SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Nova Scotia (Community Services) v NL, WM*, 2023 NSSC 184

Date: 20230608
Docket: Syd No 123165
Registry: Sydney

Between:

Nova Scotia (Community Services)

Applicant

v.

NL, WM

Respondents

LIBRARY HEADING

Judge:	The Honourable Justice Pamela Marche
Heard:	May 16, 2023, in Sydney, Nova Scotia
Final Written Submissions:	June 5, 2023
Written Decision:	June 8, 2023
Subject:	Child Protection, Fresh or New Evidence, Palmer Test, *Civil Procedure Rule 82.22*
Summary:	Decision on Motion to Admit Further Evidence after the Close of a Child Protection Hearing
Issues:	Should the Minister be permitted to introduce further evidence?
Result:	The Palmer test applies to a motion to enter further evidence after the close of a child protection hearing. Rote reference to a child's best interest will not automatically dimmish the requirement to have acted with due diligence. It is insufficient to simply point to the vastness of evidence that might factor into a best interest analysis when assessing probative force. It is necessary to demonstrate the proffered evidence, if believed, would impact the determination of the issue in

dispute. The interests of children are best protected through a careful and considered analysis of the Palmer test to the proffered evidence to ensure the appropriate balance between finality and a just result in child protection cases is met.

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Written Release:	June 8, 2023
Counsel:	Tara MacSween, for the Applicant Brianna Renou, for the Litigation Guardian, DM Alan Stanwick, for the Respondent NL WM, self-represented

By the Court:

Overview

[1] This is a decision about whether the Minister of Community Services (the Minister) should be permitted to introduce further evidence after the close of a permanent care hearing. The Minister makes the motion pursuant to *Nova Scotia Civil Procedure Rule* 82.22(a) (Rule 82.22). The Respondent parents, NL and WM, object to further evidence being admitted. The Litigation Guardian for the child, AB, who is 12 years old, and the subject of the permanent care and custody matter, agrees with the Minister.

Decision on Motion

1. Should the Minister be permitted to introduce further evidence?

Position of the Parties

Position of the Minister

[2] The Minister seeks to introduce the affidavit evidence of child protection worker J. Lovett, which was sworn on May 5, 2023. The final review hearing concluded on March 31, 2023, with the Court reserving decision. Ms. Lovett's affidavit relates to an access visit between AB and her father that took place on April 28, 2023, as well as subsequent interviews that took place with AB on May 4, 2023, and with the Respondents on May 5, 2023.

[3] The Motion was heard on May 16, 2023. The Court brought the recent Supreme Court of Canada case of **Barendregt v. Grebliunas**, 2022 SCC 22, to the attention of the parties. The parties agreed the Court could determine the motion based on written submissions without the need for further evidence.

Position of the Minister

[4] The Minister cites Rule 82.22 as well as **Jeffrie v. Hendriksen *et al.*,** 2011 NSSC 460 and **Children's Aid Society of Cape Breton-Victoria v. A.L.**, 2010 NSSC 33 in support of her motion. The Minister points to **Jeffrie**, *supra*, to confirm the principle that the primary objective of Rule 82.22 is to do justice between the parties. The Minister quotes **A.L.** *supra,* to buttress her argument that a best

interest test analysis supersedes all other considerations when deciding whether to admit further evidence after the close of a child protection hearing.

[5] In the **Jeffrie** decision, *supra*, the Court used the test set out in **Palmer v. The Queen**, [1980] 1 S.C.R. 759, (the Palmer test) to analyze whether to allow further evidence to be admitted. The Palmer test supports new or fresh evidence being admitted into evidence after the close of a hearing when the evidence:

- could not, by the exercise of due diligence, have been obtained for the trial;
- is relevant in that it bears upon a decisive, or potentially decisive issue;
- is credible in the sense that it is reasonably capable of belief; and
- is such that, if believed, it could have affected the result at trial.

[6] The Minister claims the evidence it seeks to admit goes directly to the issue before the court: whether AB remains a child in need of protective service and what order is in AB's best interests. The Minister argues it is in AB's best interests for the Court to hear further evidence so that it can make a fully informed decision with all available evidence.

[7] The Minister cites a passage from **Jeffrie** that quotes **Palmer**, *supra*, but otherwise does not apply the Palmer test analysis to the evidence that is the subject of the motion at hand. The Minister did not ask the Court to draw any inferences in relation to the further evidence proposed but may well have done so, if the evidence were to be admitted.

Position of WM

[8] WM objected to the admission of further evidence but did not file written submissions by the court imposed deadline.

Position of NL

[9] Counsel for NL is concerned the Minister is asking the Court to admit further evidence to support an inference that WM is abusing drugs. NL argues the evidence does not establish, on a balance of probabilities, that WM was under the influence of drugs during the access visit in question. Consequently, NL maintains the further

evidence should not be admitted because it does not affect the determination of a decisive issue at trial (*i.e.* whether Ab remains a child in need of protective services).

Position of the Litigation Guardian

[10] The Guardian argues the further evidence proffered by the Minister could not have been adduced at hearing given the events that form the evidence had not yet occurred. The Guardian asserts, therefore, the Minister cannot be said to have failed to act with due diligence. The Guardian says the evidence sought to be admitted by the Minister meets the remaining Palmer test criterion, (i.e.. credibility, reliability and ability to affect the final result at hearing), without question.

Applicable Law

[11] When asked to admit new or fresh evidence, upon completion of a trial, the Court must strike a balance between two foundational principles: (i) finality and order in the justice system, and (ii) reaching a just result in the context of the proceedings (**Barendregt v. Grebliunas**, 2022 SCC 22, para. 47).

[12] In **Barendregt**, *supra,* the Supreme Court of Canada confirmed the test set out in **Palmer**, *supra*, as the appropriate method to determine whether new or fresh evidence should be considered. The Palmer test is "purposive, fact-specific and driven by an overarching concern for the interests of justice" (**Barendregt**, *supra.,* para. 32). It applies to "new evidence" (evidence of events that occurred after trial) as well as "fresh evidence" (evidence of events that occurred before trial) (**Barendregt**, *supra.,* para. 48).

[13] The first criterion of the Palmer test is due diligence. Due diligence is a practical concept that is context sensitive (**Barendregt**, *supra.,* para. 58). Due diligence means litigants are required to call all of the evidence necessary to present their best case in the first instance. The requirement of due diligence protects the interests of finality and order in the justice system (**Barendregt**, *supra.,* paras. 36-39).

[14] The focus, when assessing due diligence, is on the conduct of the party seeking to adduce the evidence and why the evidence was not available at trial. Due diligence insures against court matters being prolonged, promotes certainty, and prevents litigants from pursuing a second chance to meet a legal test that

ought to have been met in in the first instance (**Barendregt**, *supra.,* paras. 36-39).

[15] The last three criteria of the Palmer test are meant to promote a just result in the context of the proceedings. The focus, when assessing these criteria, is on the evidence itself. Evidence should only be admitted when it is relevant, credible, and of sufficient probative force, when considered with the other evidence adduced, to affect the determination of issues in dispute. Evidence that falls short of these standards should not be admitted (**Barendregt**, *supra.,* paras. 44-45).

[16] The Supreme Court of Canada has recognized that the requirement to assess what is in a child's best interest may require a more flexible approach to the fourth criterion of the Palmer test. A best interest test analysis requires the Court to take into account a wide range of circumstances that are child specific. As a result, the scope of evidence that may be found to have probative force is broader in these types of cases (**Barendregt**, *supra.,* para. 66).

[17] The Court, in **Barendregt,** *supra***,** recognized (1) the premium placed on certainty in cases involving children and (2) the importance of having accurate and up-to-date information when a child's future hangs in the balance (para. 67). Evidence that does not satisfy the due diligence requirement should generally not be admitted, however, the Supreme Court also found there may be rare instances when the interests of justice may supersede the need for due diligence. This may apply in cases where the interests of justice are best met by providing the court with more context before making a decision that could profoundly affect the analysis of a child's best interests (**Barendregt**, *supra.,* paras. 36-39).

[18] That said, the Supreme Court of Canada was clear that "exceptional circumstances do not dispense with the other Palmer criteria" and that "the best interest of the child cannot be routinely leveraged to ignore the due diligence criterion" (**Barendregt**, *supra*., para. 72).

Findings and Decision

[19] To begin, I will first provide a high level overview of the affidavit evidence of child protection worker J. Lovett, sought to entered as further evidence. The evidence can be described in three parts (1) a description of WM's behaviour during a supervised access visit with AB that occurred on April 18, 2023 (2) a summary of an interview with AB about the visit and (3) a summary of an interview with WM and NL about the visit.

[20] *Description of WM's behaviour during the visit* – In her affidavit evidence, Worker Lovett reports that Case Aide JB was supervising WM's visit with AB at a hair salon. According to the Incident Report Form attached to Ms. Lovett's affidavit, the visit started at 3:00 pm and ended at 4:20 pm. The Case Aide reported that WM was "nodding off" and when he stood up, "he fell into a column…somewhat regained his balance and walked towards AB with an unsteady gait". The Case Aide claimed WM "nodded off repeatedly and slid down his chair." She described WM's movements as "very slow" and said his "eyes were half open".

[21] *Interview with AB* - As a result of the Incident Report filed by the Case Aide, child protection worker Holloway-MacDonald interviewed AB. AB reported, among other things, that she was upset and worried about her father because he fell asleep in the chair, had been mumbling his words, he stumbled when he got up and he had forgotten to pay the salon. AB reported that she was worried because it was the first time she had witnessed her father mumbling and stumbling and, based on what she learned about drugs at school, she believed her father was under the influence of drugs. AB reported that WM had fallen asleep many times during her visits with him before and that she had once scrolled through his phone while he was sleeping and had read text messages from people looking to buy painkillers.

[22] *Interview with WM and NL* - As a result of the interview with AB, child protection workers, accompanied by police officers, attended at the home of WM. WM denied sleeping, stumbling and mumbling his words. WM eventually acknowledged he may have closed his eyes because he has a hard time sleeping due to his injured leg.

[23] I will now apply the Palmer test to the proffered evidence.

Due Diligence

[24] I am not satisfied that the Minister exercised the necessary due diligence in putting her best case forward at the time of the hearing. Evidence of WM falling asleep during access visits is not new evidence. There is reference to WM falling asleep during access visits with AB, and of AB's reading inappropriate text messages on WM's phone, in the affidavit of child protection worker Shephard dated August 2, 2022. There is further reference to WM falling asleep during access visits with AB in the affidavit of the Guardian.

[25] Specifically, Ms. Shephard's affidavit dated August 2, 2022, references an access visit between WM and AB that occurred on May 10, 2022. After the visit, AB reported that WM had been asleep between 3 pm to 4:30 pm and that she had gone through his phone while he was sleeping. According to Ms. Shephard's affidavit evidence, the Case Aide supervising the visit did acknowledge that WM had fallen asleep twice.

[26] The Minister therefore, in May 2022, had knowledge of WM falling sleeping during access visits and of AB seeing inappropriate text messages on WM's phone. She could have chosen, at that point, to interview AB or to question WM about the concerns she now moves to have entered as new evidence. The Minister might have also elected to expand upon the evidence outlined in Ms. Shephard's affidavit by tendering the Case Aide Incident Report or calling upon the Case Aide to offer testimony in relation to the incident at the final review hearing. This would have allowed counsel to explore the evidence more fully.

[27] The Minister had the opportunity, before the conclusion of the final review hearing, to provide the court with the evidentiary context the Minister now says the Court must have before making a decision that could profoundly affect the analysis of what is in AB's best interests. Therefore, even though the evidence sought to be entered by the Minister emanates from an incident that occurred after the close of the hearing, I am not satisfied the Minister acted with due diligence in presenting their best case at the final review hearing.

[28] Further, I am not satisfied that this is a rare circumstance where due diligence should yield to the interests of justice. Yes, the Court is poised to make a significant decision that will have a profound impact upon AB's life. That said, litigants in child protection matters are still required to present their case with due diligence. The fact that a best interest examination is critical will not automatically diminish the Palmer test, including a due diligence analysis, simply because the Court is dealing with a child protection case.

[29] Insisting upon due diligence promotes finality and order in the justice system. Finality is an important component of the child's best interest as reflected in the legislated time limits embodied in the *Act*.

[30] Evidence in relation to WM's access visit with AB on April 28, 2023 will not be considered as further evidence. The Minister had access to evidence, prior to the final review hearing, of the same nature and value that she now seeks to have entered as new evidence. The Minister's decision not to more fully investigate

the information they had about WM falling asleep or inappropriately texting, or to more fully expand upon that evidence at hearing, cannot now be remedied by simply citing AB's best interests.

[31] Having determined the evidence related to WM's behaviour during the access visit of April 28, 2023 should not admitted into evidence, it follows that the subsequent interviews with AB, NL and WM, which flow as a direct result of that access visit, should also not be admitted into evidence.

[32] Even if I found the Minister had acted with due diligence, or that due diligence should yield in these circumstances to a finding that it is AB's best interest to consider the evidence sought to be admitted, I am not satisfied that any of the proffered evidence meets the three remaining criteria of the *Palmer test.*

Credibility

[33] There is no concern that the evidence sought to be entered into evidence by the Minister is credible.

Reliability

[34] I have serious reservations about the reliability of the evidence related to the interview with AB. If I were to grant the Minister's motion to admit further evidence, there would likely be a second stage of assessment, utilizing the principled approach analysis of necessity and reliability at a *voir dire*, of the admissibility of the child hearsay statements. However, even at this stage of the analysis, I can forecast that I would be extremely cautious of affording significant weight to the opinion of a 12-year-old as to whether someone might be under the influence, particularly in the context of the heightened conflict between the Respondents and their daughter, MD, with whom AB has been residing. I reference and adopt, as applicable, my findings in relation to reliability of Ab's evidence as outlined in the reported protection decision at **Nova Scotia (Community Services) v. NL, WM**, *supra*.

Impact upon the result at Hearing (Probative Force or Value)

[35] I am not satisfied the evidence sought to be admitted by the Minister would impact my determination of whether AB remains at risk of harm. I make this finding (1) understanding that the scope of evidence that could have probative value is broader in this case than in other cases where a best interest analysis is

not necessary and (2) taking into consideration all of the other evidence before me.

[36] The Minister claims the proffered evidence speaks directly to the issue of whether AB remains a child in need of protective services. I disagree. The evidence, at best, speaks indirectly to the issue. If I were prepared to make an inference from WM's presentation that he was intoxicated, the evidence then would have greater probative impact. I am not prepared to make such an inference given WM's known medical condition. Again, I reference and adopt, as applicable, my findings in relation to making such an inference outlined in the reported protection decision at **Nova Scotia (Community Services) v. NL, WM**, *supra*.

[37] At most I would find, if I accepted the further evidence of the Minister, that WM was groggy (mumbling and stumbling) and fell asleep during the visit. This would have limited impact, even in light of all of the other evidence, (including reference in the Minister's affidavits to alcohol containers being observed in recycling bags outside WM's apartment building, for example) on my assessment of whether AB remains in need of protective services.

[38] Having found the weight to be assigned to AB's out of court statements, should they be admitted, is likely to be low, then it follows that the impact of such evidence upon the ultimate determination of the salient issue is also minimal.

[39] The evidence related to the interview with WM and NL is demonstrative of their contentious relationship with the Minister. This is certainly not new evidence and is of insufficient probative value to affect the ultimate determination of the issue of whether AB remains in need of protective services.

Conclusion

[40] Child protection cases, by definition, involve an analysis of a child's best interest. The *Act* clearly states the best interest test is the paramount consideration in child protection cases. That said, the Palmer test still applies to a motion to enter further evidence after the close of a child protection hearing. Rote reference to a child's best interest will not automatically dimmish the requirement to have acted with due diligence before seeking to admit further evidence. Similarly, it is insufficient to point to the vastness of evidence that might factor into a best interest analysis when assessing probative force. It

remains necessary to demonstrate the proffered evidence, if believed, would impact the determination of the issue in dispute.

[41] The Minister argues it is in AB's best interests for the Court to hear further evidence so that it can make a fully informed decision with "all available evidence." The interests of children are best protected, however, through a careful and considered application of the Palmer test to any such available evidence to ensure the appropriate balance between finality and a just result in child protection cases is met.

[42] The Minister has not satisfied the requirements of the Palmer test and the motion to admit further evidence is denied.

Marche, J.