SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Nova Scotia (Community Services) v. A.M., 2013 NSSC 414

Date: 20131212
Docket: File No. 84382
Registry: Sydney

Between:

Minister of Community Services

Applicant

v.

A.M. and J.W.

Respondents

Editorial Notice

Identifying information has been removed from this electronic version of this judgment.

Judge: The Honourable Justice Kenneth C. Haley

Heard: October 15, 2013 and October 17, 2013, in Sydney, Nova Scotia

Counsel: Mr. Adam Neal, for the Minister
Mr. William Meehan, for the Respondent, J. W.
Ms. A. M., Respondent, self represented

By the Court:

[1] This is the Application of the Minister of Community Services, hereinafter call "The Minister", seeking an order pursuant to s. 42 (1) (f) of the *Children and Family Services Act* , that the child E., born January [...], 2013 be placed in the permanent care of the Minister with no provision for access.

[2] The "Respondents", A. M. and J. W. are the biological parents of the child. They oppose the Application seeking return of the child to their care.

[3] The history of the file is as follows:

> **- January [...], 2013:**
>
> - The child E. was taken into care by the Minister at birth;
>
> - The initial reason that the child was taken into care was as a result of outstanding criminal charges laid against the Respondent J. W. with respect to sexual assault offences on third party children;
>
> Also there was referral information that the Respondent, J. W. had sexually abused his own twin daughters, J(1) and J.(2) in 2011 which resulted in a Permanent Care Order with no provision for access being granted by Justice Darryl Wilson on October 3, 2012. (See: **Nova Scotia (Community Services) v.**

A.M. and J.W., 2012 NSSC 343 with the Respondents' appeal dismissed **A.M. & J.W. v Minister of Community Services**, 2013 NSCA 29)

- January 15, 2013:

- S. 39, 5 day Interim Hearing;

- Based upon reasonable and probably grounds the child, E., was placed in the temporary care of the Minister - with supervised access afforded to Respondent, A.M. only.

- February 11, 2013:

- Completion of s. 39 Interim Hearing adjourned to await the pending Nova Scotia Court of Appeal decision referenced above . This was done with the consent of the parties who agreed it was in the best interest of E. to await the appeal decision.

- March 26, 2013

-Completion of the s. 39 Interim Hearing;

-The child, E., was ordered to remain in the temporary care of the Minister.

- April 8, 2013

- Pretrial hearing to schedule dates for a contested protection hearing pursuant to s. 40 of the *Act*.

-The assigned dates were April 24th and 26th, 2013 with the Interim Temporary Care Order to remain in place until that time.

- April 24, 2013:

- Counsel for Respondent A. M. requested to and was permitted to withdraw as Solicitor of Record;

- As a result both the Minister and the Respondent jointly requested an adjournment to prepare for the Protection Hearing scheduled for June 6th and 7th, 2013;

- The Minister also requested time for the Court to hear an Application pursuant to s. 96 of the *Act* to enter evidence from the previous protection proceeding. This was initially scheduled for May 10th, 2013 but did not proceed until May 29th, 2013;

- The Interim Temporary Care Order was extended, by consent, to address the scheduling of these matters.

- May 29, 2013:

- The Minister's S. 96 Application to tender evidence from previous protection proceeding resulting in the October 3rd, 2012 decision of Justice Darryl Wilson was granted by this Court.

- June 7, 2013:

- The Respondent, A. M. and J. W., consented to a Protection Order pursuant to s. 40 of the *Act* and agreed to take services offered by the Minister;

- The Court thus found that on a balance of probabilities, the child E. was in need of protective services pursuant to s. 22 (2) (b) of the *Act*;

- The child, E. thus remained in the temporary care of the Minister;

- The matter was adjourned to September 18th and 19th , 2013 for a contested Disposition Hearing with a Pre- trial scheduled for July 11, 2013;

- July 11, 2013:

- The Minister advised of its' intention to seek a Permanent Care Order at the first Disposition Hearing;

- The Minister indicated that the Respondents were still presenting as a couple and that nothing had changed since the issuance of Justice Wilson's order. As a result they no longer would provide services to A. M. And J. W.;

- Ongoing efforts remained in effect to obtain counsel for A.M.

-September 18, 2013:

- Contested Disposition Hearing adjourned to October 15th and 17th, 2013 with consent of counsel;

- The child, E., remained in the temporary care of the Minister.

[4] On October 15, 2013 the Minister put forth the following evidence and witnesses:

1. The transcript of evidence heard by Justice Darryl Wilson on March 24, April 4, 18, May 30, June 16, July 15, September 26, October 4, 14, December 7, 2011, February 22, May 16, 30, September 20, 21, 2012 in relation to the protection proceeding involving the Respondent's twin daughters, J(1) and J(2) which resulted in an Order of Permanent Care with no provision for access by Justice Darryl Wilson dated October 3, 2012.

- This evidence was marked Exhibit #1 and was admitted by the Court pursuant to the successful s. 96 Application made by the Minister on May 29, 2013 where this Court concluded that such historical evidence of past parenting may be used in assessing present circumstances as it was found to be "germane and relevant" in the determination of future probabilities. Reliance was placed on the decision of Justice Theresa Forgeron in the **Minister of Community Services v N.L. & W.M.** 2011, NSSC 35.

2. Also pursuant to the S. 96 Application by the Minister the Book of Pleadings from the previous Protection Hearing was admitted into evidence and marked Exhibit No. 2.

-This Exhibit included the following:

(a) Protection Application and Notice of Hearing; Affidavit in support, Notice of Taking into care, dated, sworn and filed March 22, 2011.

(b) Supplemental Affidavit of Patricia Bates MacDonald, dated and sworn May 24, 2011 and filed May 25, 2011.

(c) Supplemental Affidavit of Anndelynn MacDougall, dated, sworn and filed July 12, 2011..

(d) Notice of Motion for Disposition Order and Supplemental Affidavit of Nicole Sheppard, together with Affidavit of Service, dated, sworn and filed September 23, 2011.

(e) Notice of Hearing and Supplemental Affidavit of Nicole Sheppard, dated, sworn and filed December 2, 2011.

(f)Notice of Hearing and Supplemental Affidavit of Nicole Sheppard, dated, sworn and filed February 15, 2012.

(g) Notice of Hearing and Affidavit of Nicole Sheppard dated, sworn and filed May 10, 2012.

3. Intake worker, **Nicole Sheppard**, was called to testify and her Notice of Child Protection Application in relation to the child E. born January [...], 2013 and Affidavit dated, sworn and filed January 11, 2013 were entered into evidence and marked Exhibit No. 3.

-This Exhibit included a copy of Justice Darryl Wilson's Permanent Care Decision dated October 3, 2012 and cited as **Minister of (Community Services) v AM & JW** 2012 NSSC 343.

-This witness also testified to the Plan of Care of the Minister which was admitted into evidence and marked Exhibit No. 4.

4. Access Facilitator, **Tracey Pentecost**, was called to testify. Her access notes were admitted into evidence and marked Exhibit No. 5 (a); 5 (b) and 5 (c).

5. Long Term Protection Worker, **Nadine Marr**, was called to testify. In her evidence she confirmed the Minister's Plan of Care to seek permanent care with no provision for access.

6. Temporary Child Care Worker, **Melissa Nearing** was called to testify. She testified the long term plan for the child, E., was adoption.

On October 17, 2013, the following witnesses testified:

7. The Respondent, **J.W.,** was called to testify. He filed with the Court his Affidavit dated, sworn and filed September 13, 2013 which was marked Exhibit No. 6. J.W. requested the Application of the Minister be dismissed.

8. **R. P.** was called to testify by the Respondent, A.M., who continued to represent herself in this proceeding. Ms. P. confirmed the evidence she earlier gave under oath at the protection proceeding heard by Justice Wilson on September 20, 2012, regarding the disclosure made to her by J(1) and J(2).

9. **S. W.** was called to testify by the Respondent A.M. Mrs. W. is the mother of the Respondent J.W. She was supportive of the respondents.

10. Respondent, A.M., elected to testify. She introduced into evidence two Affidavits dated, sworn and filed on May 3, 2013 and September 13, 2013 respectively. These Affidavits were marked Exhibit 7 and 8. In this regard paragraph 38 in Exhibit No. 7 was struck and not admitted into evidence having violated the Rule on Hearsay.

- A.M. requested the Minister's Application be dismissed with the child E. being returned to herself and J. W.

[5] Final written submissions were agreed to be filed with the Court.

MINISTER'S EVIDENCE

[6] The Minister's Plan of Care dated July 4, 2013 is Exhibit No. 4 concisely reflects the concerns and position of the Minister. At part 1 it states:

> 1. Disposition order sought
>
> The Application is seeking an Order pursuant to Section 42 (1) (f) of the *Children and Family Services Act* that the child E., born January [...], 2013, shall be placed in permanent care and custody of the Applicant, the Minister of Community Services with no provision for access with the plan for adoption.
>
> Ms. M. is adamant that she and Mr. W. are remaining in a relationship with her plan being that their child be returned to both of their care. Despite Ms. M.'s twin daughters being ordered into the Permanent Care and Custody of the Minister and the Respondent's appealing this decision with no success, Ms. M. still does not acknowledge that Mr. W. is a risk to children. The Minister has investigated and substantiated two referrals where Mr. W. was charged with sexual offences against children. Ms. M.'s daughter has made statements that Mr. W. has sexually abused her, this young child has exhibited age inappropriate sexualized behaviours with her sister and other same age children. Ms. M.'s children were taken into care for these reasons as it was assessed that she is not acknowledging even a potential risk and therefore would not be able to protect any child in her care. After all of these "red flags" Ms. M's position has not changed and has told counsel that she and Mr. W. will remain together. It is the position of the Minister that no services can be offered to address and alleviate the risk associated with placing a child in Ms. M.'s care.
>
> Mr. W. has had past sexual offences, he has recent sexual offense charges one involving his own daughter. Mr. W. has not accepted any responsibility for the concerns and it is the Minister's position that no services can be offered to Mr. W. to alleviate the risk. Mr. W. is of the position that because these charges were withdrawn in Criminal court that the concern no longer exists. Mr. W.'s charges were withdrawn, he was not tried and found not guilty. It is noteworthy, that the decision to not proceed with charges was based on the best interest of the children (victims) involved. After investigating, the Minister has substantiated that Mr. W. sexually abused his daughters and other children. The Minister would like to

make an Application under S. 66.3 of the *Children and Family Services Act*, to place Mr. W. on the Child abuse Registry.

At page 5 the Minister's plan states:

Ms. M. has supported Mr. W. and does not feel that her children were abused. Ms. M. has made numerous statements denying any possible sexual abuse of her children by Mr. W. Ms. M. is unwilling or unable to see any possibility of any risk to her children. Ms. M has blamed several persons, including the children, her parents, an ex-friend and the Department, for the disclosure. The children were placed in the Minister's Permanent Care and Custody in Fall 2012 after a contested hearing. Ms. M. appealed this decision in February, 2013 and was unsuccessful. The children remain with their maternal grandparents and they are completing the necessary steps to adopt the children.

On January [...], 2013 Ms. M.. gave birth to E. E. was taken into temporary care of the Minister upon her birth and has remained in the same foster home to date. Ms. M. was having scheduled access three times per week which was suspended due to numerous concerns. Access was re-instated in June 2013 to one time per week. The Minister has not been supportive of Mr. W. having access with E. due to her young age, vulnerability and the past substantiated concerns of sexual abuse.

Ms. M. remains in a relationship with Mr. W. and they reside together. Her position remains the same in that she is supportive of Mr. W. and feels that he poses no risk of harm to her children. Ms. M. has been very confrontational when speaking with workers from the Agency to the point where she has used inappropriate name calling to E. about Agency workers and has used vulgar terms.

The Minister has serious concerns with Ms. M's ability to protect a young female child given her past behaviour. The Minister feels that Ms. M. does not have the ability or insight to protect a child in her care from anybody who would be a potential danger. There are also serious concerns with Ms. M.'s anger and her ability to control this anger and her ability to put the needs of a child before her own.

> The Department believes that it is not in this child's best interests to be returned to the care of the Respondents, Ms. M and Mr. W. The Department believes given the available time frames that the child cannot be safely returned to the care of the Respondents given their lack of recognition of the significant concerns that led their children coming into care of the Department. Ms. M. is not acknowledging that her children were ever at risk.

Regarding ongoing services for the Respondents the Plan states at Page 7:

> With Ms. M's position being to remain and co-habitat with Mr. W. the Minister does not believe that there are any services to be offered to reduce the risk adequately enough to safely return a child to her care..
>
> In the previous proceeding the Department has attempted to provide appropriate services to Ms. M., however she has refused to complete such services or to have any contact with Department workers.
>
> The Department is moving towards seeking a permanent care and custody Order of E., as we believe that she cannot be safely returned to the care of the Respondents. It is apparent that Ms. M. will not gain the necessary insight or education as it relates to the risk that Mr. W. poses to the children.

[7] The Minister is of the view that the child E's best interests are served by a Permanent Care Order with no provision for access. At page 8:

> At the present time Ms. M's access was re-instated with E. at a reduced time. Access was suspended in March 2013 due to a number of concerns that Ms. M. was not willing to cooperate with.

> The Department has not been supportive of Mr. W. having any access with the child. This is due to past disclosures made by other children. E. is a female baby with no ability to self protect and the Minister believes that even in a supervised setting access would still place E. at risk.
>
> Given that the Department is seeking a Permanent Care Order of the child E. for the purpose of adoption, access would not be proposed as this would likely delay and perhaps prevent her placement for adoption.

[8] The Minister is of the opinion that the present circumstances that pose risk to E. are unlikely to change within a reasonably foreseeable time. Continuing on Page 8:

> After everything that has taken place in the last number of years, with her two children being placed in the permanent care and custody of the Applicant after a contested hearing, Ms. M's position has remained unchanged.

[9] **Nicole Sheppard** had concerns that A.M. and J. W. would not confirm their pregnancy resulting in the birth of E. As a result a Canada wide Alert was issued by the Minister fearing the Respondents were trying to conceal the pregnancy and may attempt to flee the jurisdiction.

[10] As a result of the Alert the Minister was notified by the local hospital authorities when A.M. and J. W. attended for the birth of E. E. was thus apprehended at birth due to the risk concerns identified.

[11] Ms. Sheppard testified that nothing has changed since the last Permanent Care proceeding as A.M. and J. W. still lack insight into why their twin daughters were placed in permanent care. In her opinion the Respondents continue to fail to acknowledge any risk to E. in light of the dismissal of all criminal charges against J. W.

[12] Ms. Sheppard confirmed in her evidence that A.M. continued to refuse services maintaining that "she had done nothing wrong".

[13] Ms. Sheppard further testified that absent J. W. 's acknowledgement and/or conviction for the alleged sexual relationship with his twin daughters he did not qualify for a treatment referral.

[14] Ms. Sheppard testified that in her opinion the Minister has substantiated the allegations of sexual abuse involving J. W. and his twin daughters J(1) and J(2). She references the written decision of Justice Wilson who concluded at paragraph 65 - 76 as follows:

65 There are too many red flags that suggest the child J (D) has been exposed to sexually inappropriate behaviours and that the mother knew of these concerns and did not take them seriously. I accept the evidence of R. P. that the twins told her in the summer of 2012 that their father "licked their bum" . She immediately reported this disclosure to the mother who replied that "the father does crazy things when he is drinking". The statements were spontaneous statements of the children and the court has no reason to believe that R. P. would fabricate this information. The mother acknowledged to workers of the Minister that R. P. mentioned the children's disclosure soon after it occurred. The grandmother's observation of sexually inappropriate behaviour by J(D) while in their care after apprehension provides credibility to the statement being made as opposed to the mother's belief that the children did not make any statement.

66 The father has a prior conviction for sexual assault albeit against an adult and not a child. The father has been charged with sexual touching and sexual assault with respect to other children. The mother began living with the father knowing he was charged with these offences and knowing that her own children disclosed that the father licked their bum. The mother did not take these risks seriously.

67 The mother has refused services that were agreed to at the Disposition Hearing and which were included as part of a Plan of Care to address Protection risks. There is no indication she benefited from education sessions with Dr. Durdle.

68 The mother has been confrontational rather than cooperative when attempts were made to address issues surrounding the children's safety.

69 The mother has shown more concern for how poorly she has been treated by workers for the Minister, her parents, the access facilitators and others who have reported concerns about the father's behaviour than the distress the children are experiencing as reported by Dr. MacDonald and others.

70 The withdrawal of the criminal charges with respect to the allegations of sexual touching and sexual assault involving J(D) do not risk reduce the substantial risk of sexual harm to the children in the future. The father still faces sexual assault and sexual touching offences in relation to other children. The mother continues to believe the father would never harm the children. She took time during access visits to reintroduce the children to the father and his family

and told them they would soon be returning home. The mother was insensitive to the children's emotional needs. As a result they experienced anxiety after these visits with the need for counselling with a Psychologist.

71 The mother refused to participate in the Parental Capacity Assessment which was ordered by the court. Given the mother's oppositional and confrontational behaviour with workers of the Minister, her parents, access facilitators and others, a parental Capacity Assessment would have assisted the court in determining if she had the capacity and ability to protect the children from harm.

72 The children continue to experience anxiety and engage in inappropriate behaviours when exposed to their parents. Based on the hearsay statement of the children to R. P., the mother's dismissal of these statements and the outstanding criminal charges, the children's acting out behaviours while in the care of the grandparents, the father's outstanding charges of sexual charges of sexual touching in relation to other children, and the mother's refusal of services to promote the integrity of the family, the court finds the children still in need of protective services pursuant to Section 22 (2) (b) and (d) of the CFSA *supra*.

73 The Court is required to make an Order in the children's best interests. I have considered all the relevant factors for determining the child's best interests as set out in Section 3 (2) of the *Children and Family Services Act.* I accept the Minister's Plan of Care for the children to be in their best interests. This plan would mean the children being placed for adoption with the maternal grandparents. This plan would ensure the children have a secure place as a member of a family. The children would be able to continue relationships with relatives. There would be more continuity in their care. The likelihood of disruption of that continuity is greater if they were to return to the care of their mother. The children are bonded to the grandparents who are able to meet all their physical, mental and emotional needs.

74 The risk of harm of returning these children to the care of the Respondents or the mother alone is greater than the risk of them remaining in the care of the Minister and placed for adoption.

75 I find the agency has met the burden of proof. It is in the children's best interest to be placed in a home in which their personal security and physical safety

> are assured. The court is not satisfied that would be available in the home of the Respondents or the mother . Therefore, it is in the children's best interest to be placed in the Permanent Care and Custody of the Minister.
>
> **76** Since a provision for access would impede the Minister's plan for a permanent placement through adoption, which is in the children's best interest, there will be no Order for access.

[15] Ms. Sheppard maintained her position throughout cross-examination that the primary reason for the apprehension of the child, E., was the historical parenting concerns of the Minister.

[16] Ms. Sheppard further confirmed that the historical lack of cooperation of the parties in terms of services was persuasive in the Minister's decision to offer limited services to A.M. and no services to J. W. in the present proceeding.

[17] Ms. Sheppard stated to A.M. during cross -examination:

> We have tried to work with you.

[18] Access Facilitator, **Tracy Pentecost** testified as to her concerns during supervised access by A.M. which included incidents of overfeeding; ranting; eye rolling; talking negatively about the social workers while holding the baby and use

of foul language. These concerns are noted in Exhibit No. 5 (a); 5(b) and 5(c). The Court was referred to the events of October 7, 2013 in Exhibit No. 5 (c) as an "example" of the negative attitude of A.M. The note reads as follows:

> Mom was on time for the visit and asked about the baby's eating schedule and habits. Case Aide indicated the baby was after having her cereal for breakfast and her bottle. Mom got out the toys she brought and sat with the baby on the couch. Baby was babbling and smiling and mom sat the baby on a rocking horse. Mom read the baby several story books to the baby and sat with the baby while trying to hold the baby's rattle and kissed the baby several times. At 10:30 mom fed the baby her bottle and sat quietly for 20 minutes. Mom played peek a boo with a blanket on the baby and had the baby laughing. Social Worker (Nadine Marr) asked to speak with mom after the visit and mom stated she didn't have long to speak. When the worker left Mom stated "I'm sick of playing these games, they better stay out of my business". Mom then went back to playing with the baby. Again Mom stated "Someone that doesn't have kids isn't going to tell me how to raise mine". At 11:00 Mom changed the diaper and tickled the baby and had her smiling. Mom then stated: "I have enough of this E., more ammunition this time for us to use, what they don't know is we haven't decided what to do about your grandfather. He won't do to you what he did to your sisters. We won't stand for it. Do you want to bounce E.?" Mom stood the baby up looking out the window and bounced her in the chair and gave the baby kisses. Mom read two more stories while sitting with the baby on her lap. "I'm tired of all this E." Mom said shaking her head and rolling her eyes several times. Again Mom played peek a boo with the baby and at the end of the visit Mom dressed the baby and kissed her and said it was from daddy.

[19] Ms. Pentecost testified that she facilitated 53 access visits out of 64 possible visits. She noted concerns in 39 of these visits.

[20] During cross-examination Ms. Pentecost confirmed her job was to observe and report back to the caseworker. She did not have any authority to intervene and attempt to correct any of the behaviours of A.M. which caused her concern.

[21] Ms. Pentecost agreed with A.M.'s suggestion that E. seemed hungry when A.M. was feeding her.

[22] Long term Protection worker, **Nadine Marr**, was the next witness to testify on behalf of the Minister. Ms. Marr has had carriage of the file since July 24, 2013.

[23] Ms. Marr testified that the Minister was seeking permanent care at this early stage of the proceedings because there had been no change in circumstances with either of the Respondents. She testified that the fact criminal charges against J. W. did not proceed in no way affected their view about the potential risk to E. In her opinion the allegations of child abuse were substantiated by the Minister regardless of the result in the criminal court.

[24] Ms. Marr testified she was aware the Respondents now wished to take services and participate in a Parental Capacity Assessment. She testified that a Parental Capacity Assessment would not be suitable in this situation where the circumstances have remained unchanged.

[25] Ms. Marr testified she found dealing with A.M. to be "very difficult at times". She testified A.M. often became irate, curses, swears and cuts off the conversation. Recently Ms. Marr noted that A.M. had bruising to her face and attempted to discuss same with A.M. on two occasions.

[26] On the first occasion Ms. Marr testified that A.M. said that she had fallen in the tub. On the second occasion on October 7, 2013 Ms. Marr testified A.M. stated:

> You all think (J W) did this to me. I fell down the stairs

[27] Ms. Marr concluded her direct testimony by stating A.M. believes there would be no threat or risk to E., if E. was returned to the care of A.M. and J. W.

[28] During cross-examination A.M. questioned Ms. Marr why she was concerned about her facial bruising. A.M. asked:

> What business is it of yours about my bruises?

[29] Ms. Marr responded it was part of her investigation and that she was concerned for A.M. about the possibility of an incident of domestic violence.

[30] **Melissa Nearing**, Temporary Child Care Worker, was the final witness to testify on behalf of the Minister. Ms. Nearing has been involved with the file since February, 2013.

[31] Ms. Nearing re-iterated the access concerns about A.M. earlier testified to by Ms. Pentecost.

[32] Ms. Nearing testified that the child, E., is a very healthy nine month old and the long term plan is to have E. placed for adoption. She testified:

> "There is a very high chance to be adopted"

[33] Ms. Marr testified that the current foster placement is not an adoptive option for E. She testified it is in E's best interests to facilitate the adoptive process for E. as quickly as possible. The longer E stays in the foster home the more difficult it becomes for E in terms of increasing attachment to the foster parents.

RESPONDENT J. W.'S EVIDENCE

[34] Respondent J. W. testified relying in part on his Affidavit which was marked as Exhibit No. 6.

[35] J. W.'s position is that the Minister has no basis to continue to deny him access to E since the dismissal of criminal charges against him. The evidence before the Court is that the criminal charges were withdrawn by the Crown and the dismissals were not the result of a trial on the merits.

[36] J. W. testifies that he has been seeing a clinical therapist, namely Ed Burke whom, he testified, was of great assistance to him. J. W. last saw Mr. Burke October 10, 2013. Mr. Burke was not called as a witness to provide any additional information in this regard.

[37] J. W. was critical of the manner by which E was taken into care at the hospital and he is upset about not having been able to spend time with his new infant child.

[38] A. M. asked J. W. on cross-examination whether or not the Minister's workers worked with them as a couple. J. W. replied:

> "Not with me....that's for sure...I am the black sheep"

RESPONDENT A.M.'S EVIDENCE

[39] A.M. called R .P. . R. P. is the person who received the initial disclosure of sexual abuse from the twin daughters J(1) and J(2) during the summer of 2010. She adopted her sworn evidence given at the earlier Permanent Care Hearing on September 20, 2012 before Justice Wilson.

[40] Justice Wilson conducted a Voir Dire Hearing into the admissibility of the children's statement made to J. P. Justice Wilson ruled at page 274 - 275 of the

transcript of evidence (Exhibit No. 1) that the statements were admissible and he was satisfied that the threshold tests of necessity and reliability had been met.

[41] The following is a portion of R. P.'s direct evidence at the September 20, 2012 hearing which is found at page 276 - 278 of Exhibit No. 1:

Mr. Neal:....	Where were the girls when they made the statement to you, and where were you?
A.	At the East Bay Beach
Q.	Okay, and...
A.	Sandbar
Q.	Where on the beach were you and where...?
A.	By the water.
Q.	Okay, and can you describe again what happened?
A.	They just came up to me and told me what they told me.
Q.	Okay, and what did they tell you?

A. The one little blond one told me that Daddy had liked her bum.

Q. Okay, and did the other twin say anything to you at that time?

A. She did, she said that Daddy licked her bum too.

Q. Okay, and did you say anything to the girls after this?

A. I did.

Q. And what did you say?

A. I said that Daddy did a bad thing. And if he ever does anything like that again, you make sure that you tell him no, to stop, and to let somebody know.

Q. Okay, did you question them further about the information at that time?

A. No.

Q. Okay, and how long after the children made that statement did you tell Ms. M.?

A. Probably ten minutes or so.

Q. Okay and where was Ms. M. when the statement was made?

A. She was up by the bag, like where the bags and blankets were.

Q. Okay, and what did Ms. M. say in response when you told her this?

A. She said Daddy does a lot of strange things when he's drunk.

[42] Both Respondents were represented by counsel at the earlier hearing and each counsel cross-examined R. P. on her evidence at pages 279 - 281. When questioned by A.M. at the present hearing R. P. stated:

"I said it the way the kids said it to me"

[43] A. M. questioned the reliability of R. P. and challenged the witness on the truthfulness of her initial testimony. R. P. nonetheless confirmed her earlier evidence in its entirety.

[44] A. M. then called J. W.'s mother, **S. W**. Ms. W. testified about the apprehension of E. by the Minister at the hospital on January [...], 2013. Ms. W. supports the Respondents' request to have the child E. returned to them.

[45] A.M. elected to testify on her own behalf. Her Affidavits of May 3, 2013 and September 13, 2013 were marked as Exhibit No. 7 and No. 8 respectively.

[46] A.M.'s evidence is that the Minister refused to work with her and J. W. and that they were not treated fairly by the Minister. A.M. states in her Affidavit of May 3, 2013:

> (7) Nicole Sheppard and Sandi Virick refuse to work with myself and my partner. They abuse their authority, saying they can do and say anything they want.
>
> (8) Nicole Sheppard and her supervisor, Sandi Virick (Social Worker) continue to bring forth false information to the Court about myself and my partner.
>
> (9) My twin daughters J(1) and J(2) never stated that their father and I abused them.
>
> (10) The abuse allegation came from false information provided to the Court by witnesses A.M.(2) (Respondent's mother) and R. P.
>
> (11) My partner's charges were dismissed on June 20, 2012.
>
> (18) At no time did my twin daughters even state that their father and I ever abused them.
>
> (20) R. P., who made the statement about my daughter "J" lied on the stand in Justice Wilson's courtroom.

[47] A.M. recounts the event of the apprehension of E. at the hospital on January [...], 2013 taking issue with the conduct of social workers and police who were in attendance.

[48] A.M. continues in her Affidavit of May 3, 2013:

> (49) I did not do anything wrong to lose my visits with my baby.
>
> (50) These social workers refuse to work with me and abuse their authority. It is E. that's innocent and getting punished.
>
> (51) Nicole Sheppard, a social worker and her supervisor, "Sandi Virick" are more concerned with punishing J. W. and myself that the welfare of our daughter E.
>
> (52) I have asked for a new worker and they refuse to give me a new one.

[49] In A.M's Affidavit dated September 13, 2013 and marked Exhibit No. 8 she states:

> (3) That I want my daughter, E, returned to myself and my partner J. W.

(4) That my partner and I are capable of providing for our child.

(5) That my partner's charges have been dismissed and that is the basis on why the Minister took our twin daughters and E.

(6) That I have been attending counselling since July 2013 until September 2013. Carrie Evely (Clinical Therapist) at Family Services of Eastern Nova Scotia at 295 George Street, Sydney (539-[...])

(11) There is absolutely no risk to E.

(12) Our daughter E. should be raised by us and not strangers.

(14) Since the Application of E. none of there social worker have worked with my partner, J. W. and I (A.M.)

(16) I have been punished for standing by my partner.

(18) That J. W. and I are good parents.

(20) That I am more than capable of housing, feeding and loving E. and I would deeply appreciate her Majesty of the Court to terminate the Minister's Application for Permanent Care and give E. back to us.

MINISTER'S SUBMISSIONS

[50] The Minister, by way of written submission dated November 4, 2013, submits as follows:

- That the standard of proof to be applied is on a balance of probabilities.

- That in reaching a decision regarding future care of the child, the Court must be guided by the child's best interests.

- That the Court must not make an order removing the child from the care of a parent unless the Court is satisfied that less intrusive alternatives, including services to promote the integrity of the family pursuant to S. 13 have failed, been refused or would be inadequate to protect the child.

- That the Courts are never called upon to wait until physical injuries have been received or minds unhinged. It is sufficient if there is a reasonable apprehension that such things will happen and the Courts should interfere before they have happened if that is possible.

- That the evidence of past parenting is a relevant consideration in determining the probability of an event reoccurring.

- That nothing has changed since the permanent care decision of Justice Darryl Wilson, dated October 3, 2012 in relation to two older children.

- That the Respondent A.. M. continues to deny that the Respondent J. W. is a threat to his children..

- That the withdrawal of criminal charges against J. W. with respect to allegations of sexual touching and sexual assault, do not reduce the risk of sexual harm to the children in the future.

- That there is no statutory prohibition against the Court ordering permanent care at the First Disposition Hearing.

- That time is of the essence in matters affecting children.

- That the Court may not make a further order for temporary care if the Court is satisfied that the circumstances justifying the earlier order are unlikely to change within a reasonably foreseeable time, not exceeding the remainder of the applicable maximum time period.

- That the question of whether a parent should be given "more time"to address deficits must be resolved by a balancing of the child's needs, best interest and protection.

- That S. 42 (4) of the *Act* directs the Court to consider prospects for change. Section 45 (1) of the *Act* gives only a maximum time frame for weighing this issue.

- That the Minister has the right, even the duty, to seek an order for permanent care and custody, if it believes such an order is in the child's best interests and further believes it can satisfy the burden of proof placed upon it.

- That time limits provided for in the *Act*, S. 45 (1), are just that, namely limits, not goals and not waiting periods.

- That the question at trial is whether or not the Minister has satisfied its burden with the evidence presented, having regard to all relevant considerations, including those set out in SS. 42(2) and 42(4) of the *Children and Family Services Act.*

- that the final determination must be made in light of the factors contained in S. 3(2) of the *Act,* and the purposes and paramount purpose stated in S. 2(1) of the *Act*.

- That J. W. has not engaged in services to reduce the risk that he will re-offend.

- That A. M. continues to deny any possible concern with J. W. and any possible damage that he may pose to E while continuing to blame others in the face of evidence to the contrary.

- That the Minister has proven it's case on a balance of probabilities.

- That the Minister is in support of adoption which will provide E with the care and stable environment she needs to thrive and excel in life.

- that it is in E's best interests to be placed in the permanent care of the Minister with no provision for access to the Respondents.

SUBMISSIONS OF RESPONDENT J. W.

[51] By way of written submission, dated November 27, 2013, counsel for J. W. submits:

-That an order for permanent care is premature .

- That there is sufficient time for the Minister to put in place services for the parents which will enable them to properly care for the benefit of the child.

- That the Minister failed to cooperate with J. W. in terms of offering and/or providing services to him.

- that J. W. sought counselling with Ed Burke, BSW, RSW on his own initiative.

- That the Minister has rushed to judgment in this instance.

- That the Minister failed to properly assess J. W.'s circumstances and/or his potential to effect meaningful change.

- That the Minister "wrote off" J. W. even before the apprehension of E And provided no services.

- That there is sufficient time available pursuant to S. 45 (1) of the *Children and Family Services Act* for services to be put in place for J. W.

- That the Minister has failed to prove that circumstances will not change with a reasonably foreseeable time.

- That the Application for permanent care should be dismissed and J. W. should be provided services by the Minister pending completion of this matter.

SUBMISSIONS OF RESPONDENT A. M

[52] Respondent A. M. submits the Minister's Application for Permanent Care should be dismissed and requests the Court return E to her and her partner's care.

[53] By way of written submissions dated November 12, 2013. Respondent A.M. submits as follows:

> 1. That the Minister continues to state my twin daughters were abused by their father, which is not at all true.
>
> 2. That the Minister continues to ignore the fact that my partner's charges are dismissed in both cases.
>
> 3. That both J. and myself agreed to do services, and the children's aid has refused to work with us from day one.
>
> 4. I am doing counselling and willing to do anything else that would benefit myself.
>
> 5. My partner has no other charges against him.
>
> 6. Our child E. has no risk to herself coming home with us.
>
> 7. My partner and I don't believe it's in E. best interest to be raised by strangers.
>
> 8. That the basis of R. P. 's testimony is based on a lie and should never have been used as a reason to take our twins or E. away from us.
>
> 9. Judge Wilson never stated he believed my partner sexually abused our daughters, he ruled that way because of the outstanding charges my partner had on him.

10. That the Minister does not have the best interest of E. in mind.

11. That the Minister is basing their decisions about E. on her sisters and she was not born at the time.

12. That Supervisor “Sandi Virick” is completely bias towards J. and myself. She is basing decisions on a personal level.

13. That my partner J. and myself are capable of providing a stable environment.

14. The basis for removing E. from us, has been dismissed from criminal court.

15. That our child E. deserves to be raised by us and we deserve to be given a chance.

16. That I believe I have the right to love and be with who I choose to be with and not because the Minister tells me that I shouldn’t.

17. The Minister has continued to make choices about how our child should be raised, without working with us.

18. That my partner’s parents should see their granddaughter in their lives, as long as they live.

19. My partner and I intend to apply for a leave application in regards to our twin daughters.

20. That E. should have the right to know her sisters B. M, J. W. and J. W..

21. The Minister has no respect for the criminal Judges and continue to base decisions on assumption and rumours.

22. The Minister has refused any services.

23. The Minister has been one sided from day one of dealing with them.

24. That the Minister's idea of dealing with families is splitting them up.

25. The social workers that have made decisions about our child never spoke with J. or myself.

26. That I carried E for nine months and did the best to bring her into this world healthy.

BURDEN OF PROOF

[54] A proceeding pursuant to the *Child and Family Services Act* is a civil proceeding **NS.(MCS) v DJM** [2002] N.S.J. No368 (NSCS).

[55] The burden of proof is on a balance of probabilities which is not heightened or raised because of the nature of the proceeding. **F.H. v McDougall** [2008], 3 S.C.R. 41, the Supreme Court of Canada held a paragraph 40:

> 40 Like the House of Lords, I think it is time to say, once and for all in Canada there is only one **civil** standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the serousness of the allegations or consequences. However, these considerations do not change the standard of proof. ....

And further at paragraph 45 and 46.

> 45 To suggest that depending upon the seriousness, the evidence in the **civil** case must be scrutinized with greater care implies that in less serious **cases** the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all **cases**, evidence must be scrutinized with care by the trial judge.

> 46 Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[56] The burden of proof is on the Minister to show that the Permanent Care and Custody Order is in the child's best interest.

TEST ON STATUTORY REVIEW

[57] The Supreme Court of Canada set out the test to be applied on statutory review hearings in child protection proceedings in the **Catholic Children's Aid Society of Metropolitan Toronto v C.M.**, [1994] S.C.J. No. 37 (SCC), where the Court held that at a status review hearing it is not the Court's function to retry the original protection finding, but rather, the court must determine whether the child continues to be in need of protective services. Writing for the majority, L'Heureux-Dube, J. stated as follows at paragraphs 35; 36; and 37:

> 35 "It is clear that it is not the function of the status review hearing to retry the original need for protection order. That order is set in time and it must be assumed that it has been properly made at that time. In fact, it has been executed and the child has been taken into protection by the respondent society. The question to be evaluated by courts on status review is whether there is a need for a continued order for protection...
>
> 36 The questions as to whether the grounds which prompted the original order still exist and whether the child continues to be in need of state protection must be canvassed at the status review hearing. Since the *Act* provides for such review, it cannot have been its intention that such a hearing simply be a rubber stamp of the original decision. Equal competition between parents and the Children's Aid Society is not supported by the construction of the Ontario legislation. Essentially, the fact that the *Act* has as one of its objectives the preservation of the autonomy and the integrity of the family unit and that the child protection services should operate in the least restrictive and disruptive manner, while at the same time recognizing the paramount objective of protecting the best interests of children, leads me to believe that consideration for the integrity of the family unit and the continuing need of protection of a child must be undertaken.

> 37 The examination that must be undertaken on a status review is a two-fold examination. The first one is concerned with whether the child continues to be in need of protection and, as a consequence, requires a court order for his or her protection. The second is a consideration of the best interests of the child, an important and, in the final analysis, a determining element of the decision as to the need of protection. The need for continued protection may arise from the existence or the absence of the circumstances that triggered the first order for protection or from circumstances which have arisen since that time

LEGISLATION

[58] The Court must consider the requirements of *Children and Family Services Act*, S.N.S. 1990, c. 5 in reaching its' conclusion. I have considered the preamble which states:

> AND WHEREAS children are entitled to protection from abuse and neglect;
>
> AND WHEREAS parents or guardians have responsibility for the care and supervision of their children and children should only be removed from that supervision, either partly or entirely, when all other measures are inappropriate;
>
> AND WHEREAS children have a sense of time that is different from that of adults and services provided pursuant to this *Act* and proceedings taken pursuant to it must respect the child's sense of time;

[59] I have also considered Sections 2(1) and 2(2) which provide:

Purpose and paramount consideration

2(1) The purpose of this *Act* is to protect children from harm, promote the integrity of the family and assure the best interests of children.

2(2) In all proceedings and matters pursuant to this *Act*, the paramount consideration is the best interests of the child.

[60] I have also considered the relevant circumstances of Section 3(2), which provides:

3(2) Where a person is directed pursuant to this *Act*, except in respect of a proposed adoption, to make an order or determination in the best interests of a child, the person shall consider those of the following circumstances that are relevant:

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

(b) the child's relationships with relatives;

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

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

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

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

(g) the child's cultural, racial and linguistic heritage;

(h) the religious faith, if any, in which the child is being raised;

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

(j) the child's views and wishes, if they can be reasonably ascertained;

(k) the effect on the child of delay in the disposition of the case;

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

(m) the degree of risk, if any, that justified the finding that the child is in need of protective services;

(n) any other relevant circumstances.

[61] Section 22(2) of the *Children Family and Services Act* states:

s. 22 (2) A child 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)

[clause (a) states: the child has suffered physical harm, inflicted by a parent or guardian of the child or caused by the failure of a parent or guardian to supervise and protect the child adequately.]

[62] Other relevant sections include sections 42(1); 42(2); (3) ;(4), which provides as follows:

42(1) At the conclusion of the disposition hearing, the court shall make one of the following orders, in the child's best interest:

(a) dismiss the matter,

(b) the child shall remain in or be returned to the care and custody of a parent or guardian, subject to the supervision of he agency, for a specified period, in accordance with Section 43;

(c)the child shall remain in or be placed in the care and custody of a person other than a parent or guardian, with the consent of that other person, subject to the supervision of the agency for a specified period, in accordance with Section 32;

(d) the child shall be placed in the temporary care and custody of the agency for a specified period, in accordance with Sections 44 and 45;

(e) the child shall be placed in the temporary care and custody of the agency pursuant to clause (d0 for a specified period and then be returned to a parent or guardian or other person pursuant to clauses (b) or (c) for a specified period, in accordance with Sections 43 to 45;

(f) the child shall be placed in the permanent care and custody of the agency, in accordance with Section 47.

(2) the Court shall not make an order removing the child from the care of a parent or guardian unless the Court is satisfied that less intrusive alternatives, including services to promote the integrity of the family pursuant to Section 13,

(a) have been attempted and have failed;

(b) have been refused by the parent or guardian; or

(c) would be inadequate to protect the child.

(3) Where the Court determines that it is necessary to remove the child from the care of a parent or guardian, the Court shall, before making an order for temporary or permanent care and custody pursuant to clause (d), (e) or (f) of subsection (1), consider whether it is possible to place the child with a relative, neighbour or other member of the child's community or extended family pursuant to clause (c) of subsection (1), with the consent of the relative or other person.

(4) The Court shall not make an order for permanent care and custody pursuant to clause (f) of subsection (1), unless the Court is satisfied that the circumstances justifying the order are unlikely to change within a reasonably foreseeable time not exceeding the maximum time limits, based upon the age of the child, set out in subsection (1) of Section 45, so that the child can be returned to the parent or guardian.

45 (1) Where the court has made an order for temporary care and custody, the total period of duration of all disposition orders, including any supervision orders, shall not exceed

(a) where the child was under six years of age at the time of the application commencing the proceedings, twelve months; or

(b) where the child was six years of age or more but under twelve years of age at the time of the application commencing the proceedings, eighteen months,

from the date of the initial disposition order.

LAW AND ANALYSIS

ISSUE ONE -*Whether or not the Court can issue an Order for permanent care prior to the expiration of the statutory time limits prescribed in S. 45(1)?*

[63] The Applicant submits that there is no prohibition upon the granting of a Permanent Care Order at First Disposition. The Court has the discretion to issue such an order if it is in the child's best interests.

[64] In **Nova Scotia (Minister of Community Services) v. L.L.P.** [2003] N.S.J. No. 1 (C.A.), at paragraphs 24 and 25, the Nova Scotia Court of Appeal has stated as follows with respect to the legislative time limits:

> The maximum statutory time limits for a proceeding are set out in Section 45 of the *Act:* twelve months for children under six years of age and eighteen months for those between six and twelve years. At the end of these periods a court must either dismiss the proceeding or order permanent care and custody. The time frames within which the proceeding must be resolved are necessarily short in deference to the "child's sense of time", as is recognized in the recitals [Preamble] to the *Act*:
>
> AND WHEREAS children have a sense of time that is different from that of adults and services provided pursuant to this Act and proceedings taken pursuant to it must respect the child's sense of time;
>
> The goal of "services' is not to address the parents [parents'] deficiencies in isolation, but to serve the children's needs by equipping the parents to fulfill their role in order that the family remain intact. Any service-based measure intended to preserve or reunite the family unity, must be one which can effect acceptable change within the limited permitted by the *Act.* ... (Emphasis added)
>
> The Nova Scotia Court of Appeal further adopted the following comments, of Justice R. James Williams:
>
> **Nova Scotia (Minister of Community Services) v. S.Z. et al.** (1999), 179 N.S.R.(2d) 240; N.S.J. No. 365 (S.C.F.D.) at page 258 and paragraphs 59-61:

The question of whether a matter should be adjourned, a parent given more time to address personal deficiencies or problems, that must be resolved by a balancing of the child's needs, best interest and protection including the need to be as a matter of first choice with family and parents and the issues enunciated by S. 42(4). The maximum time limit here, as stated, is one year from the first disposition order made July 16, 1991 [i.e., 'bridging order' made on the last day of a trial held at first disposition, see paragraph 27].

Should the Agency seek a permanent care order where there is what seems like so much time left on the statutory clock? The Agency has a right, if not a duty, to do so where it believes it can satisfy the burden of proof put on it by the operation of the relevant statutory provisions which include, as stated in SS. 2(1) and 3(2) of the *Children and Family Services Act*.

The time limits set out in s. 45(1) are just that - limits. They are not goals. They are not waiting periods. Each case is different. Each case must be decided on its particular facts and circumstances. The question here is: has the Agency satisfied the court with the evidence that has been presented on the basis of all the evidence before the court, based on the burden of proof being on the agency and that burden of proof being what has been referred to as "a heavy civil burden", has the Agency satisfied the court that a permanent care and custody order should be made having regard to the considerations set out in the legislation generally and particularly having regard to s. 42 (2) and 42(4) of the *Children and Family Services Act*. (Emphasis added)

The decision was upheld on appeal: (1999), 181 N.S.R.(2d) 99; N.S.J. No. 426 (C.A.).

31 The *Act* does not require a court to defer a decision to order permanent care until the maximum statutory time limits have expired. The direction of s. 46(6) of the statute is to the opposite effect. Where a child is in the temporary care and custody of the Agency, at each further disposition hearing, the court may not make a further order for temporary care and custody if the court is satisfied that the circumstances justifying the earlier order are unlikely to change within a

> reasonably foreseeable time, not exceeding the remainder of the applicable maximum time period:
>
> 46(6) Where the court reviews an order for temporary care and custody, the court may make a further order for temporary care and custody unless the court is satisfied that the circumstances justifying the earlier order for temporary care and custody are unlikely to change within a reasonably foreseeable time not exceeding the remainder of the applicable maximum time period pursuant to subsection (1) of Section 45, so that the child can be returned to the parent or guardian. (Emphasis added)

[65] The Minister submits the above case authority is both persuasive and binding upon this Court. I agree. Permanent Care is definitely an option for this Court to consider at this point in time, albeit time remains to continue the proceeding.

[66] Whether or not a permanent care order should or will be issued at this time is a completely different matter for the court's consideration. S. 42(1) details the available orders which the Court may issue in the child's best interests. The Applicant is seeking a permanent care order pursuant to S. 42(1) (f); the Respondent seeks a temporary care order pursuant to S. 42(1)(d). In this regard the Court is guided by the provisions in SS. 42(2); 42(3) and 42(4).

[67] **ISSUE TWO** - *What is the appropriate disposition order in the present circumstances (i.e.) Permanent Care v Temporary Care?*

[68] **Mi'kmaw Family and Children Services v K.D.O.**, 2012 NSSC 379 is a decision of Justice Theresa Forgeron who, at a Review Hearing, was asked to decide whether the children should be placed in the Agency's permanent care and custody, despite the fact that the legislative timelines had not been exhausted. The issue to be determined was whether or not the circumstances giving rise to a previous temporary care and custody order were likely or unlikely to change within a reasonably foreseeable time. At paragraph 24, Justice Forgeron stated:

> 24 Section 42(4) of the Act provides the court with the authority to make a permanent care order, even when the legislative time lines have not been exhausted, if circumstances are unlikely to change within a reasonably foreseeable time. Section 42 (4) states as follows.
>
> (4) The court shall not make an order for permanent care and custody pursuant to clause (f) of subsection (1) unless the court is satisfied that the circumstances justifying the order are unlikely to change within a reasonably foreseeable time not exceeding the maximum time limits, based upon the age of the child, set out n subsection (1) of Section 45, so that the child can be returned to the parent or guardian 1990. C. 5, s. 42.

[69] Justice Forgeron continues to discuss factors to be considered in determining whether or not there is a likelihood of change within a reasonable foreseeable time, at paragraphs 26 - 29 as follows:

> 26 Although discretionary, secs. 42(4) and 46(6) of the *Act* do not provide the court with unlimited jurisdiction. All discretionary authority must be exercised judicially, and in accordance with rules of reason and justice, not arbitrarily and based upon a rational and solid evidentiary foundation. **MacIsaac v. MacIsaac** (1996) 150 NSR (2d) 321 (C.A.). This requirement is heightened when the meaning of "reasonably" and "foreseeable" are examined.
>
> 27 "Reasonably foreseeable" is not defined in the legislation. In *Words and Phrases: Judically Defined in Canadian Courts and Tribunal* vol, 7. (Toronto: Carswell, 1993) (June 2012 supplement) at p. 7-36, s. v., "reasonable" is defined as follows:
>
> ...the definition of "reasonably" in Webster's Third International Dictionary [is as follows:]:
>
> 1. In a reasonable manner (acted quite...)
>
> 2. To a fairly sufficient extent (a book that is good). What is "reasonable" is not the subjective view of either the respondent or appellant but the view of an objective observer with a knowledge of all the pertinent facts.
> The Shorter Oxford English Dictionary on Historical Principles refers to "reasonably" as an adverb meaning "in a reasonable manner; sufficiently; fairly".
> (Income Tax)
> Bailey v Minister of National Revenue, [1989] 2 C.T.C. 2177 at 2182, 2183, 89 D.T.C/ 416 (T.C.C.)Rip T.C.J.

28 "Foreseeable" is defined in the Judy Pearsall, ed, *The New Oxford Dictionary of English, 9th* ed (New York: Oxford University Press, 1999) at p. 718, s. v. as follows:

> **Foreseeable - adjective able to be foreseen or predicted...**

29 In this context it is helpful to review the cases submitted to the court by counsel. Circumstances which have been identified as **important in determining if a change can be made in a reasonably foreseeable time are as follows**:

a. *Whether other children have been placed in the permanent care and custody of the agency, or in the permanent custody of other adults*. In **Nova Scotia (Minister of Community Services) v. G. R., supra**, three of the respondent's children were in the custody of paternal grandparents, another child was in the permanent care of the Minister, and a fifth child was apprehended at birth and remained in the temporary care of the Minister.

b. *Whether the children have a lengthy history of being in the temporary care of the agency.* In **Children's Aid Society fo Halifax v D. H.** 2006 1, three separate court proceedings had been initiated. As a result, the four and five year old children had only been in the unsupervised care of her parents for five months, and the youngest child had not been in the unsupervised care of her parents at any time.

c. *Whether the parent lacked meaningful insight into the issues that gave rise to the protection finding.* In **Nova Scotia (Minister of Community Services) v. G. R., supra**, the mother minimized the abusive and dysfunctional nature of her relationship with the father. The mother was unable to identify the changes she had to make in her lifestyle to ensure a

safe environment for the child. In **Nova Scotia (Minister of Community Services) v. P.M.D.**, 2002 NSSF 38, the mother lacked insight into her addiction to concaine, which led to a life of prostitution and crime. The mother failed to become involved in a meaningful drug rehabilitation program. In **Nova Scotia (Minister of Community Services) v. S. W**. 2010 NSSC 472, the court held that maximizing the statutory time limits would not result in the mother effecting necessary changes. The mother severed all relationships with each of the doctors who sought to reduce her addiction to pain medication.

d. *Whether the parent exercised access*. In **Nova Scotia (Minister of Community Services) v. G. R., supra**, the mother lacked commitment to the child having only exercised access on five occasions. In **Nova Scotia (Minister of Community Services) v. S. W., supra**, the mother was late for approximately 25% of all scheduled visits, and another 17% were cancelled as a result of her actions or inactions.

e. *Whether the parent lacked basic parenting and housekeeping skills.* In **Children's Aid Society of Halifax v. D.H., supra**, the mother's parenting skills were so pervasively and extensively inadequate, that no hope of change was probable. In **Nova Scotia (Minister of Community Services) v. S.W., supra**, the mother made limited progress in developing even basic parenting skills, such as feeding, diapering, or securing the child correctly in a car seat.

f. *Whether an expert provided opinion evidence confirming an inability to parent.* In **Children's aid Society of Halifax v. D.H., supra**, the assessor recommended permanent care because of filthy living conditions, drug and alcohol abuse, and chronic neglect. In contrast, in **Nova Scotia (Minister of Community Services) v. E.C.** 2007 NSSC 37, the court placed little weight on the expert report because of the erroneous information that it contained.

g. *Whether the parent was effecting positive changes that resulted in lifestyle improvements.* In **Nova Scotia (Minister of Community Services) v.**

> **E.C. supra**, the mother's parenting skills had improved. The mother was focussed and open to learning new skills by participating in services. The request for a permanent care order was denied.

[70] Counsel for Respondent J. W. provided a number of cases including KDO, Supra where the Court denied the Minister and/or Agency's Application for permanent care prior to the expiration of the legislative timeline. Justice Forgeron at paragraph 30 stated:

> In reaching my decision I reviewed the evidence and the submissions of the parties. I placed the burden upon the agency. The agency did not satisfy this burden. As such, I will not grant the permanent care and custody order as requested. I am not satisfied that the circumstances are unlikely to charge withing a reasonably foreseeable time... I draw this conclusion from the following factual findings.
>
> a. Although there extensive agency involvement, none of Ms. Do's children were placed in the permanent care of the agency or in the permanent custody of other adults.
>
> b. Ms. Do. exhibited some insight into the circumstances which gave rise to the protection proceedings. She is participating in a rehabilitation drug treatment program because of her addictions. She participated in some counselling sessions for a period of time. Ms. Do was not always consistent in her efforts, but she does nonetheless exhibit insight and is moving forward, albeit not as consistently or as quickly as one would hope. No recent concerns about violence have been raised, although Mr. Je is incarcerated.

> c. Ms. Do generally exercised access, although there were gaps. Valid access cancellations did occur, usually because of storms, worker cancellations, or Ms. Do attending a drug treatment program. There were also unexplained cancellations, especially during the months of June and July 2012. Visits resumed in August and were again consistent until Ms. Do entered the drug treatment program after September 29, 2012.
>
> d. Ms. Do has the ability to parent appropriately and safely. She, when not impaired by drugs or alcohol, is attentive and aware of the children's needs, and is able to meet these needs. Ms. Stewart said that Ms. Do was a cooperative and hands on parent. Ms. Do prepared and served healthy meals to her children. She played age appropriately, and provided each child with one on one time. She used positive reinforcements appropriately. She maintained a clean home, and also ensured that the children were clean. The children have a strong attachment to their mother. The court notes that in its plan for permanent care, the agency is seeking access between Ms. Do and the two older children.
>
> e. Ms. Do has effected some positive changes in her life. At times, Ms. Do has not been cooperative with the court ordered services; at other times she has been. Ms. Do attended two of the three appointments with Dr. Landry. She is currently participating in a drug treatment program. Ms. Do appears to have the ability to effect necessary positive changes.

[71] Similarly in **Minister of Community Services v MAB** 2013 NSFC11 Judge Dyer of the Nova Scotia Family Court rejected the Agency's early request for permanent care and returned the children to the supervised care of the mother. At paragraph 561 and 563 Judge Dyer stated:

> 561 I am persuaded that the mother's current psychotherapy regime has sparked significant positive changes in her mental health state which are not fleeting,

> trivial or feigned. On a balance of probabilities, I find there is good reason to believe she is capable of , and should, resume parenting of Z, provided her therapy continues in conjunction with other supports and services. Put another way, the agency has not convinced me that the circumstances justifying the last order have not changed and are unlikely to change within the statutory deadline (in this case, by the end of 2013)
>
> 563 With the foregoing in mind, the result is influenced by, but not confined to, the following considerations:
>
> - the strong expert opinion medical evidence regarding BPD and ISTDP including progress since the last order, its efficacy and the prognosis for "success", as compared to past generalized treatment recommendations and efforts.
>
> - the mother's consistent cooperation and acceptance of services and supports throughout, coupled with her improved insight into the underlying issues as a result of ISTDP.
>
> - that none of Z's siblings children have been committed to the agency permanent care and custody or been the subject of litigation seeking such an outcome.

[72] The law is nonetheless clear that should a trial judge conclude at a disposition hearing or disposition review hearing in relation to a temporary care order, that the circumstances are unlikely to change, "the judge has no option ...but to order permanent care" **(Nova Scotia (Minister of Community Services) v. LLP**, supra, at paragraph 33.

[73] I have reviewed and considered the evidence together with the plans and submissions of the parties. Although I may not have specifically commented on all of the evidence in this decision, I have nonetheless considered the totality of the evidence in reaching this decision.

[74] I have applied the burden of proof to the Minister. There is only one standard of proof and this is proof on a balance of probabilities, a burden which must be discharged by the Minister.

[75] I have considered the law and legislative provisions of the *Children and Family Services Act*.

[76] At a final disposition hearing the court has only two options (1) order permanent care or (2) dismiss the proceeding and return the children to their parents. Because this matter has yet to reach the final disposition hearing stage the option of continuing the temporary care order remains open to the Court for equal consideration.

[77] The need for protection may arise from the existence or absence of the circumstances that triggered the first order for protection, or from circumstances which have arisen since that time **G.S. v Nova Scotia (Minister of Community Services)** [2006] N.S.J. No. 52 (NSCA) .

[78] It is therefore not the Court's function to retry the original protection finding but rather, the Court must determine whether or not the child continues to be in need of protective services.

[79] I have scrutinized the evidence with care and I am satisfied that the evidence of the Minister is sufficiently clear, convincing, and cogent to satisfy the balance of probabilities test. The contention that the Respondents pose a substantial risk of harm or real chance of danger to the child, E has been proven on a balance of probabilities.

[80] I find the order requested by the Minister is the appropriate one having considered the totality of the evidence. I agree with and accept the Minister's

submissions. The child E. continues to be in need of protective services. It is in the best interests of the child to be placed in the permanent care of the Minister pursuant to S. 42 (1) (f) and S. 47 of the *Act*. I cannot return E. to the Respondents, A. M. and J. W. on a temporary or permanent basis

[81] I reject the plans put forth by the Respondents A. M and J. W. Their plans in no way address the long term needs of the child and I find that E would be placed at substantial risk of harm if returned to her parent's care.

[82] The Court is satisfied, on a balance of probabilities, that the Respondents' lack total insight into their parenting deficiencies. They continue to maintain that nothing happened to their twin girls in spite of clear, convincing and cogent evidence to the contrary.

[83] The allegations of sexual abuse in this case are alarming. I agree with Justice Wilson's conclusion in his decision of October 3, 2012 that the allegations of sexual inappropriate behaviour were made known to A. M. and that she did not take them seriously. A.M. continues to maintain this unrealistic and unacceptable position from which E must be protected.

[84] A. M. has elected to stand firm with her partner, J. W., with both being stead fast in their position that nothing happened and that the allegations of sexual abuse to their children were totally untrue.

[85] The Respondents rely upon the dismissal of criminal proceedings against J. W. as evidence that the allegations are untrue and unproven. I cannot accept such an assertion. I agree with the comment of Justice Wilson at paragraph 70 of his October 3, 2012 decision:

> The withdrawal of criminal charges with respect to the allegations of the sexual touching and sexual assault involving (J D) do not risk reduce substantial risk of sexual harm to the children in the future.

I fully adopt the evidentiary findings of Justice Wilson as they relate to the protection concerns for the child E in the present proceeding. I found R. P. to be a credible witness and I accept her evidence, as Justice Wilson did, regarding the disclosure made to her by the children in relation to their father, J. W. This historical evidence is germane and relevant in determining risk and the future probability of such an event reoccurring.

[86] The Respondents have done nothing of a positive nature in the Court's view, to alter or change the dynamics that existed when their twin daughters were placed in permanent care. The Respondents still maintain the sexual abuse did not occur. As long as the Respondents maintain this position it is not safe for the child E to be returned to them.

[87] The assertion that the Minister is at fault for not providing the Respondents' services in these circumstances is without merit and rejected by this Court. I find

the main limitation on the provision of services in this case was the Respondents themselves. They blame the Minister but they would be well advised to re-examine their conduct in this regard.

[88] The obligation to provide services is not without limit. In **G.S. v Nova Scotia (Minister of Community Services)** [2006] N.S.J. No. 52 (NSCA) , the Court of Appeal held, at paragraphs 35 - 37:

> 35 The trial judge was well aware of this issue which the appellant now raises. It was put to the trial judge, by trial counsel, in terms of giving the appellant "another chance". The trial judge noted in his decision that "any further services would be inadequate to protect the child".
>
> 36 In any event **the obligation of the Agency to provide integrated services to the appellant is not unlimited.** Section 13 (1) of the *Act* obligates the Agency to take "reasonable measures" in this regard.
>
> 37 I agree with the submissions of counsel for the Agency that the main limitation on the provision of services in this case was the appellant herself. [Emphasis added]

[89] The Respondents now indicate a willingness to take and accept services. They both testified that they have each independently sought out counselling services, however the Court was not provided any evidence in this regard.

[90] The Court can understand why the Minister has taken the unusual course of refusing to provide services to the Respondents. The Respondents' total lack of

insight provided the Minister no other option in the circumstances. There is now insufficient time available, pursuant to the legislation, to provide any remedial services that could realistically change the present circumstances in a meaningful way.

[91] The Court has grave concerns about A. M's failure to accept the risk her partner J. W. poses to her child. The continued assertion by A. M. that J. W. is not a risk to their child is a purely speculative opinion upon which the Court can place no reliance. I am satisfied that the child E would not be safe and free from risk of harm if placed back into an environment where J. W. lives. The Court must ensure E is protected from the likelihood of this occurring.

[92] The Court thus finds that the child E remains in need of protective services. I further find the circumstances justifying this conclusion are unlikely to change within a reasonably, foreseeable time.

[93] In the cases of KDO and MAB. Justice Forgeron and Judge Dyer, respectively, had evidence before them that the Respondent mothers had no previous permanent care orders made against them and had insight into their parental deficiencies. Also each Judge had the benefit of expert medical and/or psychological opinion supporting the Respondent's position. Each Judge placed reliance on these as well as other factors detailed by Justice Forgeron to conclude that the Minister or Agency had not proven, on a balance of probabilities, that the

circumstances in each case were not unlikely to change in the reasonably foreseeable future. As a result the permanent care requests were denied.

[94] There is no such similar evidence before this Court in the present instance. The Court cannot simply rely upon the pronounced good intentions of the Respondents. To continue with the Temporary Care Order would not be in the child E's best interests. The Order for Permanent Care is therefore granted.

[95] Permanent care and custody of the child, E. shall thus be placed with the Minister in accordance with section 47 which states as follows:

> "47 (1) - Where the Court makes an order for permanent care and custody pursuant to clause (f) of subsection (1) of section 42, the Agency is the legal guardian of the child and as such has all the Rights, Powers and Responsibilities of a parent or guardian for the child's care and custody."

[96] **ISSUE THREE** - *Should access be provided to the Respondents?*

[97] In view of the above finding I must now consider the issue of access under the pre-conditions enumerated under S. 47 (2) of the *Children and Family Services Act* which states as follows:

> "47(2) Where an order for permanent care and custody is made, the court may make an order for access by a parent or guardian or other person, but the court shall not make such an order unless the court is satisfied that

> (a) Permanent placement in a family setting has not been planned or is not possible and the person's access will not impair the child's future opportunities for such placement;
>
> (b) The child is at least twelve years of age and wishes to maintain contact with that person;
>
> (c) The child has been or will be placed with a person who does not wish to adopt the child; or
>
> (d) Some other special circumstance justifies making an order for access.

[98] The Nova Scotia Court of Appeal has held that the onus to show access be granted under an Order for Permanent Care and Custody is upon the person requesting the right of access. In **G.S. v Nova Scotia (Minister of Community Services)** [2006] N.S.J. No. 52 (NSCA) , Justice Cromwell noted that the access decision contemplated in S. 47(2) of the Act is a "delicate exercise that required the Judge to weigh the various component of integrity of the child". Cromwell, J. further commented that the court must consider the importance of adoption in the presented circumstances of the case and the benefits and risks of making an order for access. At paragraph 36 he stated:

> "36 These submissions must be considered in light of three important legal principles. First, I would note that **once permanent care was ordered, the burden was on the appellant to show that an order for access should be made**: s. 47(2): *New Brunswick (Minister of Health and Community Services) v. L.(M.)*, [1998] 2 S.C.R. 534 at para. 44 and authorities cited therein. Second, I

> would observe that, as Gonthier, J. Said in L.M. at para. 50, the decision as to whether or not to grant access is a "...delicate exercise which requires that the judge weigh the various components of the best interests of the child." It is, therefore, a matter on which considerable deference is owed to the judge of first instance for the reasons I have set out earlier. I would note finally that, in considering whether the appellant had discharged her onus to establish that access ought to be ordered, the judge should consider both the importance of adoption in the particular circumstances of the case and the benefits and risks of making an order for access." [Emphasis added]

[99] The Nova Scotia Court of Appeal has recently considered S. 47(2) of the *Act* in **Children & Family Services of Colchester County v. K.T.** [2010], N.S.J., No. 474 (Application for Leave to Appeal to SCC dismissed) at paragraphs 39-41 as follows:

> "39 Therefore, from my reading of s. 47, three conclusions relevant to this appeal are clear. First, the Agency effectively replaces the natural parents. This puts the onus on the natural parents (or guardian) to establish a special circumstance that would justify continued access. Second, by virtue of ss. 47(2)(a) and (b), an access order must not impair permanent placement opportunities for children under 12. Section 47(2) (c) is consistent with this. It provides that if no adoption is planned then access will be available. This highlights the importance of adoption as the new goal and the risk that access may pose to adoption. **Third, for children under 12, the "some other special circumstance" contemplated in Section 47(2)(d), must be one that will not impair permanent placement opportunities.**
>
> 40 Therefore, to rely on s. 47(2)(d) as the judge did in this appeal, the (special) circumstances must be such that would not impair a future permanent placement. When then would s. 47(2)(d) apply? Consider for example a permanent placement with a family member which will involve contact with the natural parent. Presuming that the adopting parents would be content with that arrangement, the adoption would not be deterred. See Children's Aid Society of Cape Breton Victoria v. M.H., 2008 NSSC 242 at para. 34.

> 41 In short, **access which would impair a future permanent placement is, by virtue of s. 47(2), deemed not to be in the child's best interest**. This presents a clear legislative choice to which the judiciary must defer."

[100] This position is further highlighted by the comment of Chief Justice Michael MacDonald in **K.T.**, supra, at paragraphs 37 and 38:

> "37 Before the issuance of a permanent care order, the legislative focus is on preserving the family unit. This would understandably mean that when the children are in temporary Agency care, parental access is to be encouraged so as to hopefully rehabilitate the family. However, with a permanent care order, the focus shifts. Any hope of preserving the family within the legislated time limits is presumably lost and the focus becomes a stable alternate plan. Thus, upon securing a permanent care order, the Agency under the *CFSA* effectively becomes the parent:
>
> > 47(1) Where the court makes an order for permanent care and custody pursuant to clause (f) of subsection (1) of Section 42, the agency is the legal guardian of the child and as such has all the rights, powers and responsibilities of a parent or guardian for the child's care and custody.
>
> 38 This provision suggests the termination of the natural parents' relationship with the children. However, in special circumstances, post-permanent care access is possible although given the stark change in focus, such circumstances are rare and limited to those that would not jeopardize the new focus, namely an alternate stable placement. Thus, it is not surprising that the provision allowing for such access is highly restrictive."

[101] Justice Fichaud in **Nova Scotia (Community Services) v T. H.,** 2010 NSCA 63 also comments at paragraph 46 therein that after a permanent care order has been issued, there is a de-emphasis on family contact and instead priority is assigned to long term stable placement.

[102] Justice Oland in **Mi'kmaw Family and Children's Services v L.(B.)** 2011 NSCA 104 nonetheless reminds us as follows at paragraph 42:

> ....Section 47 (2) does not impose a blanket prohibition against access. Rather, a Judge must consider factors such as the likelihood of impairment of opportunities for permanent placement and whether there are special circumstances which would justify making an access order.

[103] The Minister has confirmed its plan to seek permanent placement for E through the process of adoption with no provision for access. In my view the awarding of access to the Respondents would impair the contemplated long term permanent placement and thus by virtue of Section 47 (2) I find that access is not in the best interests of the child E. E is entitled to continuity and stability in her life. Permanent care with no provision for access will achieve this purpose.

CONCLUSION

[104] In consideration of all the evidence including consideration of the factors enumerated by Justice Forgeron in the KDO case I conclude and find that the present circumstances regarding the Respondents' parental deficiencies are unlikely to change in a reasonably foreseeable time to the extent that risk of harm or real chance of danger to E can be reduced or eliminated.

[105] In particular, the Respondents have had other children placed in the Permanent Care and Custody of the Minister, E has been in the temporary care of

the Minister since birth, both parents lack meaningful insight into the issues that gave rise to the protection finding, the Respondents have had limited and/or no access to the child; they refuse to accept the risk J. W. poses to E which demonstrates a complete lack of basic parenting skills and neither Respondent has effected any positive change that resulted in lifestyle change or improvements.

[106] A. M. and J. W. are not up to the task of parenting and I foresee the continued involvement of the Minister should the child be returned to them.

[107] The Court has an obligation to ensure this child's best interests are protected and that is best achieved by placing E in the permanent care of the Minister with no provision for access.

[108] An Order for Permanent Care and Custody in favour of the Minister will thus issue, with no provision for access to the Respondents.

Order accordingly,

_____

Justice.