.

[53] In July 2020, NL admitted to another serious relapse. NL told child protection workers that she had been using cocaine, had been hospitalized and almost died. NL claimed she been clean since her hospital admission and that she had not used drugs in the home or around WM or Ab.

[54] By October 2020, the Minister decided to support periods of unsupervised parenting time between WM and Ab given the progress WM had made in accessing services. The Minister identified a continued need for NL's parenting time to be supervised but acknowledged WM as an appropriate supervisor. By December 2020, parenting time included overnight visits.

[55] WM and NL cooperated in random drug tests throughout November and December, 2020. NL's results were positive for TCH only and WM tested positive solely in relation to his prescribed medication.

[56] By February 2021, Ab was returned to the supervised care of WM. Soon thereafter the Minister raised concerns about the presence of NL's daughter, J and J's uncle, SL, in the home. J, who had been the subject of a permanent care order,

was now living with NL. The Minister expressed protection concerns in relation to both J and SL, particularly given NL's ongoing struggles with addiction.

[57] By March 2021, WM had moved with Ab into the home of his mother, BM. The Minister lauded WM's decision to remove Ab from the situation involving NL, J and SL, as protective in nature. WM told child protection workers that Ab's safety and security was his priority. WM's actions were viewed as demonstrative of an understanding of the protection concerns and a willingness to address the issue, notwithstanding his relationship with NL.

[58] On April 6, 2021, the Minister terminated involvement with Ab remaining in the custody of WL and NL's parenting time with Ab being at WM's discretion.

Current Proceeding

[59] In July 2021, WM and Ab were still residing with WM's mother, BM, in BM's home. Sadly, BM died on July 14, 2021.

[60] On July 21, 2021, the Minister received a referral that WM was heavily medicated and unable to adequately care for Ab who was spending most of her time with neighbours. The referral source further claimed that NL had recently overdosed and was having infrequent contact with Ab.

[61] On the basis of this referral, on July 23, 2021, child protection worker Shepherd asked MD, Ab's sister and a prior placement for Ab, to keep Ab in MD's care until further notice. Worker Shepherd indicated she was on vacation and would attend to the matter upon her return. It should be noted that during this period of time, Ab was not in WM or MD's care, but was camping with her sister Jo and Jo's adoptive family.

[62] On July 26, 2021, child protection worker Lovett interviewed both MD and Ab. On July 27, 2021 child protection worker Lovett advised WM of the referral information and the plan to place Ab with MD. WM denied the veracity of the referral information and objected to Ab being placed in MD's care.

[63] On August 9, 2021, child protection workers Lovett and Donovan interviewed MD and her partner MM. Ab, by that time, had returned from camping and was in MD's care.

[64] On August 11, 2021, child protection workers met with WM. Workers reported that WM appeared extremely unwell and presented as thin and frail and speaking with a very low tone of voice. WM denied misusing medication. WM told child protection workers that he had a doctor's appointment scheduled for

August 30, 2021. When asked whether WM agreed to Ab being in MD's care, WM eventually advised "I am agreeable until I am on my feet."

[65] On August 13, 2021, child protection worker Shepherd met with NL. NL advised that she had not seen Ab in some time because WM would not allow NL parenting time given J's presence. NL told child protection worker Shepherd that she had a nervous breakdown in June 2021. NL described a two-day blackout about which she could remember nothing before waking up in hospital. NL said she was told she consumed cocaine and overdosed her anti-depressant medication. NL further advised that she had been offered a bed at a live-in treatment program for women but chose not to go with the hope that J would take the placement instead (J did not). NL further explained that she did not feel the treatment program was necessary given that she had already completed a residential treatment program and had the tools necessary to maintain sobriety.

[66] On August 19, 2021, the Minster held a Risk Management Conference and decided to take Ab into care and to place Ab with her sister, MD. Attempts to serve WM and NL were unsuccessful. Child protection worker Shepherd was advised on that date by WM's son R, that WM was in Halifax for a medical appointment.

[67] On August 25, 2021, NL was served with a Notice of Taking Into Care. On August 30, 2021, the Minister filed a Notice of Child Protection Proceeding.

Findings and Decision

[68] In making my decision I have considered the burden of proof as well as the provisions of the *Act*. I have considered the applicable case law, including that relating to credibility (**Baker-Warren v. Denault**, 2009 NSSC 59). I have analyzed the evidence, in consideration of the law, and I have reflected upon the submissions of counsel and the parties.

[69] The Minister has established that Ab is in need of protective services pursuant to 22(2)(b). As stated previously, apart from s. 22(2)(a) and (c), a protection finding is not made against a parent or guardian. It is the circumstances of the child which places a child at risk. That being said, I find that the demonstrated risk relates primarily to circumstances emanating from NL's substance abuse and WM's resumed cohabitation with NL. The evidence presented did not establish, on a balance of probabilities, substantial risk of harm to Ab because of substance abuse or violence on the part of WM or due to WM's failure to attend to his medical needs.

Protection Concerns and NL

[70] NL did not submit affidavit evidence and she did not testify. The only evidence before me from NL is presented through the affidavit evidence of child protection workers regarding NL's comments to them. That being said, counsel for NL elected not to cross-examine the child protection worker Shepherd or otherwise challenge the comments attributed to NL, outside of the *voir dire*, and so I view that evidence as uncontroverted.

[71] NL had a serious overdose in May 2021. She was in a coma for several days. She admitted to drinking and consuming cocaine along with her entire bottle of prescription medication. NL expressed concern for her life because of her substance abuse.

[72] NL has a long history of struggling with substance abuse. NL's comments about not needing treatment because she already had the tools to address her addiction issues are very concerning and demonstrate a serious lack of insight given NL has overdosed several times in recent years, subsequent to her last residential treatment stay.

[73] There is no evidence to suggest that NL's substance abuse issues no longer present a protection concern. The Minister has established, on a balance of probabilities, that NL's addiction issues create a substantial risk of harm for Ab.

Protection Concerns about NL and WM Together

[74] In light of my protection concern finding in relation to NL, the Minister has satisfied me that Ab would be at substantive risk of harm if she were to be returned to WM's care, while WM and NL are residing together. I make this finding on the basis of WM's testimony on the issue of NL's substance abuse.

[75] WM's evidence regarding NL's substance abuse was evasive and flippant. WM claimed NL's drug use was not a topic that he and NL discussed because he was not NL's therapist. WM was dismissive of the protection concerns associated with NL's drug abuse.

[76] WM did not display sufficient insight or concern about the risk posed by NL's serious addiction problem. WM's attitude in this regard seriously diminished his credibility in terms of his willingness to guard Ab against the risk associated with NL. If the substance abuse issue is not a topic of discussion, it is not clear how WM can protect against it.

[77] The Minister has established, on a balance of probabilities, that WM's resumed cohabitation with NL poses a substantial risk of harm to Ab given WM's demonstrated attitude towards NL's serious addiction issue.

Protection Concerns Specific to WM

WM - Substance Abuse

[78] The Minister concedes it can not prove that WM's presentation in the summer of 2021 was a result of intoxication. The Minister acknowledges that WM's appearance and affectation during this period of time could have been the result of his illness. The Minister asks me to rely on the evidence of NL, MKM and Ab to make an inference that WM was abusing drugs.

[79] I have reviewed all comments attributed to NL by child protection workers. NL was very open about her own drug use and recent overdose. At no point, however, does NL suggest that WM was misusing medication or otherwise abusing drugs. NL was asked directly whether WM was using drugs and she said she did not know. NL did acknowledge WM was extremely unwell and heavily medicated. Nothing in the evidence attributed to NL would cause me to infer that WM was abusing drugs apart from her description of WM's presentation, which the Minister concedes could reflect WM's illness.

[80] When considering the evidence of MKM, I am mindful that she characterized her relationship with WM as "difficult." In cross-examination, she disavowed any relationship with father. MKM gave evidence that WM had been

abusive towards her. There was further evidence of current family conflict over BM's estate. It was evident to me, based on MKM's testimony, that MKM bears a fair amount of resentment towards WM. While her resentment may well be justified, it may also color her perception of WM, and it is the latter that is of concern to me when weighing MKM's evidence.

[81] Moreover, MKM acknowledged that she had limited exposure to WM during the summer of 2021 and had no first-hand knowledge of the state of WM's health at the time of the protection hearing. MKM had been living out of province and had returned to Nova Scotia to attend to her ailing grandmother for a few weeks in 2020 and 2021, only moving here permanently in November 2021. MKM admitted that she had limited exposure to the situation involving WM and Ab.

[82] As noted previously, the comments made by Ab to child protection workers Shepherd and Lovett on August 9, 2021 were the subject of a *voir dire*. In applying a principled approach to these hearsay comments, and in light of s. 96(3)(b) of the *Act*, I determined that Ab's comments met the test of necessity and threshold reliability. Threshold reliability relates to admissibility and I determined there was sufficient indicia of reliability to afford a satisfactory basis for evaluating the truth of the statement.

[83] At this stage, I now must consider “ultimate reliability” which is the weight or value to be assigned to the evidence. Ultimate reliability must be assessed based upon the totality of the evidence.

[84] For context, I will reiterate the indicia of trustworthiness I identified at the conclusion of the *voir dire* to satisfy the threshold requirement of reliability:

1. Ab’s statements were made to child protection workers who are disinterested witnesses.
2. The child protection workers have specialized training in interviewing children.
3. The child protection workers involved took notes reasonably contemporaneously to their interview with Ab. The notes were recorded within 48 hours of the interview and in accordance with policy.
4. Ab made her statements naturally and voluntarily without coercion and without duress. Ab was comfortable in her surroundings at the time of the interview and she was familiar with the child protection workers.
5. Ab had been interviewed by child protection workers several times in the past and, on occasion, refused to talk to child protection workers when she felt uncomfortable doing so.
6. For the most part, Ab’s answers were not the result of leading questions.
7. At least some of Ab’s response were spontaneous and unprompted.
8. Ab was even and measured in her responses. At times Ab sought clarification to questions being asked of her. If Ab didn’t know the

answer to a question, she said she didn't know. Ab made several positive comments about WM in her responses.

9. There is no suggested motive for Ab to lie.

[85] All that being considered, I am reluctant to rely heavily upon the evidence of Ab. I have no reason to believe Ab would be untruthful. I am concerned about assigning significant weight to Ab's statements given Ab's age, communication skills and cognitive reasoning, particularly in context of the ongoing conflict in the family.

[86] For example, at one point in the interview, Ab displays circular reasoning when asked about alcohol:

Ms. Lovett asked Ab if she knows what alcohol is and Ab said yes.

Ms. Lovett asked Ab how she knows what alcohol is and Ab said, "R drinks it. That is usually when him and Dad fight."

I asked how she knows R is drinking alcohol when they fight and Ab stated "because he is drunk."

I asked how she knows he is drunk and Ab stated, "that is usually when they fight."

[87] In terms of potential substance abuse by WM, perhaps the most critical passages of the interview are:

I asked Ab if she knows what medication is, and Ab stated “my dad takes medication, because his back hurts.”

I asked if her dad acts or looks any differently after he takes his medication, and Ab again said she was unsure, noting she was not usually at home.”

.....

Ab then stated, “when you guys said medication, did you mean drugs, too?”

I said yes, and Ab stated, “because I know my mom used to do drugs, but I am not sure about my dad.”

I asked Ab how she knows what drugs are, and Ab stated, “because I heard about them.”

Ab then stated, “and when you asked about my dad’s medication, you didn’t ask about my nan’s.”

I asked Ab if her nan took medication too and Ab stated, “yeah, and sometimes my dad would ask me to ask my nan if he could have hers.”

I asked if this happened when she was living at her nan’s, before coming to MD’s house in the last few weeks, and Ab said yes.

I asked Ab if her nan would allow her dad to take her pills, and Ab said “yes, just one or two.”

I asked Ab if she knew what kind of pills they were and Ab stated, “well, for her cancer or bladder infection.’

I asked Ab if she knew they were Advil or Tylenol, and if they were given to her nan by the doctor, and Ab stated, “yeah, they were from the doctor.”

I asked Ab where her grandmother’s medication went after her grandmother died, and Ab said, “my aunt P took them so my dad wouldn’t have access to them. And they took his car, too.”*

[88] A careful examination of this communication exchange is necessary.

Consider first: *I asked Ab if her nan took medication too and Ab stated, “yeah, and sometimes my dad would ask me to ask my nan if he could have hers.” ... I asked Ab if her nan would allow her dad to take her pills, and Ab said “yes, just one or two.”* There is no clear indication in this exchange that the medication Ab was discussing was prescription medication. It may well have been non-prescribed medication such as Advil or Tylenol.

[89] Then: *I asked Ab if she knew what kind of pills they were and Ab stated, “well, for her cancer or bladder infection.”* At this point, Ab could be describing why her grandmother needed medication, rather than the kind of medication WM was requesting.

[90] And then: *I asked Ab if she knew they were Advil or Tylenol, and if they were given to her nan by the doctor, and Ab stated, “yeah, they were from the doctor.”* In this exchange “Yeah they were from the doctor” is critically important. The phrase could be interpreted to mean, “Yeah the pills that Nan gave Dad were pills from the doctor” suggesting substance abuse on the part of WM. However, it is also possible that Ab was simply affirming that the pills her nan had for cancer or bladder infection was medication the doctor had given her nan.

[91] I am not convinced that Ab, still ten but almost 11 years old, was necessarily following the chain of logic attempting to be built by the child protection worker. From my assessment, it is just as likely that she was simply answering the direct questions posed to her.

[92] Even if Ab did intend to convey in her response that WM had asked Ab to ask her nan for one of her nan's prescription pills, it is possible that Ab's interpretation of the exchange was colored by the situation. Ab advised child protection workers that her Aunt P* took her grandmother's medication away so that WM would not have access to it. Suppose WM did ask Ab to ask her nan for a pill (without specifying what type of pill). In light of the information Ab has about the accusation that WM was using her nan's medication, it is possible Ab might have interpreted this request to have meant a prescribed pill.

[93] Based on my analysis of all of the evidence, and at the request of the Minister, particularly the evidence of NL, MKM and MN, both individually and collectively, I am not prepared to infer or otherwise find that that WM was abusing substances.

WM – Poor Health and Inadequate Parenting

[94] There is no dispute that WM was seriously ill in the summer of 2021. WM was heavily medicated. He was sleeping a lot and not eating well. WM had lost a lot of weight and presented as weak and frail. None of these facts are in dispute.

[95] The Minister contends that WM's failing health, in conjunction with WM's delay in attending to his medical condition, presented a substantial risk of harm to Ab.

[96] WM acknowledged that he delayed attending to his health. WM says he did so because he wanted to be present for his mother's passing and for the aftermath of her demise. Clearly the matter of BM's estate was a contentious issue for the family.

[97] I do not accept that deferring self-care, in and of itself, necessarily generates a substantial risk of harm. The actions of WM were not entirely unreasonable given the circumstances. BM died on July 14, 2021 and the child protection referral was made a week later, on July 21, 2021. By August 11, 2021, WM had advised child protection workers that he had a medical appointment in Halifax for the end of August 2021. By August 19, 2021, WM was in Halifax attending to his medical needs.

[98] Furthermore, there is evidence to support that WM took actions to protect Ab. MP is the neighbor of WM. He presented as a neutral third party and his evidence was credible.

[99] I am satisfied that Ab spent a significant amount of time at MP's house, primarily because his daughter and Ab were best friends. I suspect that Ab may well have spent as much time at the home of MP, given her friendship with his daughter, regardless of whether WM was ill.

[100] I am further satisfied that MP and his wife were willing to take Ab into their care, if need be, at the request of WM. WM asked MP and his wife to enter into a guardianship agreement to this effect. When the agreement was drafted and whether the agreement was signed, was the subject of significant cross-examination. From my perspective the salient point was that WM asked MP if he would care for Ab and MP agreed.

[101] The Minister suggests that WM approached MP and his wife about caring for Ab as a means of avoiding having Ab placed in the care of MD. I have no doubt that this is likely the case as WM was quite vocal about his preference to have Ab placed with MP instead of MD. This preference does not detract from the fact that WM developed a plan for Ab's protective care in the face of his illness.

[102] The Minister argues that WM did not act protectively because WM was in fact ill and WM did not invoke the plan of placing Ab with MP. By my assessment, WM did not have the chance to do so. After the protection referral was made on July 21, 2021, Ab was never again in the care of WM.

[103] The Minister challenged the veracity of the guardianship agreement given MP and his wife did not put forward a plan of care for Ab. MP's explanation that the guardianship arrangement no longer seemed necessary after Ab had been placed in MD's care, was reasonable. Furthermore, the fact MP did not put forth a plan of care for Ab does not detract from the fact that WM asked MP and his wife to care for Ab and they agreed to do so.

[104] In summary, I am not convinced WM's medical condition presented a substantial risk of harm to Ab because I am satisfied that WM took reasonable protective measures to ensure proper care for Ab during his illness. Moreover, there was no suggestion that WM was incapacitated due to health reasons from caring for Ab at the time of the protection hearing, which is the critical point in time at which risk of harm must be assessed.

[105] The Minister relied primarily upon the evidence of MD to prove inadequate parenting on behalf of WM. Like MKM, it is clear MD bears resentment towards

WM and NL. I must keep this context in mind when weighing the evidence of MD.

[106] MD does not believe that Ab should have been returned to WM in April 2021. In MD's opinion, Ab's behavior improved significantly while Ab was in her care and deteriorated after Ab was returned to WM.

[107] Furthermore, MD told child protection workers she would not participate in facilitating any access, either by providing transportation or supervision. MD questioned whether Ab should have any contact at all with WM or NL. MD later sought to qualify her position with the explanation that she was concerned about Ab seeing WM and NL given the state they were in at the time (ie. WM having lost a lot of weight). I am satisfied that MD does not support Ab being in the care of WM and does not support parenting time between Ab and WM and NL.

[108] MD made it clear that she feels she can provide better care for Ab than WM can. She expressed concern about the amount of time Ab was spending with neighbors. She argued that WM was not appropriately monitoring Ab's social media and that WM was insufficiently concerned about Ab's troubling behaviors, such as bullying and vaping.

[109] MD feels she is in a better position than WM to care for Ab because she can offer structure and stability. At this point of the proceeding, however, the issue is not whether MD can provide better care for Ab than can WM. The issue is whether Ab is at substantial risk of harm. It is apparent that MD's protection concerns about WM pre-exist WM's illness and were firmly in place in April 2021, even in the face of the Minister's determination that WM had resolved protection concerns sufficiently to have Ab returned to his care. I am not prepared to find that Ab is at substantial risk of harm on the basis of evidence offered by MD.

WM - Violence

[110] Furthermore, I am not satisfied that the Minister has established violence as a current protection concern in relation to WM. The only current reference to this issue emanates from Ab's interview with child protection workers on August 9, 2021. Given my reluctance to rely heavily on the evidence of Ab for the reasons I have outlined previously, I am not prepared to find violence as a current protection concern posed by WM.

Past Parenting of NL and WM

[111] The Minister cites past parenting as relevant when considering protection concerns for Ab. There is little doubt that NL and WM have a deeply troubling

past of child protection concerns. It is worth remembering, however, that Ab was returned to WM's care in 2015. The Minister did not get involved again until 2019, and then returned Ab to WM's care, with the acknowledgement that WM had shielded Ab from protection concerns involving NL at that time. No doubt these are issues that should be examined more closely upon disposition.

Views and Preferences of the Child

[112] WM asserts Ab does not want to reside with MD and wishes to be returned to WM's care. I would caution the parties against involving Ab in details of this proceeding. Ab views and preference, if they can reasonably be ascertained, may be one of several best interests factors that may be taken into consideration when assessing Ab's best interests upon disposition.

Conclusion

[113] The Minister has established, on a balance of probabilities, that Ab is in need of protective services pursuant to s. 22 (2)(b) of the *Act*. The Minister will draft the Protection Order.

[114] The substantial risk of harm arises from NL's substance abuse and WM's resumed cohabitation with NL in conjunction with his current attitude towards

NL's addiction problem. The Minister did not satisfy me that substance abuse, violence, or inadequate parenting on the part of WM posed a substantial risk of harm for Ab.

Pamela Marche J.