

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Minister of Community Services v. J.N. and M.K.*, 2024 NSSC 3

Date: 2024-01-10

Docket: SFHCFSA-123404

Registry: Halifax

Between:

Minister of Community Services

Applicant

v.

J.N. and M.K.

Respondent

Restriction on Publication: s. 94(1) <i>Children and Family Services Act</i>

Judge: The Honourable Justice R. Lester Jesudason

Heard: March 2, June 2, 20, 26, 27, 29, July 13, 14, September 6, 25 and December 14, 2023, in Halifax, Nova Scotia

Written Release: January 10, 2024

Counsel: Jean Webb, for the Minister of Community Services
Neil Robertson, for J.N.
Damian Penny, for M.K. (not participating in final trial)

Publishers of this case please take note that s. 94(1) of the *Children and Family Services Act* applies and may require editing of this judgment or its heading before publication.

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 two girls, B and T, who are ten and three, respectively. The Minister claims that the evidence establishes that:

- B and T have been and would remain at a substantial risk of physical harm, emotional neglect, and medical neglect if returned to their mother's care;
- There are no reasonable services to provide to the mother which are adequate to protect the children;
- The circumstances placing the children in need of protective services have persisted well beyond the maximum time limit allowed under the *Children and Family Services Act* ("CFSA"); and
- It is in the best interests of B and T to be placed in the Minister's permanent care and custody.

[2] J.N., the children's mother, seeks to have the Minister's application for permanent care dismissed and have the children returned to her care.

[3] B's biological father has not been involved in this proceeding. T's biological father initially participated in this proceeding but did not participate in the final disposition trial. His lawyer confirmed that he was not contesting the Minister's application for permanent care of T.

[4] This proceeding started on September 21, 2021 - almost 28 months ago. The children were removed from the mother's care for the entirety of this time and placed in the Minister's temporary care and custody. The maximum statutory time limit was reached on March 16, 2023, but was extended at the request of the parties largely because they wanted to explore settlement options which were in the children's long-term best interests. Unfortunately, despite having three settlement conferences, the parties were unable to agree on what long-term placement was in

the children's best interests. Clearly, this proceeding has gone on far longer than is desirable.

[5] The preamble to the *CFSA* appropriately recognizes that children have a sense of time that's different from adults and that services provided, and proceedings taken under the *CFSA*, must respect the children's sense of time. For B and T, having their fates in limbo while living in foster care for over two years likely seems like an eternity.

[6] During the entirety of this proceeding, the mother has done, to the absolute best of her ability, everything asked of her. All the witnesses who worked with the mother describe her as a kind and caring person who loves her children. I fully agree. She is a remarkable and incredibly resilient person who, through no fault of her own, has faced considerable challenges in her life. I acknowledge that she has made some progress in addressing some of the initial child protection concerns. I commend her for this. I also accept that she genuinely believes that B and T would be safe from any substantial risk of harm if now returned to her care.

[7] If this case turned on whether the mother is a kind individual who dearly loves her children and will do her best to safely parent them, I would have no hesitation returning the children to her care. However, decisions made under the *CFSA* must not be made based on parents' beliefs or feelings of sympathy for parents whose circumstances may be extremely challenging. Rather, the paramount consideration upon which decisions must be made are the best interests of the children: section 2(2).

[8] Unfortunately, despite the mother's best efforts, there has not been enough progress made by her over the many months it took this matter to come to trial to allow me to safely return the children to her care. Thus, I regrettably conclude that it is in the children's best interests that they be placed in the Minister's permanent care and custody. My reasons follow.

2.0 BACKGROUND/HISTORY OF PROCEEDING

[9] B and T were taken into the Minister's care on September 17, 2021. The Minister filed an application dated September 21, 2021. The Minister's initial

concerns related to risk of physical harm, inadequate parenting skills, and chronic neglect.

[10] The children have remained in the Minister's temporary care and custody ever since they were first removed from the mother's care. The statutory outside date for the final disposition in this matter was March 16, 2023. A final disposition trial was commenced on March 2, 2023. At the request of the parties, I adjourned the completion of the trial past the outside date to allow the parties the opportunity to focus on efforts to try to resolve this matter in the children's best interests including participating in a second settlement conference on March 3, 2023. That settlement conference didn't resolve the matter but the parties requested a third settlement conference with the same judge in April 2023. I agreed to this request.

[11] Unfortunately, the April 2023 settlement conference was unsuccessful and the matter proceeded to a final disposition trial. Based on counsels' estimates, four days of trial were set. Those estimates ended up being overly optimistic and significantly more trial time had to be found to complete the evidence which ended up taking eight days. The parties then filed written post-trial submissions and appeared by phone on December 14, 2023, so that counsel could answer questions in relation to those submissions.

3.0 ISSUES

[12] Given that the statutory outside date for completing final disposition has passed, the issues I must decide are as follows:

1. Are the children still in need of protective services?
2. If so, what order is in the children's best interests?

4.0 THE LAW

4.1 Purposes of the *CFSA*

[13] 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).

[14] In *CFSA* proceedings, the children’s best interests are paramount. At different points in a child protection proceeding, the *CFSA* directs me to consider “the best interests of a child” when making an order or a determination. When that happens, subsection 3(2) dictates that I consider those enumerated circumstances which are relevant. I broadly group them 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.

4.2 Options Available to Me

[15] This is an application for a final disposition order. Given that the maximum statutory deadline has already been passed, the only options open to me under subsection 42(1) of the *CFSA* are:

(a) Dismiss the matter and return the children to the care of the mother;

or

(b) Place the children in the Minister’s permanent care and custody.

4.3 Burden of Proof

[16] 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. To answer the question of whether the children are in need of protective services, it is necessary to consider both the needs of the children and the capacity of the mother to meet them: *Nova Scotia (Community Services) v. V.A.H.*, 2019 NSCA 72.

4.4 Substantial Risk

[17] The Minister alleges that B and T would be at a substantial risk of physical harm, emotional neglect and medical neglect if returned to the mother’s care.

[18] “Substantial risk” is a real chance of danger that is apparent on the evidence: subsection 22(1) of the *Children and Family Services Act*. It is the real chance of

physical or emotional harm or neglect that must be proven to the civil balance of probabilities standard. That future physical or emotional harm or neglect will actually occur need not be established on a balance of probabilities: *MJB v. Family and Children Services of Kings County*, 2008 NSCA 64 at paragraph 77.

[19] If the Minister fails to establish that the children continue to be in need of protective services, then the children must be returned to the mother. If the Minister establishes that the children continue to be in need of protective services, I must consider the children's best interests, as between being placed in the Minister's permanent care and custody or being returned to the mother: *Catholic Children's Aid Society of Metropolitan Toronto v. M.C.*, [1994] 2 S.C.R. 165 at paras. 37-38; s. 42(1) of the *CFSA*.

5.0 THE CHILDREN

[20] Because the paramount consideration in this case is B's and T's best interests, and it is their long-term futures which are at stake, I will start by discussing them.

5.1 B

[21] B was described by the child-in care worker, case aide, family support worker, and long-term social workers as a kind, sweet and active little ten-year-old girl.

[22] She has faced, and will continue to face, significant challenges. She has been diagnosed with having cerebral palsy with asymmetric diplegia. Dr. Tricia Beattie, Ph.D., registered psychologist, also diagnosed B as having an intellectual disability in a neuropsychological assessment report dated April 18, 2023. In that assessment, Dr. Beattie stated that B is "significantly delayed in her intellectual, academic, memory, visuo-motor integration, and basic language skills" and "fell broadly at the four to five-year old age level across these tasks". Dr. Beattie noted that B will require extensive supports for her special needs throughout her life.

[23] While B has made significant gains since being placed in the care and custody of the Minister, she still requires constant hands-on help with the basics of self-care. She will never live independently and requires assistance with toileting,

washing herself, and brushing her teeth. She is not capable of self-protecting nor does she have the ability to consistently communicate her needs. She requires braces for her legs which must be worn during the day to help her walk flat on her feet and protect her spine.

[24] B is followed by a number of professionals including an IWK Team, school supports, occupational therapist and speech/language professionals. She is unlikely to advance intellectually beyond a four to six-year-old level.

5.2 T

[25] T was taken into the Minister's care when she was about 10 months old. When she was brought into care, she displayed significant delays in her development and was functioning more in the four to five-month-old range.

[26] Since being taken into the Minister's care, T has made significant gains. She has caught up developmentally and meeting all her milestones except that her speech is slightly delayed. She is being seen by a speech/language professional and is on a list for a pre-school neurological assessment. She is described by her child-in care worker, case aide, family support worker, and long-term workers as a very active and sweet little girl.

6.0 THE MOTHER

[27] In the Minister's post-trial submission, the Minister's counsel says, "It does not go unnoticed that all witnesses in this case...have agreed that [the mother] is a lovely and kind person who was motivated to engage in services".

[28] I fully share that view. The mother is indeed a lovely and kind person. I respect and admire her resilience in facing the significant challenges she has had in her life. Those challenges include being in abusive relationships with the fathers of B and T who treated her poorly despite the mother's kindness and her deserving far better treatment from them. While the Minister suggests that these fathers may have helped her look after the children, I conclude that they were a net negative to the mother's and children's lives. While the Minister may be correct that they may have provided some physical assistance to the mother, the evidence suggests they were physically and emotionally abusive to her and the children. To suggest, as the

Minister has, that they may have provided “assistance” to the mother in looking after the children is misplaced. The mother and the children were better off without those fathers’ being in the home. I fully commend the mother for ending these unhealthy relationships.

[29] The mother has been assessed as having significant cognitive limitations. Anna Webster, MSc., psychologist, conducted a psychological assessment of the mother and prepared a report dated January 24, 2022. By agreement of counsel, Anna Webster was qualified as “an expert in the field of psychology with particular expertise in diagnosing psychological functioning and conducting psychological assessments”: Exhibit 8.

[30] Anna Webster testified by video. Her evidence about the mother included the following:

- “...most of [the mother’s] cognitive abilities are significantly below the level expected for her age. However, it was noted that although [the mother’s] intellectual functioning was in the Extremely Low range (1st percentile; Extremely Low range), qualitatively, she demonstrated practical reasoning and adaptive functioning levels that were better than expected given her low performance on cognitive testing”.
- The mother “lacks an understanding of typical infant development and needs”; “struggles to divide her attention between caring for both of her children at the same time and balancing their needs”; and “presents as having a great deal of difficulty setting boundaries in romantic relationships”.
- These areas of risk would need to be addressed “as they could result in significant ongoing protection concerns for [the mother’s] children”.

7.0 ISSUE 1: ARE THE CHILDREN STILL IN NEED OF PROTECTIVE SERVICES?

7.1 The Minister's Main Areas of Concern

[31] In the Minister's Agency Plan for the Children's Care dated February 2, 2023, the Minister identified the following child protection concerns:

1. Risk of physical harm- inadequate parenting skills.
2. Physical neglect- food, clothing, shelter.
3. Emotional neglect- lack of affection and/or cognitive stimulation.
4. Medical neglect- not seeking medical care nor following through.

[32] In the Minister's post-trial written submissions, the Minister concedes that the concerns of physical neglect (food, clothing, shelter) have now been mitigated and that the mother's home is clean and tidy with appropriate food for the children. I agree so will go on to discuss the Minister's remaining three concerns. I will, however, change the order and discuss the Minister's concerns about emotional neglect first because I do not find that ground to be substantiated.

7.2 Unsubstantiated Concern of the Minister - Emotional Neglect

[33] As outlined in the definitions section of the *CFSA*, "neglect" must be the "chronic and serious failure" to provide for a child's needs: subsection 3(1)(p).

[34] The Minister asserts that the children would remain in need of protective services if returned to the mother's care due to a substantial risk of emotional neglect caused by her alleged lack of affection and/or cognitive stimulation for the children. The Minister relies heavily on the evidence of Anna Webster in support of this concern. The Minister states the following in their post-trial written submissions:

- Anna Webster's testimony gives context around the importance of children receiving stimulation and physical nurturing. Anna Webster explained that when the brain needs to work harder to understand, then the ability to nurture becomes difficult.

- Anna Webster spoke about the effects children can experience as a result of lack of nurturing and stimulation which include developmental delays and children becoming either very fussy or not crying. Anna Webster explained that children with lack of nurturing and stimulation have difficulties forming relationships in the future as well as possible involvement in criminal activity.
- When asked, in her expert opinion, if [T] caught up developmentally what does that mean, Anna Webster responded unequivocally “it was neglect”.
- It is acknowledged that affection and cognitive stimulation are vital to the development of children as confirmed by Anna Webster.

[35] In the mother’s post-trial submissions, her counsel asserts that, despite the appropriate scope of Anna Webster’s expertise being agreed to by counsel in advance of the trial, Anna Webster’s evidence frequently strayed outside this scope. The mother therefore asks me to disregard the portions of Anna Webster’s evidence for which she asserts that Anna Webster was not qualified to give. This would include Anna Webster’s opinion evidence that T’s deficits were caused by neglect by the mother.

[36] The Minister did not address this objection in their post-trial written submissions. I therefore gave the Minister’s counsel the opportunity to do so orally during the appearance of December 14, 2023. The Minister’s counsel’s position is that all of Anna Webster’s opinion evidence fell within the scope of her agreed upon area of expertise and should be accepted by me.

[37] In *The Canadian Civil Liberties Association v. Nova Scotia (Attorney General)*, 2022 NSCA 64, Justice Beveridge succinctly summarized trial judges’ roles as gatekeepers of expert evidence as follows:

[6] Trial judges are to act as the gatekeepers with respect to expert opinion evidence. There are two steps that could preclude admission. At the first step, the judge must be satisfied the evidence is necessary, relevant, does not offend an exclusionary rule, and the expert is properly qualified to offer the opinion (*White Burgess* at para. 23). The second engages a cost-benefit analysis (*White Burgess* at para. 24).

[7] As part of the inquiry whether the proposed expert is properly qualified, the judge must be satisfied the expert is independent and impartial (*White Burgess* at paras. 45 and 53). The issue of independence and impartiality can also play a role at the second step (*White Burgess* at para. 54).

[38] Similarly, in *Nova Scotia (Community Services) v. J.M.*, 2018 NSSC 31, our Court of Appeal summarized the approach with respect to admissibility of expert evidence as outlined by the Supreme Court of Canada in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 as follows:

[17] ...Current law trends toward an emphasis on the gatekeeper stage of the analysis and a general tendency to tighten admissibility requirements...

[18] The **White Burgess** two-stage admissibility framework was summarized as follows in **R v Abbey** (No 2), *supra*, at para 48:

48 The test may be summarized as follows: Expert evidence is admissible when:

(1) It meets the threshold requirements of admissibility, which are:

a. The evidence must be logically relevant;
b. The evidence must be necessary to assist the trier of fact;
c. The evidence must not be subject to any other exclusionary rule;
d. The expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfil the expert's duty to the court to provide evidence that is:

i. Impartial,
ii. Independent, and
iii. Unbiased.

e. For opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose, and

(2) The trial judge, in a gatekeeper role, determines that the benefits of admitting the evidence outweigh its potential risks, considering such factors as:

- a. Legal relevance,
- b. Necessity,
- c. Reliability, and
- d. Absence of bias.

49 In short, if the proposed expert evidence does not meet the threshold requirements for admissibility it is excluded. If it does meet the threshold requirements, the trial judge then has a gatekeeper function. The trial judge must be satisfied that the benefits of admitting the evidence outweigh the costs of its admission. If the trial judge is so satisfied then the expert evidence may be admitted; if the trial judge is not so satisfied the evidence will be excluded even though it has met the threshold requirements.

[39] I do not propose to delve into a detailed examination of all the expert evidence offered by Anna Webster. I have considered all her evidence when deciding what evidence to admit and what weight to give to her admissible evidence. I will state, however, that I agree with the mother's counsel that, in some instances, Anna Webster offered opinion evidence on matters which went beyond her agreed upon scope of expertise and gave evidence which I ultimately conclude should not be admissible or entitled to any weight. I provide the following examples and reasons in support of my conclusion:

- I qualified Anna Webster by written agreement of the parties as an "expert in the field of psychology with particular expertise in diagnosing functioning and conducting psychological assessments" [Exhibit 8]. While I accept that this qualification entitled her to give opinion evidence on the mother's level of cognitive functioning from a psychological perspective, it did not open the door for her to give broad encompassing opinions on issues beyond the scope of her agreed upon scope of expertise. For example, it did not qualify her to give opinions on general issues of healthy child development or to give opinion evidence that the cause of any development delay by T while in the mother's care was unequivocally due to neglect by the mother.

- Anna Webster is a psychologist, not a medical expert such as a pediatrician who may be qualified to give opinions on whether any developmental delay with T was caused by neglect. Not only did the Minister never seek to have Anna Webster qualified to give this sort of opinion, but it is noteworthy to me that Ms. Webster opined on the cause of T's developmental delay being neglect by the mother without ever having observed T during the relevant time. Indeed, she did no assessment whatsoever on either of the children and did not see or speak to them on a single occasion.
- Even if I had concluded that Anna Webster's opinions on the above subjects met the initial requirement of threshold reliability, I would exercise my discretion as part of my overall gatekeeping role to exclude this evidence on the basis that it was not necessary or reliable and Anna Webster's oral opinion evidence was not contained in her assessment report but was first given orally during the trial. Her opinions had not been previously provided to the mother or her counsel. Thus, given all these circumstances, I conclude that the overall prejudicial value of allowing this evidence outweighs any probative value or benefits from admitting same.

[40] The Minister also relies on the evidence of the family support worker, Roxann LaPierre, and case aide, Shannon LaPierre, in support of the ongoing concerns about emotional neglect. For example, in their post-trial written submissions the Minister states:

- “Roxann LaPierre testified that she spent a lot of time encouraging [the mother] to show affection to her children, such as greeting them with hugs and kisses. There was an access visit Shannon LaPierre supervised and she noted [the mother] hugged and kissed her children when they arrived. As it was not the norm for [the mother], Shannon LaPierre mentioned it to Roxann LaPierre who confirmed she was working on affection with [the mother].”
- “Shannon LaPierre testified affection by [the mother] towards her children was short lived as the hugs and kisses did not continue. This was confirmed by Laura Couturier who described [T] now as a “cuddle bug”.

- “Roxann LaPierre as well as Shannon LaPierre encouraged [the mother] to verbally communicate with her children, such as naming the colours of toy and objects.”
- “Shannon LaPierre testified she was attempting to show [the mother] how to interact with [T] by pointing to her own ears, eyes and nose and saying the identifying word. While doing so, she observed [the mother] standing behind [T] pointing to her own parts of her face saying what they were.”

[41] The Minister appears to be extrapolating from this evidence that the mother was guilty of emotionally neglecting the children. With respect, I am not willing to make that same inferential leap. I fully acknowledge that family support workers and case aides perform very important roles working with parents and children in child protection cases. They do not, however, have the level of training or expertise that social workers do. Absent being properly qualified, they are not experts in child development or experts on what constitutes emotional neglect.

[42] Here, the only individuals put forward to be qualified as experts by the Minister were Anna Webster, registered psychologist, and Amanda Fitzpatrick, occupational therapist. Neither Roxann LaPierre or Shannon LaPierre was sought to be qualified by the Minister as an expert in child development nor were they qualified as an expert on the necessary level of “affection or cognitive stimulation” parents need to provide to their children. Furthermore, they were not qualified to give expert opinion on when any such alleged lack of affection or cognitive stimulation by the mother rose to the level of a “chronic and serious failure” which would constitute neglect.

[43] Parents may show their affection to their children in different ways. Some may be more demonstrably affectionate with their children than others. This does not mean that a parent, who may not be as demonstrably affectionate as another parent, is automatically guilty of emotional neglect. This is particularly so when the parent, as the mother was in this case, was being judged on her level of affection and cognitive stimulation in the somewhat artificial context of how she demonstrated these qualities while being under the microscopic scrutiny of Agency employees during visits with the children. Suffice it to say, judging or drawing conclusions on how a parent would behave naturally towards their children based on observations of how that parent acted with their children in a very unnatural

setting while being carefully watched and assessed on their every action, should be done cautiously.

[44] In all these circumstances, I am not prepared to conclude, as the Minister has, that the mother's level of affection and cognitive affection constitutes emotional neglect based on the evidence of Roxann LaPierre or Shannon LaPierre. I also note that when testifying, neither of those individuals used the words "emotional neglect" when describing the mother's interaction with the children.

[45] As made clear by the definition in the *CFSA*, there must be a "chronic and serious failure" in order to establish neglect. Here, the Minister has failed to satisfy me based on the evidence that the concern with respect to emotional neglect has been substantiated. Indeed, I note that while the Minister has focused on certain evidence in their post-trial submissions, there was other evidence given during the trial which included the following:

- Roxann LaPierre confirmed on cross-examination that the mother had a strong bond with B and agreed that it was possible that the mother was bonded with both children.
- Primary social worker Laura Couturier confirmed that the mother loved both her children and was attached to both but was more attached to B. She agreed that this could simply be because the mother had more time to bond with B given that T was removed from her care at ten months.
- In Anna Webster's psychological assessment report, she provided an overview of the history of the mother's involvement with the Agency and noted that an extensive investigation revealed that the mother had numerous service providers including social workers at the IWK and school staff. Anna Webster noted, "All parties acknowledged that both [B] and [the mother] have significant developmental delays, however they all also consistently noted that [the mother] was a loving parent..." [Exhibit 2, Page 11, Emphasis added].
- Witnesses from both the Minister and the mother consistently confirmed that the mother clearly loves her children. For example, oral evidence given on the stand from the two primary social workers, Laura Couturier

and Allison Muise, included that they saw one of the mother's strengths being her clear love for her children and that the mother cares deeply for the children.

[46] Thus, if this case turned solely on the Minister's concerns about the children being at a substantial risk of emotional harm if returned to the mother's care, I would dismiss the Minister's application for permanent care because the Minister has failed to substantiate this ground based on the evidence. However, as I will go on to address now, the Minister has met the burden of establishing the remaining two grounds under which they allege the children remain in need of protective services.

7.3 Substantiated Concerns of the Minister

- **Risk of Physical Harm – Inadequate parenting skills; and**
- **Medical Neglect – Not seeking medical care nor following through**

[47] The Minister asserts that the children would remain at a substantial risk of physical harm and medical neglect if returned to the mother's care. The Minister claims that the mother has inadequate parenting skills to protect the children from physical harm and has demonstrated the inability to seek timely medical care for them or follow through with medical advice. The mother disagrees and says that the evidence does not support that the children would be at risk of physical harm or medical neglect if returned to her care.

[48] In analyzing whether the children would remain at a substantial risk of harm if returned to the mother's care, it is useful to first review the reasons why they were originally removed from the mother's care.

[49] With respect to B, the Minister points out the following:

- On September 9, 2021, intake social worker, Nicole Warren met B at her home with the mother and T. Nicole Warren noted that B was unkept, hair was greasy, with a large patch of cut hair on the top of her head.

- Seven days later when Nicole Warren met B at her school she noted that B appeared “very disheveled and unclean” with her hair “extremely matted and full of dirt and debris”.
- B’s appearance, as noted by Nicole Warren, was consistent with the testimony of both Laura Couturier and Allison Muise as they both were present at the Agency office on September 17, 2021, when the children were taken to the Agency office after being removed from the mother’s care.
- After B was taken into care, concerns were noted about the condition of her oral hygiene. In May 2022, B had dental surgery which required multiple primary teeth extracted and caps placed on several of her permanent molars. Laura Couturier, Allison Muise, and child-in-care social worker, Cheryl Osmond, confirmed B had cavities in every tooth when taken in care.
- Dr. Shannon Fitzpatrick, pediatric dentist, IWK Health Centre, noted in his letter dated June 16, 2023, that on the day of surgery, May 20, 2022, B’s “oral hygiene was fair, but it was suspected in the past oral hygiene had been quite poor as the patient’s dentition exhibited severe decalcification, especially in the posterior areas. It was noted on the patient’s first permanent molars that caries occurred circumferentially with decalcification and in many cases these teeth required stainless steel crowns”.

[50] With respect to T, the Minister points out the following:

- Intake worker, Nicole Warren, noted on September 17, 2021, that T, ten months old at the time, was unable to sit unassisted, nor could put any weight on her legs.
- Due to concerns around T’s presentation, Nicole Warren immediately attended the Emergency Department of the IWK on September 17, 2021, at which time T was diagnosed and treated for croup.
- Because IWK staff expressed concern about possible developmental delays, T was referred to a pediatrician.

- As noted in the affidavit of Laura Couturier, sworn on November 16, 2021, Nicole Warren took T to an appointment with Dr. Morley, pediatrician, on September 27, 2021. Dr. Morley noted that T was bright, attentive, and although appeared to be attempting, she was unable to roll over, sit unassisted, nor bear weight on her legs. Despite being ten months old, Dr. Morley assessed T to be approximately four to five months developmentally.

[51] After the children were removed from the mother's care, various services were put in place for the mother to try to mitigate the child protection concerns. Besides the social workers, some of the individuals who worked with her included the following:

- Anna Webster who, as noted earlier, conducted a psychological assessment of the mother and made a number of recommendations for her in a report dated January 24, 2022.
- As recommended by Anna Webster, an occupational therapist, Amanda Fitzpatrick, was retained by the Minister to work with the mother on parenting skills. She met with the mother weekly from August 2022 to January 2023. She was qualified by consent as “an expert in the field of occupational therapy, with particular expertise in assessing parenting skills functioning”: Exhibit 8.
- Family support worker, Roxann LaPierre, and case aide, Shannon LaPierre.
- Liz Ferrell, supportive counsellor through Veith House, became involved through the mother's efforts. In collaboration with the long-term social worker, Laura Couturier, it was agreed that Ms. Ferrell's focus with the mother would be on the topic of healthy relationships with the goal of addressing the mother's past problematic romantic partners. Ms. Ferrell testified that she had completed approximately thirty-five counselling sessions with the mother since they began working together on September 19, 2022. Ms. Ferrell confirmed that she and the mother have covered a variety of subject matter during their counselling sessions together,

including healthy relationships, conflict resolution, emotional literacy, and building upon the mother's social network.

- Liz Harrop-Archibald Ms. Harrop-Archibald was the mother's Parenting Journey Home Visitor and worked with the mother through the Parents and Children Together (PACT) Resource Center since May of 2022. Ms. Harrop-Archibald confirmed that the mother has been connected with the Parenting Journey Program through PACT since November of 2021 and had worked with another person before Ms. Harrop-Archibald took over in May 2022.
- Ms. Harrop-Archibald testified that she had completed 43 home visits with the mother as of June 20, 2023. She also testified that the work done through the Parenting Journey Early Home Visitor Program is directed by the client. Therefore, the mother was able to determine areas of concern that she wished to gain instruction on, with help from Ms. Harrop-Archibald and consultation with the Agency social worker. Ms. Harrop-Archibald testified that she has worked with the mother on various topics including healthy relationships, age-appropriate activities, developmental stages, safety, bonding, preparing for court, and accessing resources.

[52] In the mother's post-trial submissions, her counsel states she "would concede that the Agency has met its statutory duty to take reasonable measures to provide services promoting the integrity of the family." I agree. I commend the Agency for all their efforts in putting in services for the mother and the children. I also commend the mother for searching out and obtaining additional community-based services.

[53] In the Minister's post-trial submissions, the Minister's counsel concedes that the mother actively participated in all services requested of her. Again, I agree. The Minister's counsel then says that despite the mother's active participation in services, the mother has not mitigated the child protection concerns. Regrettably, I must agree when it comes to the ongoing concerns of substantial risk of physical harm and medical neglect.

[54] In coming to this conclusion, I acknowledge that there were consistently very positive reports about the mother's level of engagement from all the

professionals who worked with her. I also generally accept the evidence of the professionals about the progress made in addressing some of the concerns by the Minister (e.g. Liz Ferrell testified about the significant improvement made by the mother in her ability to distinguish between healthy and unhealthy relationships, Amanda Fitzpatrick testified about the significant progress the mother made in all goal areas of the occupational therapy sessions, etc.). However, most of that evidence was given from professionals who had no or very limited opportunity to observe the mother in a hands-on parenting role with the children. That evidence must be appropriately balanced against the evidence from the professionals who had significantly more direct opportunity to observe the mother in a hands-on parenting role with the children. Indeed, the child-in-care worker, Cheryl Osmond, family support worker, Roxann LaPierre, case aide, Shannon LaPierre, and former long-term social workers, Laura Couturier and Allison Muise, have all known and observed the children throughout the last two years of this proceeding. Most of those individuals have also directly observed the mother in a parenting role with the children on multiple occasions. They all expressed significant concerns about the mother not being able to consistently meet the physical and medical needs of the children.

[55] The mother was very honest and forthright when giving her evidence. Unfortunately, the evidence, including the mother's own evidence, clearly demonstrates that she lacks insight into some of the children's needs or lacks the capacity to consistently meet those needs. Returning the children to her care now would place them at a substantial risk of physical and medical neglect. I could give several examples but highlight the following:

- When asked by her counsel as to the reasons the children were taken into care, the mother stated B “was a little bit dirty” and indicated B had some hair missing from her head and some problems with her teeth. The mother stated she didn't think that B was “that dirty” and acknowledged missing “a day or two” of teeth brushing and having never taken B to a dentist. As noted, B had cavities in every tooth and required extensive surgery after being taken into care.
- Despite the significant concerns expressed by the pediatrician about T being significantly developmentally delayed when taken into care on September 17, 2021, the mother stated that, “I think she was fine” and

believed that T was getting stronger and did not see any problems. The mother also testified that she thought she “was doing everything right” and if she had any problems with T, she would ask for help. She testified, “I feel [T] had no delays at the moment when she was in my care. She was a tiny baby brand new” and “I had no feeling something was off with [T]”.

- B needs to consistently wear braces in order to prevent toe-walking which can negatively impact on her spine. Despite medical professionals, as far back as 2018, expressing concerns about the mother’s level of compliance with ensuring that B consistently wears her leg braces, the evidence suggests that the mother has not consistently ensured B wears her braces or understand the need for same. She continues to ask social workers and others about B’s ongoing need to wear braces despite this issue being extensively discussed with her for many months or, in some cases, years by social workers and medical professionals.
- In response to questioning by me, the mother agreed she would rely upon “mother’s instinct” to know when the children required attention. She explained that “mother’s instinct” was a feeling she could feel inside of her and that, when the children were taken into care, she felt “mother’s instinct” strongly with B but not as much with T. She said that if something was wrong with her children, she would get a gut feeling about it inside her body and would take the children to the doctor. Despite this, it is clear from the medical evidence that both children had serious issues when taken into care which required immediate medical attention which were not being addressed while in the mother’s care.
- When asked by her counsel on what besides “mother’s instinct” she would rely upon to ensure the children’s needs would be met if returned to her care, the mother stated that if something was wrong “I might get the feeling but when [B] is old [B] should be able to tell me what is wrong with her”. She then added, “[B] should be able to tell me what is wrong with her”. With respect to T, the mother stated that T is almost three and she could feel around T’s body or ask if her tummy hurts pointing to her tummy. The mother added, “[T] might be harder to read but I would do my best”.

While I have no doubt that the mother would do her very best if the children were returned to her care, relying on the children to self-report their needs to her simply isn't reasonable. Both children cannot self-protect or appropriately articulate their needs. B has difficulty communicating and has a significant intellectual disability. She currently functions at a four to five-year-old level with little likelihood of progressing past a five to six-year-old range. T is only three years old and cannot be expected to fully communicate her needs.

- As testified by Anna Webster, given the mother's identified cognitive limitations, she can do "parts of parenting" quite well if she operates on a script. However, as testified to by Agency witnesses who had the most opportunity to directly observe the mother in a hands-on parenting role with the children, the mother consistently was unable to incorporate and apply the concepts taught to her and required constant prompting. Furthermore, parenting does not operate on a script and requires the ability to adapt to unknown and unforeseen situations. The mother simply has not demonstrated the ability to do this. Combined with the history which led to the children being taken into care, the Minister has satisfied me that if the children were now returned to the mother's care, they would be exposed to a substantial risk of physical harm and medical neglect. This risk exists because, despite the significant services which have been put in place for the mother (e.g. family support, parenting journey visitor program, occupational therapy, counselling, etc.), she still is unable to meaningfully recognize the significant concerns which resulted in the children being removed from her care. She also does not have the capacity to consistently identify, understand and meet the children's needs in a way which would protect them from being at a substantial risk of harm of physical harm and medical neglect if returned to her care.
- While the mother has provided me with evidence about her proposed plan of care should the children be returned to her care, when I carefully consider and evaluate that plan, I conclude that it would not sufficiently mitigate the risk of substantial harm to the children. I will address this more fully later in my decision.

[56] The Minister has met the burden of establishing that the children would be at a substantial risk of physical harm and medical neglect if now returned to the mother's care.

8.0 ISSUE 2: WHAT ORDER IS IN THE CHILDREN'S BEST INTERESTS?

[57] In the Minister's post-trial submissions, it states, "If the Minister of Community Services establishes there is a real chance of harm, the question becomes purely one of the children's best interests, as between being placed in the Minister of Community Services' care and being returned to [the mother] *via* dismissal." I agree. As outlined by the Supreme Court of Canada in *Catholic Children's Aid Society of Metropolitan Toronto v. MC*, [1994] 2 S.C.R. 165, a two-stage analysis must be done. The first consideration is whether the children remain in need of protection and the second consideration is their overall best interests: paras. 37-38.

[58] Thus, now that I have concluded that B and T would remain in need of protective services if returned to the mother's care, I must still consider what order is in their overall best interests,

[59] The Minister asserts that the plan for permanent care and custody is in the children's best interests. In the mother's post-trial submissions, her counsel says, "[The mother] would also concede that if the Court determines the children remain in need of protective services, the only available option that would be in the best interests of the children would be to make an order for Agency permanent care and custody". The mother's counsel confirmed this position again during the appearance of December 14, 2023.

[60] Given that I have found that the children would remain in need of protective services if now returned to the mother's care, and the mother's concession on the best interests element, it may be unnecessary for me to do a detailed comparison of the Minister's plan for permanent care and custody versus the mother's plan when determining what order is ultimately in the children's best interests. However, for the sake of completeness, I will go on to address this nevertheless.

8.1 The Minister's Plan

[61] The Minister says it is in the children's best interests to be placed in the Minister's permanent care and custody.

[62] Somewhat unusually, the Minister chose to introduce evidence during the trial about the long-term plans for the children should permanent care be ordered. At my request, both counsel for the Minister and for the mother confirmed that when deciding whether to place the children in the Minister's permanent care and custody, I do not have the ability to order the possible long-term plans of the Minister. However, given that this evidence was introduced by the Minister, and there was considerable questioning in relation to same, I will outline what I understand the Minister's long-term plans for the children are.

[63] The Minister seeks to have the children adopted together in the same home but recognizes that, given B's significant needs and age difference compared to T, that may not be possible. Thus, long-term workers, Laura Couturier and Allison Muise, and child-in-care worker, Cheryl Osmond, testified about the Minister's long-term plan for the children as follows:

- The Minister's mandate would be to try to place B and T together and every effort would be made to ensure this happened.
- If this was not possible, an exception to this policy would have to be sought to have the siblings adopted into separate homes. This would involve discussions about ensuring ongoing contact between the siblings for which the Agency would advocate.
- The Minister would also advocate for the mother to be able to maintain contact with the children.
- B's former educational program assistant (EPA) worker through her school, who I will refer to as "Ms. S", has indicated a willingness to adopt B. Ms. S was B's EPA in 2021/2022 and currently provides respite care to B's foster parent such that B spends most weekends in Ms. S's home. Ms. S has another child about the same age as B who also has special needs and functions at a similar chronological level. The son and B play and attended the Special Olympics together.

- Ms. S advised that if she were allowed to adopt B, she would want the mother to remain part of the family as well and would support B having an ongoing relationship with the mother.
- While Ms. S is interested in adopting B, she is unable to also adopt T but would support B maintaining contact with T.

[64] In the Minister's post-trial submissions, the Minister's counsel states, "...the Court can not order access post permanent care and custody. Counsel for [the mother] will be provided with a letter confirming the Minister of Community Services' commitment to encourage and strongly advocate for ongoing contact between [the mother] and her children with any potential adoptive home or homes". This commitment was again confirmed by the Minister's counsel orally on December 14, 2023.

8.2 The Mother's Plan

[65] In seeking the children to be returned to her care on the basis that they would no longer be at any substantial risk of harm, the mother's counsel raises various arguments, including the following, in the mother's post-trial submissions:

- Since the children were apprehended, the mother has independently arranged a supportive counsellor through Veith House, accessed food banks, set up funding for respite care, registered B for school, and has added T to the waitlist for two separate daycares. She has also connected with a dentist for the children and has been consistently engaged in the Parenting Journey Program.
- The mother has demonstrated herself to be resourceful be able to problem solve and will reach out for support when she identifies issues.
- The mother now has access to service providers who are able to support her and her children if they move forward as a family. Ms. Ferrell and Ms. Harrop-Archibald have both indicated that their work with the mother remains ongoing, and that they intend to continue supporting her regardless of whether the children are returned to her care. Ms. Harrop-Archibald noted

that if the children are returned to the mother's care, she can continue to help the mother to identify and address areas of improvement in her parenting.

- In addition to participating in extensive services, the mother has eliminated the safety concerns from her home which gave rise to the original Agency involvement. This included her independently taking steps to have T's biological father removed from her and her children's life, which had occurred even prior to the Agency's intervention. Furthermore, the mother has demonstrated an ability to avoid similar situations from arising in the future. She has gained a greater understanding of the needs of her children and how to fulfill those needs. Perhaps most importantly, she has developed a web of support through this process that she will be able to access for support in parenting her children on an ongoing basis.

8.3 Conclusion on Best Interests

[66] I have considered the evidence, the law including the purposes of the *CFSA* and the best interests factors outlined in subsection 3(2) of the *CFSA* and the submissions of the parties. I conclude that it is in both children's best interests to be placed in the Minister's permanent care and custody. I come to this conclusion for various reasons, including but not limited to, the following:

- Both children have shown significant improvement since being taken out of the mother's care. The Agency addressed B's immediate medical needs through dental surgery and has put in services and supports to address her ongoing needs. T, while originally diagnosed by the pediatrician as being significantly developmentally delayed has, according to Cheryl Osmond and others, made "incredible gains" and is now caught up developmentally with the exception of having slightly delayed speech. When long-term worker Allison Muise last saw T, she described her as being lively, energetic, and meeting all her development milestones. Services have been put in place to address T's ongoing needs.

It is not in the children's best interests to see the significant gains which have been realized since they have been placed in the Minister's care, be potentially lost or diminished by again placing them in the mother's care

given that I have already concluded that they would be at a substantial risk of physical harm and medical neglect if this was to happen.

- Both B and T operate at the level of a young child. They cannot self-protect or look after their own needs. B's needs will likely only increase as she gets older and progresses through her pre-teen and adolescent years. The evidence suggests she will be almost totally reliant on her caregiver to identify and attend to almost all her needs including basic self-care during her lifetime. While she will become a teenager biologically, she will still function at a four to six-year-old level. Between the mother's own challenges and B's challenges, I regrettably conclude the mother is not capable of consistently meeting the children's needs.
- While the mother has some supports to assist her should the children be returned to her care, she simply doesn't have the necessarily supports to allow her to safely parent either child on a permanent basis. Anna Webster's evidence included that, given the mother's cognitive limitations, she would not be able to safely parent the children on her own and would require another adult to support her full time "on site" twenty-four hours a day, seven days per week. Despite Ms. Ferrell's and Ms. Harrop-Archibald's commendable willingness to continue help the mother should the children be returned to her care, she simply does not have the level of support necessary to allow her to safely parent the children.
- Through no fault of her own or any lack of trying, I conclude that the mother simply doesn't have the necessary level of insight into the children's ongoing needs and how to ensure those needs will be appropriately met. While she dearly loves her children, and desperately wishes to parent them, she simply does not have the necessary skills and capacity to safely and appropriately do so. Her wishes cannot be placed above the children's best interests. B and T are vulnerable and young children. They require significant support and need to be protected from harm. They require caregivers who can consistently ensure that their needs are identified and met on a timely basis. I regrettably conclude that the mother simply cannot do this. I'm satisfied that the Minister's care for permanent care and custody will best ensure the children's needs will be consistently met and is in their overall best interests.

9.0 CONCLUSION

[67] The Minister has met the burden of satisfying me that B and T would be in need of protective services if returned to the mother's care and that it is in their best interests that they be placed in the Minister's permanent care and custody. Circumstances have not changed to mitigate the substantial risk of harm and less intrusive alternatives, including services to promote the integrity of the family, have been tried and have failed to address the child protection concerns which still exist.

[68] I know this is not the outcome the mother wanted. She dearly loves her children. I know she strongly desires the chance to parent the children and accept that she genuinely believes that she can safely do so. To her credit, she has faced several personal challenges and has been able to overcome many of them. I commend her for all of this. However, despite the positive views I may have of the mother as an individual, it is the children's best interests, as opposed to the mother's best interests, which must be paramount. The child-centered focus of child protection cases means that the best interests of children trumps the wishes and interests of the parents: *New Brunswick (Minister of Health and Community Services) v. C.(G.C.)*, [1988] 1 S.C.R. 1073, paragraph 14.

[69] This proceeding has gone on for close to 28 months. The children have been in the Minister's care for the entirety of this time. B was eight years old when he was placed in temporary care and is now almost eleven years old. T was only ten months old when placed in temporary care and is now three years old. Their lives and futures have been placed on hold while the mother has been given time to try to address the issues which led to them being taken into care. Sufficient progress has not been made and the children's futures cannot wait any longer. Their best interests require permanent placements with people who not only will love them but will also protect them from any substantial risk of harm. They deserve stability and certainty after a lengthy period of turmoil. Thus, the children's best interests require me to now place them in the Minister's permanent care and custody.

[70] Finally, while I cannot order this, I sincerely hope that, as the Minister suggested it will advocate for, that the mother may be able to remain a part of the children's lives, particularly B's, should B be adopted by Ms. S. I also trust that, as

the Minister indicated in their written post-trial submissions, and confirmed by the Minister's counsel on December 14, 2023, that the mother's counsel will be provided with a letter confirming the Minister's commitment to encourage and strongly advocate for ongoing contact between the mother and the children with any potential adoptive home or homes.

[71] I direct that the Minister's counsel prepare the appropriate form of Order reflecting my decision.

Jesudason, J.