IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Nova Scotia (Community Services) v. M.P. , 2014 NSSC 80

Date: 2014-03-12
Docket: 79794
Registry: Sydney

Between:

Minister of Community Services

Applicant

v.

M.P. and T.M.

Respondents

Editorial Notice

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

Judge: The Honourable Justice Kenneth C. Haley

Heard: December 16 and 17, 2013 and January 15, 2014, in Sydney, Nova Scotia

Counsel: Tara MacSween, for the Applicant
Jennie Donnelly-McDonald, for the Respondent, T.M.

By the Court:

[1] This is the Application of the Minister of Community Services, hereinafter called "The Minister", seeking an Order pursuant to s. 42(1)(f) of the *Children & Family Services Act*, that the children, C.M. born October 2009, and J.M.P. born October 2010, be placed in the permanent care of the Minister with no provision for access.

[2] The Respondent, M.P., consented to this Application, however the Respondent, T.M., who belatedly became involved in the proceeding, opposes the Application. T.M. seeks return of the children to his care. In this regard T.M. relies heavily upon his father, R.M., and other family members and friends for support and assistance.

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

March 2, 2012 - children taken into care.

March 9, 2012 - Interim Hearing

- s. 39, 5 day Interim Hearing

- Based upon reasonable and probable grounds, the children were placed in the temporary care of the Minister, with supervised access to the Respondent, M.P.

- Respondent, T.M., was not present, and did not participate in the hearing due to his incarceration.

April 2, 2012 - Interim Hearing

- Completion of s. 39 Interim Hearing by consent with the status quo placement to continue.

May 14, 2012 - Protection Hearing

- The Respondent, M.P., consented to a Protection Order pursuant to s. 40 and s. 22(2)(b) and (g) of the Act, and agreed to take services offered by the Minister.

- The children found to be in need of protective services.

August 20, 2012 - Disposition Hearing

- By consent the status quo placement was to continue.

February 11, 2013 - Disposition Review Hearing

- The matter was adjourned to February 18, 2013 by consent.

- it was noted that the Respondent, T.M. was still in custody.

April 10, 2013 - Disposition Review Hearing.

- status quo to continue by consent.

- parties working on expanding access for the Respondent, M.P.

June 4, 2013 - Disposition Review Hearing

- status quo to continue by way of consent.

- parties awaiting completion of parental capacity assessment.

- Respondent T.M., still not participating in process due to his incarceration.

July 10, 2013 - Disposition Review Hearing

- adjournment required as the parental capacity assessment not completed.

July 18, 2013 - Disposition Review Hearing.

- Minister formally advises of its intention to seek permanent care.

- The Respondent, M.P., advises through her counsel that she has made the difficult decision to consent to the Minister's request for permanent care. The Respondent understood this would include a provision for no access.

- Status quo to continue at this time.

- Respondent, T.M., still not participating in process. Efforts being made to serve him with Notice of Permanent Care.

August 21, 2013 - Disposition Review Hearing

- Court refused to order permanent care, as efforts to serve the Respondent, T.M., proved to be unsuccessful.

- Status quo to continue by consent.

September 4, 2013 - Disposition Review Hearing

- Minister requests the Court to grant the Permanent Care Order, which was earlier consented to by the Respondent, M.P.

- Although Respondent, T.M., was not present, counsel who appeared on his behalf advised that T.M. was opposed to the Permanent Care Order, and was requesting a hearing wherein he could put forward a plan of custody for the children.

- In view of this development, all parties agreed and the Court ordered that the statutory deadlines would be extended in the best interests of the children, and to allow the Respondent, T.M., to put forth his plan.

- Status quo to continue.

September 24, 2013 - Pre-trial Conference

- Parties not ready to proceed.

- Respondent, T.M. to be released from custody on September 25, 2013.

September 25, 2013 - Pre-trial Conference

- Permanent Care Hearing scheduled to be heard November 13, 14, and 15, 2013.

October 17, 2013 - Pre-trial Conference

- Adjourned to November 6, 2013.

November 6, 2013 - Pre-trial Conference

- New dates set for Permanent Care Hearing - December 16 and 17, 2013.

- Court confirmed on the record that it was in the best interests of the children to extend the statutory time lines, and to afford the Respondent, T.M. an opportunity to put forth his plan for the children.

[4] On December 16, 2013, the Minister put forth the following evidence and witnesses.

(1) Paul Daigle - Parole Officer for the Respondent, T.M.

(2) Lynn Otis - Child Protection Worker, Department of Social Development for the Province of New Brunswick.

[5] Exhibits tendered on this date included:

(a) Exhibit Number One - Book of Pleadings prepared by the Minister which includes:

Tab 1 - Notice of Child Protection Application and Affidavit of Nicole Stevenson signed, sworn to on March 6, 2012, and filed with the court on March 7, 2012.

Tab 2 - Affidavit of Nicole Stevenson, signed, sworn to on May 7, 2012, and filed with the court on May 8, 2012.

Tab 3 - Supplemental Affidavit of Nicole Stevenson, signed, sworn to, and filed with the court on May 11, 2012.

Tab 4 - Notice of Motion for Disposition Order with attached Affidavit of Monique Gibson, and Agency's Plan for the Child's Care, signed, sworn to on August 15, 2012, and filed with the court on August 16, 2012.

Tab 5 - Notice of Motion and Affidavit of Monique Gibson, signed and sworn to on November 1, 2012, and filed with the court on November 2, 2012.

Tab 6 - Notice of Motion and Affidavit of Dawn Clark, signed, sworn to, and filed with the court on February 7, 2013.

Tab 7 - Notice of Motion and Affidavit of Dawn Clark, signed sworn to, and filed with the court on April 9, 2013.

Tab 8 - Notice of Motion and Affidavit of Dawn Clark, signed, sworn to, and filed with the court on May 30, 2013.

Tab 9 - Notice of Motion with attached Affidavit of Dawn Clark, and Agency's Plan for the Child's Care, signed, sworn to, and filed with the court on July 17, 2013.

(b) Exhibit Number Two - Copy of decision of the National Parole Board in relation to the Respondent, T.M., dated April 16, 2013.

(c) Exhibit Number Three - Copy of correspondence from Lynn Otis to Dawn Clarke dated November 8, 2013.

[6] On December 17, 2013 counsel agreed to interrupt the Minister's case to permit counsel for T.M. to call T.M.'s father, R.M. (witness number five), to accommodate him giving his evidence via video conference from New Brunswick. The Minister then continued with its case by calling its third witness, namely Ryan Ellis, Social Worker.

[7] The hearing was then adjourned to January 15, 2014, at which point the Minister called its fourth and final witness, namely Dawn Clarke, Protection Worker.

[8] The Respondent then recommenced its case and called the Respondent, T.M. as its final witness.

[9] The Respondent tendered the following Exhibits, namely:

Exhibit Number Four, Pay statement for Respondent, T.M.

[10] Exhibit Number Five, Affidavit of Service of T.M. dated March 22, 2012 was tendered by the Minister during the cross-examination of the Respondent, T.M.

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

Minister's Evidence

[12] The Minister's Plan of Care dated July 17, 2013 is Exhibit Number One, Tab 9. It outlines the concerns of the Minister. At part 1 it states:

> 1. Disposition order sought
>
> The Applicant is seeking an Order pursuant to Section 42(1)(f) of the *Children and Family Services Act* that the children, C.M. born October 2009, and J.M.P. born October 2010, shall be placed in the permanent care and custody of the Applicant, the Minister of Community Services.

[13] The Minister became involved in this matter due to the parenting concerns of M.P. who was the primary focus of the Minister throughout its involvement. At page 3, part 4(a) the Plan states:

> The department first became involved with Ms. P. in December 2011 when a referral was received by a New Brunswick agency regarding concerns of neglect and parental capacity as well as two other referrals received that time regarding transiency and domestic violence with her than partner B.H. Ms. P. has been in multiple abusive relationships in the past, mainly with the children's father, T.M. and then with B.H. of [...]. Workers were made aware of his history of violence and advised Ms. P. multiple times that Mr. H. could not be in a care giving role for the children at any time. Ms. P. left Mr. H. with the children on several occasions. In February 2012 Mr. H. assaulted Ms. P, and C. was awake during part of the altercation. There was a no contact order between Ms. P. and Mr. H. however neither party followed this condition. Workers arrived at the home on February 27, 2012 to find Mr. H. in the home, police arrested Mr. H. and Ms. P.'s children were taken into care of the agency at that time..

> It also appeared as though Ms. P. was struggling with basic parenting skills. Several referrals were received with this information as well.

[14] As noted earlier, M.P. has since consented to the Minister's request for permanent care with no provision for access.

[15] The plan does not address concerns regarding the Respondent, T.M. since he was incarcerated, and not the focus of the Minister's initial investigation.

[16] It is apparent from the evidence that the Minister did not make any meaningful effort to contact T.M. or have him involved in the file due to his incarceration, and resulting non-involvement with his children.

[17] The Minister's involvement with the Respondent, T.M. and his family is briefly referenced at page 9, part (c) of the Plan:

> At the time of the children coming into care of the department they were in the care of Ms. P. The natural father of C. and J. was incarcerated at the time and recently was released. Upon the children first coming into care Mr. M.'s sister did make contact with the department and expressed interest as a possible placement. However at that time we were working with Ms. P. and with her living in New Brunswick this would have made access difficult. Since that time, March, 2012, we have not had contact nor did his sister contact us again.
>
> Ms. P. also did not present any options and based on her history as a child in care we were aware that her biological parents were not a viable option for placements.

[18] The plan does detail some salient information about the children which would be relevant to whomever is entrusted with the demanding job of parenting. At page 4, paragraph 17, it states:

It is noted that C. and J. both display strong behaviour issues. Both children were examined by Dr. Lynk and have Fetal Alcohol Indicators. Dr. Lynk is also questioning if C. is on the autism spectrum as she is showcasing some characteristics of this, such as sensory issues, ritualistic behaviors, etc. J. also is displaying alarming behaviors such as fecal smearing/eating, temper tantrums including head banging and issues with eating. He is also very much non verbal at this time. Because of these issues parent aid and family support was implemented to help Ms. P.

[19] At pages 10 to 12, the Plan discusses the child C.M.

C. is generally in good health. She does have a cyst slightly above the bridge of her nose which Dr. Lynk has examined and is not concerned about at this time.

C. has recently had a speech assessment completed and it found that she has receptive and expressive language delays. C.'s foster mother took the necessary training offered by Nova Scotia Speech and Hearing Centres staff an C. receives speech therapy every three weeks in addition to her foster mother working with her. C. had a hearing assessment in the past and all seemed fine at the time.

C. does have daycare available to her two days a week, as she is in access visits the other 3 days through the standard work week. C. has not attended daycare since going to her most recent foster home because foster mother wanted these two days per week to bond with C. C. has many children in the foster home and community to socialize with and the relationship building with her foster mother is developing very well.

C. has some delays. C. currently is not toilet trained; however, she and her foster mother are working on this. C. is cued by foster mother to go to the bathroom three times per day to "potty" and this seems to be working well to a degree.

C. has completed or is engaging in the services:

- ALLKIDS are currently working with her in the foster home

- Nova Scotia Speech and Hearing Centres staff are providing speech therapy

- Daycare services are available for socialization

- Dr. Lynk follows and addresses her medical needs.

C. is generally an endearing, adorable child who touches the heart of those around her. C. has begun socializing more with the children in her foster home and community. C.'s speech has improved and some of her concerning behaviours have subsided, while other questionable behaviours have started.

C. has been a selective speaker since she has come into the care and custody of the Minister of Community Services. I am not aware if this was the case prior to her coming into care. However, C. would speak to some people and not to others. She primarily spoke with care providers. This is starting to subside and C. is speaking more openly.

C. historically (at least while in care) had some issues relating to bathing, changing her diaper and eating (i.e., nobody could touch her plate if she was eating); however, these issues seem to have subsided. That being noted, other issues seem to have arised. C. has some sensory issues in that she dislikes the feel of clothing on her body, which makes dressing her difficult. C. is also engaging in some ritualistic typed behaviours (e.g., staring at something for an extended period of time, chanting and performing several movements with her hands and body in sequence repeatedly). Overall, C.'s behaviours fluctuate depending upon her mood. C.'s foster mother states that C. is wonderful to parent because she is so endearing, however, her behaviours can be very challenging at times.

Dr. Lynk has examined C. and stated that C. has FAS indicators. In addition, Dr. Lynk and care providers have been questioning if C. is on the autistic spectrum as she is exhibiting some of the typical behaviours; however, she is maintaining a conversation and tracking people, which could contradict an autism diagnoses. A

development and/or autism assessment is being considered as is occupational therapy for C.

C. is now residing in an agency approved foster home and is doing very well. She has been in several prior to this as well. As we have made the decision for permanent care we will move towards a special needs adoption. She will have a secure placement until adoption.

[20] The Plan continues to discuss the child J.M.P. at pages 12 to 14:

J. is generally in good health. He does get colds often. Dr. Lynk has suggested a break from daycare at times to see if this remedies his getting a cold as frequently.

J. does attend daycare two days a week, as he is in access visits the other 3 days through the standard work week. J. attends daycare and seems to enjoy the socialization he receives with the other children. In addition, J. has several children in the foster family with whom he socializes and the relationship building in the foster family is developing very well. J. typically requires constant supervision due to his age, but he also becomes aggressive with others which require additional interventions.

J. has some delays. J. currently is not toilet trained. His foster family has tried to address this with J.; however, he does not seem to be ready for this at this time.

Services that are currently involved are the following:

- ALLKIDS are currently involved with J. in the foster home.

- Nova Scotia Speech and Hearing Centres staff are involved with J.

- Daycare services are available for socialization.

- Dr. Lynk follows and addresses J.'s medical needs.

- Intensive Community-Based Treatment Team is "on hold" at this time.

J. is generally a fun-loving, adorable child who charms the hearts of those around him. J. has made some gains in his current foster home in that his speech has improved, his security seems to be building and some of his concerning behaviours have subsided somewhat (e.g., not hitting other children as often). However, other questionable behaviours have started, continued or intensified . J. historically (at least while in care) had some issues relating to bathing, changing his diaper and eating (i.e., nobody could touch his plate if he was eating o he would throw the plate); these issues continue to be a concern.

Other issues seem to have been raised including J.'s head banging, smearing feces and even eating feces. These issues have been address with Dr. Lynk. Foster parents are currently using behavioural strategies to try and address these behaviours. Overall, J.'s behaviours fluctuate depending upon his mood. J.'s foster parents state that J. is wonderful to parent because he is so cute; however, his behaviours can be very challenging much of the time and they question if you are making gains with him developmentally.

Dr. Lynk has examined J. and stated that J. has FAS indicators. A developmental assessment is being considered. In addition, J. was referred to Child and Adolescent Services in October 2012 and has recently received an appointment with the Intensive Community-Based Treatment Team. In a recent meeting with Lynn Billard, Coordinator of ICBTT, this service was put on hold and will not initiate until J. is either returned home or placed in the permanent care and custody of the Minister of Community Services. That being noted, ICBTT staff also told this Worker that Ms. P. may not live in their catchment area; therefore, the service may not be available to her if she remains in her region.

> J. has currently been in the same foster home for the last while although he has moved several times. At this time J. does have a secure placement and it is our hope this will be the status quo until adoption.
>
> We are hoping to have C. and J. adopted together if at all possible and will work on this area as soon as possible.

[21] The belated plan of care proposed by the Respondent, T.M., has not altered the Minister's position which maintains permanent care is in the best interests of the children.

[22] **Mr. Paul Daigle** has been a parole officer for ten years, and has been assigned to the Respondent, T.M.'s case since his release in September 2013.

[23] T.M. was convicted in 2009 for armed robbery (knife), attempted armed robbery, and disguise with intent (mask). T.M. pleaded guilty, and was sentenced to four years in prison.

[24] Mr. Daigle gave evidence regarding T.M.'s background, and his history while incarcerated. Mr. Daigle was responsible for assessing T.M.'s application for day parole which was first filed November 17, 2011. The purpose of this assessment and/or investigation was to find out the "contributing factors to T.M.'s offence cycle".

[25] Mr. Daigle found that T.M. had issues because of a series of personal losses in his life, including his mother to cancer, and three friends to various circumstances. Mr. Daigle concluded this resulted in "possible depression and anxiety" for T.M.

[26] Day parole was recommended by Mr. Daigle, and his supervisors, however day parole was denied on April 17, 2013, by a decision of the National Parole

Board (Exhibit Number Two). At page 4 of the decision, the Board outlines T.M.'s plan:

> Your plan for day parole is to further your education, find work, attend Alcoholics Anonymous (AA) meetings, participate in all available programs and use the skills you have learned in programming. Two Community Based Residential Facilities (CBRFs) have confirmed accommodations for you. Local police are not opposed to your release. Your CMT is of the opinion that your limited past criminality and strong support makes your risk manageable in the community under the structure of day parole. As such, they are recommending day parole be granted with the following special conditions: not to consume, purchase or possess drugs other than prescribed medication taken as prescribed and over the counter drugs taken as recommended by the manufacturer; not to consume, purchase or possess alcohol; not to associate with any person you know or have reason to believe is involved in criminal activity; follow treatment plan/program to be arranged by your parole supervisor in the area of emotional health/stability. Your CMT also recommends that you participate in the Community Maintenance Program, Community Mental Health Initiative, Addictions Services, employment counseling and undergo urinalysis testing. Leave privileges are being recommended.

[27] The Board however noted:

> Although the downward spiral you experienced seems to coincide with some personal losses, it is obvious that your drug use was ultimately the key factor in the robberies. While your loss and unresolved grief cannot be ignored, you clearly chose inappropriate means to handle those emotional difficulties. This method of self medicating was not new for you as you had been using alcohol and marijuana particularly the latter for a number of years to deal with ADHD. Using cocaine was a natural progression for you. Being laid off from work and using expensive drugs easily set the tone for the robberies to support your addiction, as well as your family.
>
> It is evident that in the period leading up to your offending, you were unable to exert much self control over your alcohol/drug use or your emotions. Likewise,

> there have been a number of occasions during incarceration when difficulties arose, and you responded in a similar manner.

[28] The Board continued to voice concerns at page 5 of its decision:

> ...the number of incidents and negative situations in which you have been involved are not good indicators that you are able or willing to apply skills acquired on any sustained basis, particularly as demonstrated in a minimum security institution. Your non-compliance in that environment does little to instill confidence in the Board that you would be more compliant if residing in a CBRF.

[29] The Board, in denying day parole, commented on T.M.'s personal and emotional issues as follows:

> Furthermore, the Board is well aware that personal/emotional issues as they relate to loss were a major factor in your offending. Those issues have not been resolved and in the Board's opinion, are now compounded by the break up and the relationships with your partner and the loss of contact with your children. The Board believes this situation and the stress associated with it will add to your stress, increase the likelihood of a return to drug/alcohol use and by extension, elevate your risk for reoffending.

[30] T.M. thus served his full sentence. He will be on parole until January, 2015.

[31] T.M.'s current release conditions include abstinence from alcohol and drugs (except as recommended); to avoid persons in criminal activity, and to follow his treatment plan which includes counselling.

[32] **Ms. Lynn Otis** is a child protection worker employed by the Department of Social Development of New Brunswick. Ms. Otis testified via video conference.

[33] Ms. Otis performed a home assessment with regard to the Respondent's father, R.M.

[34] Ms. Otis met with R.M. and found his home in New Brunswick to be acceptable, but noted a few deficiencies such as smoke alarms and fire extinguishers, which R.M. undertook to remedy. Ms. Otis did not know whether or not these deficiencies were rectified.

[35] Part of the assessment required R.M. to consent to a criminal background check which necessitated the provision of photo I.D.

[36] Mr. R.M. undertook to obtain a photo I.D., and complete the criminal record check, but to date it remains incomplete.

[37] Mr. R.M. did advise he was convicted of assault in 1992, but no official particulars were provided to Ms. Otis.

[38] Ms. Otis also confirmed there was previous child welfare involvement with R.M.'s family, i.e., R.M.'s daughter, noting the file was later closed.

[39] Ms. Otis advised R.M. she would require his financial information, and also information regarding his mental health; none of which were ever provided to Ms. Otis.

[40] R.M. discussed with Ms. Otis his social support network, which included his sister, other family members, and neighbours.

[41] R.M. acknowledged to Ms. Otis that he had attempted suicide after his wife passed away in 2008. The attempt was the result of drinking to excess, and taking his wife's morphine pills.

[42] R.M.'s daughter, C.M., was interviewed by Ms. Otis, and she was aware of her father's suicide attempt. According to Ms. Otis, C.M. does not believe her father had or has a drug/alcohol problem or was/is unstable.

[43] By letter dated November 8, 2013, addressed to Ms. Dawn Clarke of Nova Scotia Department of Community Services (Exhibit #3), Ms. Otis does not recommend the paternal grandfather, R.M., as a possible placement for the children. She further advises in her letter at page 2:

> If placement of the children with Mr. M. proceeded, the Minister of Social Development would be so inclined to open a Child Protection Case at that time.

[44] **Mr. Ryan Ellis** is a child care worker, and the social worker in this case. His overall role is to ensure children in temporary care of the Minister have their daily and medical needs addressed, and prepare children for adoption in the event a permanent care order is granted.

[45] Mr. Ellis assumed carriage of the present case on April 16, 2012. The child, C.M. had four placements, and the child J.M.P. had five placements during his involvement with the file.

[46] Mr. Ellis testified that change in placements were necessary because the foster parents found the children's behaviour to be challenging (i.e.) eating, toilet training and anger issues.

[47] Mr. Ellis testified about Dr. Lynk's involvement, and his concern regarding the child, C.M. possibly having fetal alcohol syndrome. Mr. Ellis testified the symptoms were of concern, but not sufficient to make a diagnosis.

[48] C.M. also has "delayed speech", and Mr. Ellis testified about the therapy and programs being provided to C.M., all of which were earlier referred in the Plan of Care in Exhibit #1, at Tab 9.

[49] Mr. Ellis testified that C.M. has been referred to Dr. Reg Landry, who is conducting a developmental assessment, and examining the potential that C.M. may be autistic. To date that report has not been completed.

[50] In recent months C.M. has seen noticeable improvement in her speech; her sleeping is more settled; food issues have lessened; bathing issues have subsided; however, C.M. is not yet toilet trained which is not the norm for a four year old child.

[51] Mr. Ellis testified that the child, J.M.P. has similar issues to M.P. (i.e.) temper tantrums, food throwing, refusal to bathe.

[52] J.M.P. is not toilet trained, and is smearing feces on the walls and his body. This "ongoing issue" continues to be treated. Mr. Ellis testified:

> We do not know why he is doing this.

[53] Additionally, there are concerns about J.M.P.'s head banging, and Dr. Lynk has been consulted in this regard.

[54] There has been noted improvement in J.M.P.'s speech; his socialization; head banging has reduced; he sleeps better; however smearing of feces is still an issue.

[55] In Mr. Ellis' opinion both children need to be "monitored very closely" and "require constant supervision". Mr. Ellis further testified that good parenting skills are required to care for these children, suggesting that the person or persons providing care must have a good understanding of the children's behaviours/issues, and understand how to engage with them.

[56] Mr. Ellis testified about his role with potential adoptions. He testified there is a very good chance that there is a match for the children to be adopted together in the Province and/or region.

[57] Mr. Ellis testified that in his opinion should permanent care be awarded, the Minister would pursue adoption for both children with no provision for access, because access may impede the adoption process.

[58] The final witness to testify was **Dawn Clarke**. Ms. Clarke is a protection worker, and has been involved with this file since November 29, 2012.

[59] Ms. Clarke testified about the reasons why the children were taken into care from the Respondent, M.P., which included domestic violence, neglect, and M.P.'s frequent relocations.

[60] Ms. Clarke testified that the Respondent, M.P., participated in a parental capacity assessment. Upon review of the report (which was not tendered as evidence), the Minister determined that M.P. did not have the capacity to care for the children on her own. This was when the decision was made on July 12, 2013 to pursue permanent care.

[61] Regarding contact with the Respondent, T.M. and his family, Ms. Clarke testified T.M.'s sister contacted her on February 20, 2012. Ms. Clarke was advised T.M. was incarcerated, however for confidentiality reasons declined to discuss the file with T.M.'s sister.

[62] T.M. called the Minister's office on February 29, 2012, however the children were not in care at this time. The Minister did not hear from T.M. again until September 4, 2013.

[63] In the interim on February 29, 2012, Ms. Clarke heard from a neighbour of T.M. to advise her that the paternal grandfather, R.M., had the children's health cards.

[64] Ms. Clarke then attempted to contact R.M. on March 6, 2012 regarding same, however did not get a response from R.M. until April 2, 2012.

[65] Ms. Clarke testified R.M. said he would do whatever he could to ensure the children were not placed into permanent care.

[66] Ms. Clarke testified no M. family member expressed any interest about being a placement option for the children, except for T.M.'s sister prior to the children being taken into care and sister, S.H., who offered to provide support, but not placement.

[67] Ms. Clarke testified that R.M. called her on August 21, 2013 to advise the Respondent was still in jail, and had just received notice of the permanent care being sought by the Minister. Ms. Clarke was advised at this time that T.M.'s application for day parole had been denied, and that his release date from jail was scheduled for late September, 2013.

[68] Ms. Clarke first met with T.M. on September 4, 2013 when he was transported by authorities to Nova Scotia from New Brunswick to attend the court hearing scheduled for that day.

[69] Ms. Clarke discussed with T.M. the position of the Minister regarding permanent care, to which he advised that interested family would have to come forward to provide support (i.e.), his father R.M., because he felt he could not care for the children on his own.

[70] Ms. Clarke then contacted R.M. who indicated he was interested in putting forth a plan of care for the children. R.M. told Ms. Clarke he was "willing to do whatever it took".

[71] R.M. was then assessed as a possible restricted foster placement, however this process was terminated upon receipt of correspondence from Lynn Otis (Exhibit #2). The Minister concluded that R.M.'s home and plan did not provide a stable, long term option for the children.

[72] Ms. Clarke reiterated the same concerns about R.M. that Lynn Otis had earlier testified to, which included the lack of background information provided by R.M.

[73] Regarding T.M. Ms. Clarke testified that he is not a realistic consideration for placement given that he was just released from jail, and the statutory time lines have been exhausted in this matter.

[74] Ms. Clarke confirmed the Minister's plan to seek permanent care with no provision for access.

[75] During cross-examination Ms. Clarke confirmed the Minister was aware of the existence of T.M. and his family. Ms. Clarke further testified that T.M. was not formally informed of the Minister's, July 12, 2013, decision to seek permanent care. She testified she was uncertain whether or not he was in jail, having received conflicting information from the Respondent, M.P.

[76] On this particular issue the Court questioned Ms. Clarke as follows:

> Q. So I'm curious, over the course of the file you became involved in what was it?
>
> A. Um, December, 2012.
>
> Q. The children were taken into care in March of 2012?
>
> A. Right.
>
> Q. And before they were taken into care there seemed to be a fair amount of interest expressed from Mr. M. and/or his family about the children. Mr. M. contacted...I don't know whether it was T. or R. that contacted your office on February 29, 2012?
>
> A. That was T.M., and that was prior to the children coming into care.
>
> Q. Sure, but he was incarcerated at the time and he contacted your office?
>
> A. Right.

Q. Somebody had a conversation with him?

A. Yes.

Q. And the Agency would have been aware that he was incarcerated at that time?

A. Yes.

Q. And again on February 13th and 20th, the Agency had contact from T.M.'s sister, S....?

A. ...C.M..

Q. C., okay, and again you were aware that Mr. M. was incarcerated at that time as well, or not you personally, but the Agency?

A. Yes, C.M. informed the workers.

Q. And then my notes indicate that you had no contact from Mr. M., T.M., until September 4th, 2013?

A. Right.

Q. That's when he would have been getting involved in this proceeding?

A. I think that's when he was transported while he was still incarcerated.

Q. And when was it you had contact with Mr. M.'s neighbour regarding the health card? Is that the godmother we're talking about?

A. Yes, um, I think she had called the office on February 29th, and with regards to the health cards we spoke to her on March 5th, and she informed us that R.M. had them.

Q. So then you a conversation then with the neighbour, the godmother, three days after the apprehension then?

A. Yes.

Q. March 5th, and then as a consequence of that conversation you contacted Mr. R.M., the grandfather, for the health cards? Is that correct?

A. That's correct.

Q. And then you didn't hear back from him until April 2nd, 2012?

A. That's correct.

Q. Almost a month later. That's when you testified that Mr. R.M. said he would do whatever he could so the children would not be placed in permanent care? Is that the essence of what he said to you?

A. Um, I think he said they would do whatever they could so they wouldn't permanently stay in foster care.

Q. This would have been...the children were now in temporary care of the agency. Was there any discussion about the M.'s...Mr. T.M. is in custody as we know. Is

there any discussion with Mr. R.M. about the possibility of being involved as a placement, a transfer of the file or anything of that nature?

A. Through the whole involvement or....?

Q. I'm talking about at that stage of the game in April of 2012?

A. I don't believe at that time he put forward a plan for himself, but at that time we were working newly with M.P., and we were hoping that we could return the children to M.P. so the kids needed to be here to have access with their mom during that time.

Q. But there was no suggestion that the M. family could equally participate in putting forth a plan with the Agency?

A. No, I don't think so.

Q. And is that a conscious decision not to do so, because you're working with one party over the other, or is it an oversight, or is it not policy, or why would you not invite the other side of the family to get themselves involved as well?

A. I'm not...in this situation we were working with mom, and we knew dad was incarcerated, um, and we didn't work with R.M., but he didn't contact us after that date throughout our involvement until he was served with the paperwork, and at that time that is when we did have him assessed for a restricted foster home.

Q. And I guess that was done...did that happen after his call of August 21, 2013?

A. Ah, yes, um, we requested the assessment in September.

Q. So is there any contact with R.M. from, um, his contact on April 2nd, 2012 until August 21st, 2013?

A. No there's no contact in between then.

Q. And it was at that point that you became aware that Mr. T.M. would be released in late September of 2013?

A. Yes.

Q. And you relied upon the information you received from Mr. R.M. in that regard when he called on August 21st?

A. Yes I do believe he gave me his release date at that time.

Q. I'm just curious, you mentioned a number of times that you were uncertain or unsure as to whether Mr. T.M. was incarcerated or not. You were getting mixed messages I guess from some sources. Did you ever consider calling the facility itself, the correction facility itself to determine whether he was in or not?

A. I never made that phone call to the facility, no.

Q. No I realize the call wasn't made, I'm just curious why it wasn't made. Don't you want to know these things in terms of planning the file, and looking forward? I mean if M.P. doesn't pan out, I know you had hopes for M.P., but there's a biological father there in the wings, granted he's in jail, but he's named as a party to the proceeding. Why wouldn't you be interested in knowing his whereabouts and his circumstances?

A. I'm not sure I know how to answer to it. I know that we were under the impression that he was incarcerated, and then we kinda went with that.

Q. The impression was not an informed impression was it?

A. No.

Q. You just made the decision, I gather you just decided not to contact him?

A. Right.

Q. And again I'm asking the question, why would that be done? Are you the Worker in charge of making that decision?

A. Um, yes, I would have been the one who would contact T.M.

Q. So, can you give the Court an explanation as to why you wouldn't have contacted Mr. T.M. to find out what his whereabouts were, and what his plans were in terms of maybe making, or not, putting forth a plan to the Court?

A. Um, I mean, ah, maybe I should have phoned him, but I didn't do that as we were working with M.P. in hopes to return the children to M.P.

Q. In any event he's not released until September of 2013?

A. Right.

Q. And you are aware that the Court extended the time lines in this matter to permit Mr. M. to participate in this proceeding?

A. Yes.

Q. And you're also aware that Ms. P. basically consented to the permanent care earlier...late last year?

A. Yes.

Q. And you indicated in your evidence that when you spoke with Mr. M., T.M. I'm speaking about, that he could not necessarily look after the children, but he could with his father's assistance? Is that the essence of your evidence?

A. Um, he stated that he knows we wouldn't be able to return the children to him, but he would like the children to be with his family, and put R.M....and for his plan.

Q. And then you spoke to Mr. R.M., the grandfather, after you spoke with T.?

A. Yes.

Q. And Mr. R.M. indicated that he was interested in putting a plan forward?

A. He indicated he wanted to put a custody plan forward, and then we gave him the, um, I spoke to him about the process of how we wanted an adoption plan, and that he could be considered for that adoption.

Q. So, just in general terms and nothing specific with this case, but just in general terms, where a Court issues a Permanent Care Order with a provision for adoption, does...then that leaves the door open for family members who were not party to or involved with the permanent care proceeding to put forth a request to be a restrictive foster placement with a view to adoption? Is that it?

A. They can be in the adoption running just like any other family. They would have to go through the training and assessments. Well, our plan was when we assessed R.M. was if he was approved as a restrictive foster home we could place the children there, and support him while he applied for custody...or applied for adoption.

Q. But that didn't happen?

A. No it wasn't approved for him to be a restrictive foster home.

Q. And you indicated that Mr. R.M. said he would do...he was willing to do whatever it took to follow up in that regard, but yet you didn't receive the required consents and paperwork that you needed to go through that process to approve him for that possible placement?

A. Right.

Q. And again like I said, I'm going back through the notes in the order which I took them, so I'm now dealing with some of the notes that I took on cross; but February 13th you received a call from T.M.'s sister, and she expressed an interest in being a placement option, and that wasn't explored by your agency?

A. At that time the children weren't in care at that time.

Q. Okay, but would that not have been a flag to the file perhaps in the event the children were placed in temporary care that there was a family member who was expressing interest in being a placement option?

A. Um, normally that would be something that would be considered if, let's say C.M. was in the area. Um, where she was in New Brunswick we were working with mom at that time, and mom was seeing the kids regularly, and we needed the kids to be...the kids needed to be in the same area as mom and we were working with mom at that time, so that's why we didn't consider C.M..

Q. So there was a reason why you didn't, it wasn't just a matter of dismissing her interest?

A. No.

Q. And again when the decision was made to pursue permanent care, July 12th, 2013, you made no effort to contact Mr. T.M.?

A. I didn't phone T.M., no.

Q. And in retrospect do you think...I know you indicated earlier to me that maybe...in retrospect maybe you should have, but I'm just curious as to what thought process is going on when that phone call is not made?

A. Um, I mean I knew he was incarcerated and he was...I mean we were...under the impression that he was....

Q. ...well you didn't really know, you weren't sure, you were uncertain, but assuming...I'll give you the benefit of the doubt that you believe he's incarcerated. I mean in previous encounters you obviously had contact with Mr. M. while he was in jail...

A. ...yes he did phone on February 29th, yes.

Q. So I mean wouldn't that have indicated that perhaps he was a person that could be contacted even though he was still in jail to be informed of that decision?

A. Yes.

Q. As a biological father should he not have the right to be informed of that decision as soon as it's made?

A. Yes. You know he was served with the documentation, and that's how he received information.

Q. I'm just going to suggest this, if he was informed in July of 2013, whether or not he's in jail or not, he may have had access to seeking out legal counsel or advice to involve himself earlier than September 4th, would that be a possibility?

A. It could.

Q. And as we all know in this legislation when the clock is ticking, and all of a sudden you know July goes into August, and August goes into September, and there's now two months past, and the agency will say well we have no time to provide him services; but yet there's two months there that may or may not have been available to assess the situation. I'm not saying that could have happened or would have happened, I'm just raising the spectra of the need, in the Court's view, to communicate information to parents of these children. Don't you agree?

A. Yes.

Q. And my last question is this, and again it is a hypothetical one and does not reflect in any way in which the Court is going to rule in this matter, but just in a general sense where a Permanent Care Order is issued, does the option still exist for the extended family to ask to be or request to be or apply to be part of the adoptive process, and be considered as an adoptive placement?

A. Yes, any family members can come forward and go through the same adoption process that anybody else would, and with them being family they would be highly considered, but they would have to pass the same training....

Q. ...understood, but that window is still available, even post permanent care?

A. I believe so, yes.

RESPONDENT'S EVIDENCE

[77] **R.M.**, age 54, is the father of the Respondent, T.M., and the paternal grandfather of the children C.M. and J.M.P.

[78] R.M. resides in [...], New Brunswick, and lives in a four bedroom home where his son T.M. now resides. He pays $580.00 per month on his mortgage.

[79] R.M. works full-time with [...], and has held this position for the last four years. He primarily works during the day. Prior to that he was employed with [...] for 23 years.

[80] R.M. testified he is generally laid off from work in December, and he expects to return to his full-time job in April 2014.

[81] R.M.'s wife passed away on September 20, 2008. He and his wife had three children, with T.M. being the youngest. R.M. acknowledged that his late wife was the primary care giver to his children.

[82] R.M. is helping T.M. find work, and is optimistic T.M. can work with his employer, [...], in the spring of this year.

[83] R.M. testified that the mother of the children, M.P. and his grandchildren lived with him in New Brunswick from January to December 2011. M.P. then returned to Nova Scotia. R.M. has not seen his grandchildren since that time.

[84] R.M. testified that he is familiar with his grandchildren, and assisted in their care by changing diapers, putting them to bed, and providing for them financially.

[85] R.M. testified he no longer drinks, stipulating that he had his last drink just before M.P. and the children moved in with him in 2011.

[86] R.M. testified he has no health issues, and explained to the Court he attempted suicide in 2008, because he was depressed about the loss of his wife. He testified he was discharged by the hospital the very night of the incident.

[87] R.M. acknowledged that he did not complete the criminal record check, but he testified he was convicted of assault in 1992 stating it was a "bad mistake...a bad decision". R.M. was fined five hundred dollars and placed on probation for six months.

[88] Regarding ongoing care for the children, R.M. testified:

> T.M. would have to look after them. I would spoil them.

[89] R.M. testified he has lined up a babysitter, a neighbour from down the road, who has children, and would be reliable in R.M.'s opinion.

[90] R.M. has family living in [...], New Brunswick, which is approximately forty-five minutes away from [...]. This family includes R.M's sister, brother, and his parents who are in their seventies, but reportedly in good health.

[91] R.M. understands his grandchildren have special needs, and that he would ensure all their medical and developmental needs and/or appointments would be addressed by T.M. with family support. R.M. testified:

> T.M. can do it.

acknowledging that T.M. does not drive.

[92] When cross-examined about the children's special needs, R.M. testified:

> I'll have to pay closer attention won't I?

[93] R.M. testified that he understood the reason for him to provide the Minister with the authority to investigate both his criminal and mental health background. As of the conclusion of this hearing R.M. had not provided this information to the Minister.

[94] R.M. concluded his evidence by testifying that the children should be with their father and family. He stated:

> I can offer a stable home, food, love, care, whatever I can.

[95] **T.M.** was the final witness. He is 24 years of age, and has lived with his father R.M. since his release from prison in September 2013.

[96] T.M. provided information about his developmental years, growing up in New Brunswick. T.M. is the youngest of three children. He testified that his mother looked after the household while his father worked. He testified:

> Dad looked after the kids after work.

[97] After T.M.'s mother passed away in 2008 he moved to [...] and lived with his older brother, and started to work at a call centre.

[98] T.M. is currently employed [...]. He works nights. He commenced this job in December 2013, and expects to earn approximately $500.00 per week.

[99] T.M. hopes in the spring to be employed at [...] where his father works, and testified that he would expect to earn $400.00 for a 40 hour week.

[100] T.M. confirmed his criminal past testifying that he commenced serving his four year sentence on January 25, 2011. During his incarceration he was formally diagnosed with depression and anxiety, for which he was prescribed medication. He also received counselling for grief and depression.

[101] T.M. discontinued contact with his family in November 2011. He became aware that M.P. and the children had returned to Nova Scotia in December 2011. T.M. has not seen his children since January 9, 2011. He did arrange to provide the children Christmas gifts in December 2013.

[102] T.M. testified he first became aware of the Minister's involvement in June 2012. On cross-examination he confirmed he was personally served with Notice of the proceeding on March 22, 2012, evidenced by the Affidavit of Service marked Exhibit #5. T.M. testified that he had no further information from the Minister until being served with documentation indicating that the Minister had made the July 12, 2013 decision to seek permanent care. T.M. became formally involved in this proceeding September 4, 2013.

[103] T.M. testified he has been drug free since April 2012, when he was found to be using marijuana while incarcerated. T.M. has attended Narcotics Anonymous and Alcoholics Anonymous while in prison, admitting he had a pre-incarceration history with marijuana, extasy, L.S.D., and crack cocaine use. T.M. also took part in job training while incarcerated, which included drywall, and vehicle painting. He hopes to attend Community College to complete a two year course for automotive repair and painting.

[104] T.M.'s plan is to have the children live with him and his father in [...], New Brunswick. He acknowledged his father works five days a week, and is usually laid off during the winter months.

[105] T.M. testified that he would be the primary caregiver for the children while his father worked or was unavailable. In addition, T.M. identified a support network of approximately ten family and friends who could assist him with child care. It was brought forth in cross-examination that none of the proposed support persons testified at this proceeding.

[106] T.M. was asked:

> Q. There's been a suggestion that the children may have developmental delays. How do you plan to address that?

T.M. responded:

A. Find the resources in my area to help with those needs.

[107] T.M. concluded his direct evidence as follows:

Q. Now we heard Dawn Clarke's evidence this morning quoting you as saying that you "know the children can't be in your care". Would you please clarify what you mean by that?

A. When I first was released, well actually I wasn't released by then, in my mind I didn't figure I could get the kids because I was on parole. I didn't think they would grant me any kind of custody.

Q. And are you seeking custody now?

A. Yes.

Q. And why do you feel it is in the best interests of the children to be in your care at R.M.'s place?

A. Because I am their biological father, and I know there would be a stronger bond between me and the kids than the kids and a stranger.

Q. Medical issues, are there any medical issues that you could address?

A. Well I heard J.M.P. has problems with his ears, and I had the same problems at his age, and then C.M. with the milk, and C.M. being hyper just like me. It's probably hereditary.

Q. And have you been asked to participate in any parental capacity assessment?

A. No.

[108] T.M. was cross-examined about his coping and parenting skills as follows:

Q. But in April of 2013 the Parole Board found that the issues, the personal and emotional issues related to the losses that you have experienced, they found that those issues had not yet resolved by April of 2013?

A. Yes, but every time I see the psychologist they say, I'd meet with them for a couple of months, and they'd say I'm good.

Q. Okay, but now you're seeing someone?

A. Yes, once a month.

Q. Okay, and I was a little confused by your evidence because first you said it was a psychologist?

A. She's a psychologist and a social worker.

Q. And a social worker, okay. You indicated you're taking parenting courses through...from your psychologist?

A. Well through the social worker part. She has parenting books in her office.

Q. Okay so you've gone through some of those parenting books?

A. Yes, and that was set up by Paul.

Q. And when was that set up?

A. When I was released.

Q. But you really haven't been a parent...haven't had an opportunity to be a parent to your own children to date, correct?

A. No, not since I've been released.

Q. Okay, but even before you were released, J.M.P. was only three months when you were incarcerated right?

A. C.M. was a year and a half.

Q. But you were using drugs prior to that?

A. Not the whole time.

Q. You were drinking before that?

A. Not the whole time.

Q. Not the whole time, okay.

A. It was more the last month, month and a half before I went in. That's when everything fell apart.

Q. Okay.

A. When I got laid off from [...] that's when everything...I was doing good right from there till when C.M. was first born. I worked the whole time. M.P. stayed home with the kids, and I went to work, then I'd come home and help out with the kids afterwards.

Q. Okay.

A. I provided for the three of us, well three of us then four of us.

[109] Regarding his drug use T.M. testified as follows during cross-examination:

Q. Sure. You indicated that you were going to Narcotics Anonymous in Springhill, and Alcoholics Anonymous?

A. Yes.

Q. Are you still going to any of those programming?

A. No, because I am drug free now.

Q. Okay.

A. And alcohol free.

Q. Right, but you indicated that in your evidence when you were talking about Narcotics Anonymous you went to meetings but said you never used narcotics.

A. Narcotics in my eyes is I.V. needles. I wasn't into heavy, hard narcotics for a long time. It was more the marijuana is what I went for.

Q. But you'd agree you were using crack cocaine?

A. Yes.

Q. And that led to some pretty serious consequences in your life?

A. Yes, I understand that.

Q. Okay, and you don't consider that a serious drug?

A. Yes I do, it's just it wasn't for a long period of time. I corrected it before it got...I didn't correct it, they corrected for me.

Q. They being?

A. Well, I got sent to prison, and I learned from my mistakes.

MINISTER'S SUBMISSIONS

[110] By way of written submissions filed February 10, 2014, the Minister submits the following:

- That the standard of proof that it must meet is on a balance of probabilities.

- That the function of the Court is to determine whether or not the children continue to be in need of protective services.

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

- That there are only two possible disposition orders presently available to the Court, namely, dismissal of the proceeding or an Order for Permanent Care and Custody.

- That if the Court finds the children are still in need of protective services, the matter cannot be dismissed.

- That although the statutory time line expired in this matter on August 20, 2013, it was in the best interests of the children to extend the time lines so as to permit the Court to hear all of the relevant evidence.

- That the requirements of s. 42(2)(3) and (4) of the *Children & Family Services Act* have been met, thus permitting the court to consider the granting of a Permanent Care Order in favour of the Minister.

- That no access should be afforded to the Respondents.

- That in support of the Minister's position, the evidence demonstrated that Respondent's T.M.'s plan does not alleviate risk to the children.

- That it is clear from the evidence that T.M. has had a history of substance abuse, and has struggled with addictions.

- That T.M. has difficulty coping with adversity, which will make it difficult for him to parent two special needs children.

- That drug use was a factor in T.M.'s criminal past.

- That although T.M. has participated in programming and services while incarcerated, his progress was sporadic.

- That the Parole Board findings as per Exhibit #2 are an important consideration in assessing the remaining risk to the children.

- That the Parole Board concluded T.M. still presented a risk to the public as of April 2013, such that he was denied day parole, and later on release placed on conditions to abstain from alcohol and drugs; not to associate with persons believed to be involved in criminal activity, and to follow the treatment plan for emotional health and stability.

- That as of April 2013 the Parole Board concluded T.M.'s emotional and grief issues had not been resolved.

- That T.M.'s difficulty dealing with adversity is well established by his inability to deal with the death of his mother and friends, and further evidenced by his deterioration in prison upon learning that his children had been taken into care.

- That T.M. does not have the parenting skills required to care for two special needs children.

- That the evidence is vague with regard to the role of family and friends whom T.M. would be reliant upon to assist him with day-to-day child care.

- That T.M's plan to have his father assist him with caring for the children fails to alleviate risk to the children.

- That R.M.'s failure to provide any information regarding his mental health background is a cause of concern in terms of assessing potential risk to the children.

- That although T.M. and his father, R.M. mean well, their plan of care for the children is neither realistic nor reasonable.

- That T.M. and R.M. have not seen the children in over three years.

- That T.M. does not know his children, and the children do not know him.

- That this unfortunate circumstance was created as a result of T.M.'s incarceration, which impeded T.M.'s ability to play a more active role in the children's lives.

- That if the children were placed with T.M. and his father, it is likely that the children would be the subject of continued child welfare interventions in New Brunswick.

- That the children remain in need of protective services, and therefore the Court cannot dismiss the proceedings in favour of T.M.

- That it is in the best interests of the children to be placed in the permanent care of the Minister, with no provision for access.

RESPONDENT'S SUBMISSIONS

[111] The Respondent, T.M. submitted by way of written submissions filed February 18, 2014 as follows:

- That the Court must consider, pursuant to s. 46(4) of the *Children & Family Services Act*, whether or not circumstances have changed since the protection finding.

- That the Court must consider, pursuant to s. 46(4)© of the *Children & Family Services Act*, what is the least intrusive alternative that is in the best interests of the C.M. & J.M.P.

- That circumstances have changed since the making of the last Disposition Order, which permits favourable consideration of T.M.'s plan of care.

- That T.M. has acknowledged his criminal past, and has taken responsibility for his actions.

- That T.M. has demonstrated his commitment to his children by coming forward to seek custody, even though he has not had sufficient time since his release to re-establish himself firmly into the community.

- That T.M. has taken the initiative to try to care for his children.

- That many family support persons were not available to testify in this proceeding due to the difficulties of travel and financial hardship.

- That to date the children have experienced much disruption and transition while being in the care of the Minister.

- That T.M. can establish a continuity of care for the children, and a sense of belonging in their family.

- That it is acknowledged that both C.M. and J.M.P. would not remember their father, T.M.

- That there is no evidence to support the Minister's contention that the children have special needs.

- That alleged developmental delays with the children may be the result of the children being in unfamiliar circumstances.

- That in the absence of medical diagnosis it cannot be assumed that the children have special needs, especially in light of the foster parents being eligible for increased allowance from the Minister if such circumstances.

exist.

- That the concern about J.M.P. smearing his feces may be reflective of inadequate diaper changing, and that such behaviour is hardly surprising if J.M.P. is in need of changing.

- That T.M. is aware of the Minister's concerns regarding the children's special needs.

- That T.M. is willing to seek the help of professionals in getting assessments done so as to address any issues that may exist.

- That the children have not been well-served by being in care.

- That the children have been in multiple homes.

- That there have been delays in arranging services for the children.

- That there has been limited or no communication between the Minister and T.M. as to the medical history of the children.

- That by virtue of M.P. consenting to the permanent care of the children, any risk that she may have posed to the children is now removed.

- That T.M. has supports in place through his parole conditions and services, sufficient to alleviate any concern about T.M.'s ability to handle stress and anxiety.

- That T.M.'s father, R.M. is a capable support person, and any concerns about his mental fitness and stability are unsubstantiated.

- That both T.M. and R.M. have a proven and established work ethic.

- That T.M.'s determination in following through with the proceeding indicates that T.M. has made great strides in controlling his anxiety.

- That the evidence of T.M. that he is a “work in progress” speaks well of his attitude in working with the circumstances at hand.

- That T.M. can provide a safe and suitable environment for the children in his father’s New Brunswick home.

- That T.M. and his family provide the advantage of understanding the medical issues of the M. family in terms of dealing with medical issues that may arise with the children.

- That T.M. did take advantage of the services and programs offered to him while incarcerated.

- That T.M.’s recognition of his issues and/or weaknesses further demonstrates the progress T.M. has made in addressing same during incarceration and since his release.

- That the Minister has failed to fulfill its responsibility under the *Children & Family Services Act* to promote the integrity of the family.

- That the failure to involve T.M. in this proceeding in a more timely and informed fashion has negatively impacted the Minister’s view of T.M.’s plan of care.

- That the Minister breached its duties under the *Children & Family Services Act* by failing to notify and/or inform T.M. of the progress of these proceedings.

- That T.M. has been denied the opportunity to participate effectively at this hearing, thus violating the principles of fundamental justice and fairness.

- That in the absence of a parental capacity assessment of T.M. and in the absence of parenting information regarding him, the Minister has not proven, on a balance of probabilities, that there is substantial risk to the children should they be placed in the care of T.M.

- That the children C.M. and J.M.P. are no longer in need of protective services.

- That the Minister's application for permanent care should be dismissed.

- In the event the Minister's application is granted, T.M. requests that he have access with his children as long as they remain in foster care, and for such additional periods as this Honourable Court deems just.

BURDEN OF PROOF

[112] A proceeding pursuant to the *Children and Family Services Act* is a civil proceeding **NS(MCS) v. DJM** [2002] N.S.J. No. 368 (NSCS).

[113] 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 at paragraph 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 seriousness of the allegations or consequences. However, these considerations do not change the standard of proof.

And further at paragraph 45 and 46:

> 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.
>
> 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 musts be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[114] The burden of proof is on the Minister to show that the Permanent Care and Custody Order is in the children's best interests.

TEST ON STATUTORY REVIEW

[115] 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:

> 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 protective 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...

> The question 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.
>
> 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

[116] 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.

[117] 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 matter pursuant to this *Act*, the paramount consideration is the best interests of the child.

[118] I have considered the relevant circumstances of Section 3(2), which provide:

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 of 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 relationship 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 view and wishes, if they can be reasonable 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.

[119] I have considered the relevant provisions of Section 22, and in particular Section 22(1) and Section 22(2)(b) and (g) of the *Children and Family Services Act*, which states:

> **Child is in need of protective services**
>
> 22 (1) In this Section, "substantial risk" means a real chance of danger that is apparent on the evidence.
>
> (2) A child is in need of protective services where
>
> (a) 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;
>
> (b) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (a);
>
> (c) the child has been sexually abused by a parent or guardian of the child, or by another person where a parent or guardian of the child knows or should know of the possibility of sexual abuse and fails to protect the child;
>
> (d) there is a substantial risk that the child will be sexually abused as described in clause (c);
>
> (e) a child requires medical treatment to cure, prevent or alleviate physical harm or suffering, and the child's parent or guardian does not provide, or refuses or is unavailable or is unable to consent to, the treatment;
>
> (f) the child has suffered emotional harm, demonstrated by severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour and the child's parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;
>
> (g) there is a substantial risk that the child will suffer emotional harm of the kind described in clause (f), and the parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;

(h) the child suffers from a mental, emotional or developmental condition that, if not remedied, could seriously impair the child's development and the child's parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the condition;

(i) the child has suffered physical or emotional harm caused by being exposed to repeated domestic violence by or towards a parent or guardian of the child, and the child's parent or guardian fails or refuses to obtain services or treatment to remedy or alleviate the violence;

(j) the child has suffered physical harm caused by chronic and serious neglect by a parent or guardian of the child, and the parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;

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

(k) the child has been abandoned, the child's only parent or guardian has died or is unavailable to exercise custodial rights over the child and has not made adequate provisions for the child's care and custody, or the child is in the care of an agency or another person and the parent or guardian of the child refuses or is unable or unwilling to resume the child's care and custody;

(l) the child is under twelve years of age and has killed or seriously injured another person or caused serious damage to another person's property, and services or treatment are necessary to prevent a recurrence and a parent or guardian of the child does not provide, or refuses or is unavailable or unable to consent to, the necessary services or treatment;

(m) the child is under twelve years of age and has on more than one occasion injured another person or caused loss or damage to another person's property, with the encouragement of a parent or guardian of the child or because of the parent or guardian's failure or inability to supervise the child adequately. 1990, c. 5, s. 22; 1996, c. 10, s. 1.

[120] In addition, the Court has reviewed and considered s. 9 and s. 13 of the *Act* which respectively states:

Functions of Agency

9. The functions of an agency are to

(a) protect children from harm;

(b) work with other community and social services to prevent, alleviate and remedy the personal, social and economic conditions that might place children and families at risk;

(c) provide guidance, counselling and other services to families for the prevention of circumstances that might require intervention by an agency;

(d) investigate allegations or evidence that children may be in need of protective services;

(e) develop and provide services to families to promote the integrity of families, before and after intervention pursuant to this Act;

(f) supervise children assigned to its supervision pursuant to this Act;

(g) provide care for children in its care or care and custody pursuant to this Act;

(h) provide adoption services and place children for adoption pursuant to this Act;

(I) provide services that respect and preserve the cultural, racial and linguistic heritage of children and their families;

(j) take reasonable measures to make known in the community the services the agency provides; and

(k) perform any other duties given to the agency by this Act or the regulations, *1990, c. 5, s. 9.*

Services to Promote Integrity of Family

13(1) Where it appears to the Minister or an agency that services are necessary to promote the principle of using the least intrusive means of intervention and, in particular, to enable a child to remain with the child's parent or guardian, the Minister and the agency shall take reasonable measures to provide services to families and children that promote the integrity of the family.

(2) Services to promote the integrity of the family include, but are not limited to, services provided by the agency or provided by others with the assistance of the agency for the following purposes:

(a) improving the family's financial situation;

(b) improving the family's housing situation;

(c) improving parenting skills;

(d) improving child-care and child-rearing capabilities.

(e) improving homemaking skills;

(f) counselling and assessment;

(g) drug or alcohol treatment and rehabilitation;

(h) child care;

(I) mediation of disputes;

(j) self-help and empowerment of parents whose children have been, are or may be in need of protective services;

(k) such matters prescribed by the regulars. *1990, c.5, s. 13.*

LAW AND ANALYSIS

ISSUE ONE

Whether or not the Court has the jurisdiction to exceed the statutory timelines as prescribed in s. 45(1)?

[121] Section 45(1) states as follows:

Duration of Orders

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.

(2) The period of duration of an order for temporary care and custody, made pursuant to clause (d) or (e) of subsection (1) of Section 42, shall not exceed

(a) where the child or youngest child that is the subject of the disposition hearing is under three years of age at the time of the application commencing the proceedings, three months;

(b) where the child or youngest child that is the subject of the disposition hearing is three years of age or more but under the age of twelve years, six months; or

(c) where the child of youngest child hat is the subject of the disposition hearing is twelve years of age or more, twelve months.

(3) where a child that is the subject of an order for temporary care and custody becomes twelve years of age, the time limits set out in subsection (1) no longer apply and clause © of subsection (2) applies to any further orders for temporary care and custody. *1990, c. 5, s. 45.*

[122] 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 proceedings or other 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 remains intact. Any service-based measure intended to preserve or reunite the family unity, must be one which can effect acceptable change within the limit permitted by the *Act.* ... (Emphasis added)

[123] The belated involvement of T.M. in these proceedings necessarily required the Court to consider exceeding the statutory time lines as defined by the *Children and Family Services Act.*

[124] As a result, the Court found, with the consent of the parties, that it was in the best interests of the children to exceed the statutory time lines to afford the necessary time for the Respondent, T.M. to present all relevant evidence so as to permit the Court to fairly and properly adjudicate upon the matter.

[125] In the case of **D.C. v. Family & Children Services of Lunenburg County and T.M.C. and C.L.C.**, (2006) 249 N.S.R. (2d) 116 (NSCA) Justice Oland stated at paragraph 17 as follows:

> [17] However, the law is clear that exceeding that time limit does not always constitute an error of law. In **Children's Aid Society of Cape Breton-Victoria v. A.M.** 2005 NSCA 58 (CanLll), [2005] N.S.J. No. 132, 2005 NSCA 58, in seeking to overturn an order placing her children in permanent care, the appellant parent argued first, that the judge had no jurisdiction to make a permanent care order once the section 45(1)(a) time limits had been reached, and second, if the judge had discretion to extend the time, he erred in doing so because he failed to consider whether the extension was in the best interests of the children. Cromwell, J.A. for this Court stated:
>
> [28] Turning to the first submission, there was no loss of jurisdiction here. The Court made this clear in **Nova Scotia (Minister of Community Services) v. B.F.** 2003 NSCA 199 (CanLll), (2003), 219 N.S.R. (2d) 41 (C.A.); [2003] N.S.J. No. 405 (Q.L.) (C.A.). At paras. 57 an 58 and **The Children's Aid Society and Family Services of Colchester County v. H.M.** reflexm, (1996), 155 N.S.R. (2d) 334 (C.A.). The *Act* contemplates that there will be a judicial determination of the

> child's best interests. If a time limit, which is a milestone toward that determination, caused the Court to lose jurisdiction to determine the child's best interests it would contradict the purpose of the *Act*. Therefore, the Court did not lose jurisdiction by reserving its decision as to disposition for longer than the time limits for temporary care orders under section 45.

[126] In my view it was necessary and appropriate for the Court to exceed the time lines in the best interests of the children. Not to do so would contradict the purpose of the *Act*.

ISSUE TWO

(a) Has the Respondent, T.M., been afforded procedural fairness in this proceeding?

(b) Has the Minister breached its duty under the *Children and Family Services Act?*

[127] The Respondent, T.M., submits that he has been denied a fair hearing as a result of the Minister not notifying him and/or keeping him informed as to the ongoing status of the proceeding.

[128] As earlier noted, the statutory time lines were extended by this Court to ensure T.M. had a fair and reasonable opportunity to present his plan of care for his children to the Court.

[129] It must be recognized this was done in the circumstances of the Respondent, M.P., consenting to the Minister's application for permanent care.

[130] The Minister initially requested the Court to issue a permanent care order without hearing from T.M., who was incarcerated at the time.

[131] The Minister subsequently agreed that it was in the best interests of the children to extend the time lines, which would afford T.M. the opportunity to present his case.

[132] In **N.P. (Re),** [2001] O.T.C. 93 (Sup.Ct.), the Court set aside an order for Crown wardship that was made without notice to the biological father. The Society had obtained two orders dispensing with service; however, the Court found that these orders were deficient in disclosure of material information; were misleading, and so found that notice was not given. At paragraph 19 Justice Nelson quoted the Supreme Court of Canada in **New Brunswick Minister of Health v. G.**, [1999] 3 S.C.R. 46 as follows:

> ...the state can remove a child from parental custody only in accordance with the principles of fundamental justice which are to be found in the basic tenets of our legal system. The Chief Justice went on to say...
>
> Thus, the principles of fundamental justice in child protection proceedings are both substantive and procedural. The state may only relieve a parent of custody when it is necessary to protect the best interests of the child, provided that there is a fair procedure for making this determination...
>
> For the hearing to be fair, the parent must have an opportunity to present his or her case effectively. ... If [they are] denied the opportunity to participate effectively at the hearing, the judge may be unable to make an accurate determination of the child's best interests. There is a risk that the parent will lose custody of the child when in actual fact it might have been in the child's best interest to remain in his or her care.

[133] Justice Nelson continued at paragraph 20 of his decision:

> The importance of procedural fairness, which encompasses the requirement of notice is further underlined in *Children's Aid Society of Halton Region v. C.J.R.,*

> 2005 ONCJ 514 (CanLll), [2005] O.J. No. 5786, 2005 ONCJ 514. The Court found (during the original protection application) that the aunt and uncle who cared for the child in the past should have been given formal notice of the status review application seeking Crown wardship. Similarly, in *A.M. v. Chatham-Kent Integrated Children's Aid Society*, [2006] O.J. No. 2984 (O.C.J.), where the Society neglected its duty to locate the father and give him notice of the wardship proceedings, the Court found that there was a lack of compliance with the fundamental principles of procedural and substantive fairness.

[134] I agree with Justice Nelson's comment at paragraph 27 of his decision where he states that although the best interests of the child are paramount, the fundamental right of a parent to be heard cannot be "sacrificed".

[135] However, this is not the case here. I find T.M. was afforded an opportunity to present his case effectively. T.M. had the benefit of counsel, the opportunity to effectively challenge the Minister's case, and present evidence in support of his plan of care.

[136] T.M. had been served personally, and thus had clear notice of this proceeding. He was aware his children were taken into care. Unfortunately, his incarceration prevented him from earlier participating in person, but he could have pursued other options to have his views expressed or made known to the Court at an earlier time.

[137] It is unfortunate that the Minister was not more diligent in notifying T.M. of its intention to seek permanent care.

[138] T.M. was entitled to be informed of this very important decision taken by the Minister, and in the Court's view, his incarceration does not provide the Minister any reasonable excuse for failing to follow up with notice of this decision to T.M.

[139] I trust the Minister will examine its deficiencies in this regard, and be more diligent in keeping Respondent parents informed of a proceedings' status regardless of the circumstances of the parents. I see this as part of the Minister's function pursuant to ss. 9 and 13 of the *Act*.

[140] This Court previously stated in **Minister of Community Services v. J.D. and J.H.** [2011] NSSC 113 as follows at paragraph 191:

> As referenced earlier, the Court wishes to address concerns with what appears to be a lack of meaningful communication between some Agency workers and Mr. H. I accept Mr. H.'s evidence that his efforts to rehabilitate his relationship with the Agency were largely dismissed by the Agency once the permanent care plan was put in place. Although Mr. H. is not without fault, it is the Court's view that better efforts should have been made by Agency workers to remain in contact with Mr. H. and keep him informed of information relevant to the proceedings, particularly as it related to scheduling his access.
>
> And again, although not affecting the result, I, nonetheless wish to express additional concern regarding file maintenance and disclosure procedures of Agency workers in this instance who did not share relevant file reports regarding the Respondents on a regular and timely basis. It is apparent to this Court that Agency workers work within a team environment and rely upon each other's assessments in making determinations which affect the children and parents alike. Agency workers must be diligent in maintaining regular contact with each other so that all relevant file information is available to each other, and the Agency hierarchy, before making any interim or final decision regarding the children's best interests.
>
> Protecting the children's best interests is not a license for the Agency to be insensitive to the informational needs of parents or other parties to a proceeding. I am satisfied that was not the agency's intention, or the message to be sent, but the evidence suggests otherwise in terms of the Respondents' testimony regarding their respective interactions with some agency representatives. The Agency should consider re-examining its policies in this regard to ensure that litigants to a proceeding are kept well informed of the agency mandate and the reasons for which certain actions are being contemplated or taken.

[141] The circumstances of T.M.'s belated involvement in this proceeding are unfortunate; but he has nonetheless been afforded a fair hearing in accordance with the principles of fundamental justice.

[142] It was not unreasonable for the Minister to assume T.M. may not be a viable option to provide care for his children, given that he was not in a parenting role for over three years. Nevertheless, such an assumption by the Minister, reasonable or not, should not be a basis upon which to justify the action of not providing notice to T.M. of the decision to seek permanent care of his children. That being said, the Ministers alleged breach of notice, although deficient, falls far short of violating its duty or function under the *Children and Family Services Act* in these circumstances.

[143] Therefore, I find it is appropriate that the Court adjudicate upon the merits of the Minister's application.

ISSUE THREE

What is the appropriate disposition order in the present circumstances, i.e., permanent care or dismissal?

[144] 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.

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

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

[147] According to the legislation which I must follow, the Court has only two stark options available at this time:

(1) Order permanent care, or

(2) dismiss the proceeding and return the children to the Respondent, T.M.

[148] There is no middle ground. As noted by the Nova Scotia Court of Appeal in **G.S. v. Nova Scotia (Minister of Community Services),** [2006] N.S.J. No. 52 (NSCA) at paragraph 20:

> If the children are still in need of protective services the matter cannot be dismissed.

[149] The law is clear that should a trial judge conclude at a disposition hearing or disposition review hearing in relation to a temporary care order, that circumstances are unlikely to change, the judge has no option ... but to order permanent care. **Nova Scotia (Minister of Community Services) v. LLP** [2003] N.S.J. No. 1 (NSCA).

[150] 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).

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

[152] 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 Respondent poses a substantial risk of harm or real chance of danger to the children C.M. and J.M.P., has been proven on a balance of probabilities.

[153] 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 children C.M. and J.M.P. continue to be in need of protective services. It is in the best interests of the children 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 C.M. and J.M.P. to the Respondent, T.M. on a temporary or permanent basis.

[154] I reject the plan put forth by the Respondent, T.M. His plan in no way addresses the long term needs of the children, and I find that C.M. and J.M.P. would be placed at substantial risk of harm if returned to their father's care. The proceeding cannot be dismissed.

[155] T.M.'s plan is uncertain, unstructured, and speculative. It is not reasonable or realistic to place the children in their father's care. As well intentioned as T.M. is, he lacks total insight into the parenting skills which will be required for his two children, who have or may have special needs.

[156] I am compelled to reject T.M.'s plan in the children's best interests. I further reject his contention that the children do not or may not have special needs. His submission to the contrary is not realistic in view of the evidence. To ignore the concerns of the Minister in this regard would not be in the children's best

interests. Even if T.M. accepts the children have special needs, he does not have the necessary parenting skills and/or resources to adequately address same.

[157] Additional reasons for rejecting T.M.'s plan of care are as follows:

- T.M. does not know his children, and his children do not know him.

- T.M. has not seen his children for over three years, since January, 2011.

- T.M. has served his term of imprisonment, and upon completion of parole will have fully paid his debt to society. As a consequence, I place no weight on his criminal past, save and except to recognize that his years of imprisonment have had the unfortunate result of estranging him from his children.

- T.M. has no established parenting skills. His expressed good intentions in this regard are simply not a sufficient basis upon which to conclude there is a reduction or elimination of risk.

- T.M.'s history of depression and anxiety has not been completely addressed. I fear the demanding role of parenting, especially with two children with apparent special needs, could trigger a relapse and place the children at risk of harm.

- T.M.'s father, R.M. does not have the ability to assist with the parenting role to the extent necessary in these circumstances.

- R.M. works full-time, and he made it clear he more embraces the role of grandfather than caregiver.

- R.M. has also been a non-factor in the children's lives for over three years. In spite of his expressed intention to do whatever it would take to have the children returned to their father, R.M. has not taken the necessary steps to cooperate with Agency officials in an effort to alleviate concerns about his ability to assist with parenting.

- There is major uncertainty about R.M.'s overall mental and physical health. The evidence of his suicide attempt in 2008 is a red flag, which the Court cannot ignore in terms of assessing risk to the children.

- The Court was told of a number of people who would be available to assist T.M. and R.M., but none were called to testify. Thus, there remains great uncertainty in the Court's mind as to whether or not these people pose an assist or risk to the children.

[158] T.M's plan is purely speculative upon which the Court can place no reliance. I am satisfied, on a balance of probabilities, that the children would not be safe and free from risk of harm if placed into an environment where T.M. lives.

[159] T.M.'s plan is neither sound, sensible, workable, nor well conceived. It has no basis in fact.

[160] 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. I find that T.M. is not capable of assuming the demanding role of parenting. It is not safe to turn the children to him.

[161] T.M.'s pronounced good intentions are not sufficient in terms of removing risk from the equation. T.M's intentions are laudable, but not reasonable in terms of the children's best interests.

[162] The children are entitled to be in a stable, long-term and permanent environment. I find it is more likely than not that they have special needs, which will require that they be monitored very closely with constant supervision. They will require dedication and devotion from skilled parents to not only address their day to day needs, but also to address concerns regarding developmental delays and

special needs. Based upon my assessment of the evidence, this is best achieved by maintaining the status quo with a view to a permanent adoptive placement.

[163] The Court thus finds that the children C.M. and J.M.P. remain in need of protective services. I further find the circumstances justifying this conclusion are unlikely to change within a reasonably foreseeable time.

[164] The Order for permanent care is thus granted.

[165] Permanent care and custody of the children, C.M. and J.M.P. 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.

ISSUE THREE

Should access be provided to T.M.?

[166] 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:

> 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.

[167] 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 components 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:

> 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]

[168] The Nova Scotia Court of Appeal has 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:

> 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 o 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.**
>
> 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.
>
> 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."

[169] This position is further highlighted by the comment of Chief Justice Michael MacDonald in **K.T.**, supra, at paragraphs 47 and 38:

> Before the issuance of a permanent care order, the legislative focus in 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.
>
> 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.

[170] 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 de-emphasis on family contact and instead priority is assigned to long term stable placement.

[171] 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.

[172] The Minister has confirmed its plan to seek permanent placement for C.M. and J.M.P. 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 bests interests of the children, C.M. and J.M.P. C.M. and J.M.P. are entitled to continuity and stability in their lives. Permanent care with no provision for access will achieve this purpose.

CONCLUSION

[173] An order for Permanent Care and Custody in favour of the Minister will issue, with no provision for access to the Respondents, T.M. and M.P.

[174] T.M. is not up to the demanding task of parenting, and I foresee the continued involvement of child welfare authorities should the children be returned to him.

[175] The Court has an obligation to ensure the children's best interests are protected, and that is best achieved with this Order.

Order accordingly,

_____

J.