SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Nova Scotia (Community Services) v. K.W., 2014 NSSC 136

Date: 20140410
Docket: SFSNCFSA 081176
Registry: Sydney

Between:

The Minister of Community Services

Petitioner

v.

K.W. and B.W.

Respondent

TO PUBLISHERS OF THIS CASE:

PLEASE TAKE NOTE THAT SECTION 94(1) OF THE CHILDREN AND FAMILY SERVICES ACT APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADINGS BEFORE PUBLICATION.

SECTION 94(1) PROVIDES:

Prohibition on publication
1. 94 (1) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.

Editorial Notice

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

Judge: The Honourable Justice Darryl W. Wilson

Heard: November 28, 2013; December 11 and 12, 2013; and January 6, 7, 8 and 9, 2014, in Sydney, Nova Scotia

Written Submissions: January 31, 2014; February 14, 2014; and February 18, 2014

Written Decision: April 10, 2014

Counsel: Tara MacSween, for the Minister of Community Services
Kimberly Franklin, for K.W.
Jennie Donnelly McDonald, for B.W.

By the Court:

[1] The Minister of Community Services has filed an application pursuant to the ***Children and Family Services Act***, S.N.S. 1990, c.5 requesting the following orders:

(a) The child, S.W., born September [...], 2010, be found in need of protective services under Subsection 22(2)(b) and (d), and;
(b) An order for permanent care and custody without access for the purposes of adoption.

[2] The Respondents K.W., the mother, and B.W., the father, are the parents of S.W.

[3] The mother requests the court dismiss the application for permanent care and custody and return the child solely to her care.

[4] The father requests the court dismiss the application for permanent care and custody and return the child to the mother's care with access to him on such terms and conditions the court deems appropriate. Alternatively, the father requests the court dismiss the permanent care and custody application and return the child to his care with access to the mother on such terms and conditions as the court deems appropriate.

BACKGROUND:

[5] Representatives of the Minister visited the mother shortly after the birth of S.W. in September, 2010, with concerns that the child may be at risk of sexual harm based on the father's prior conviction for sexual offences involving children. The father was convicted at age 13 for an invitation to sexual touching offence, while babysitting a young cousin. He was also convicted at age 22 pursuant to Section 173(1) of the ***Criminal Code*** - Unlawful use of a computer to communicate with a person believed to be under the age of 14 for purposes of facilitating the commission of an offence under 173(2) (Luring). His sentence included six months incarceration consecutive to sentences received for property offences and a twenty year prohibition order which provided:

a. shall not attend any public park or public swimming area, where persons under the age of fourteen years are present or can reasonably be expected to be present , or daycare centre, school ground, playground or community centre;

b. shall not seek, obtain or continue any employment, whether or not the employment is renumerated, or become or be a volunteer in a capacity that involves being in a position of trust or authority towards persons under the age of fourteen years; and

c. shall not use a computer system within the meaning of subsection 342.1(2) for the purpose of communicating with a person under the age of fourteen years.

[6] There was an agreement by both Respondents that the mother would not allow the father to be alone with the child. The Minister's involvement with the Respondent's lapsed after the child's birth until November, 2011. The Minister says this was an oversight and not because the Minister did not have concerns with the father caring for the child unsupervised.

[7] In early November, 2011, the Respondents were involved in a domestic dispute. The mother learned the father had an affair which resulted in the birth of a child. The mother was charged with assaulting the father and placed on an Undertaking with conditions to have no contact with him and stay away from the family home. Shortly thereafter the parties attended court and had these conditions removed.

[8] From November, 2011, until May, 2012, the Minister was involved with the Respondents on a voluntary basis. This period was marked by:

a. conflict and instability in the Respondent's relationship resulting in several breakups and reconciliations;

b. the mother having mental health issues which required treatment by her psychiatrist;

c. an updated report from Dr. Angela Connors, a forensic psychologist, identifying the father as a high risk to re-offend;

d. the receipt by the mother of an email from a person alleging inappropriate communication via computer of a sexual nature between the father and an eleven year old girl; and

e. the Respondents alternating between accepting and refusing the Minister's intervention and directions.

[9] In February, 2012, the Respondents agreed to participate in a family case plan whereby the mother would:

a. engage in mental health services;

b. participate in a crisis, trauma therapy through Cape Breton Transition House;

c. participate in a SAFE program - a psycho educational program for non offending partners of sexual offenders designed to ensure the safety of vulnerable members of the family unit; and

d. ensure the father's access with his child was supervised until the SAFE program was completed.

[10] No concerns were identified with the mother's parenting skills.

[11] The father agreed to engage in family support services, directed to facilitating a strong bond with the child, and obtaining education in child development. He agreed to re-engage with his psychiatrist, Dr. Christians. The Respondents weren't required to engage in marital counselling and the mother was not required to complete anger management. The parties agreed to the case plan.

[12] By April the Respondents were not open to accepting the Minister's involvement. While some services had been completed, the mother's participation in the SAFE program had not started and she was refusing participation. The SAFE program - one hour per week for twelve weeks - was to be conducted by

psychologist, Dr. Durdle. The mother did not believe the father's access should be supervised or accept that he posed any risk to his child. The father was moving to [...] for employment in July, 2012, and the mother wished to relocate with him and their child. Although the mother did not think participation was necessary, she was agreeable to attending a two day program in New Glasgow which she had recently heard about.

[13] The father was not agreeable with the mother participating in a SAFE program with Dr. Durdle because she had conducted a similar program with a former partner. The father did not think the program was beneficial and that Dr. Durdle would be in conflict.

[14] Child protection proceedings were initiated on May 30, 2012, with the Minister identifying concerns relating to substantial risk of physical and sexual harm, mental health issues and domestic violence concerns.

[15] The interim orders provided that the child would remain in the care of the mother subject to supervision of the Minister with the father's access supervised upon terms and conditions set out by the Minister.

[16] The protection hearing was contested. A protection finding was entered on September 11, 2012, under Section 22(2)(b) and (d) - substantial risk of physical harm and sexual harm. The finding took into account the father's prior convictions for sexual offences; the opinion of Dr. Connors, forensic psychologist, that the father was a high risk for recidivism; the Respondents off and on relationship; the mother's vacillation on accepting services and the mother's poor judgment and lack of insight into the risk of sexual harm posed by the father given her knowledge of his past criminal behaviour.

[17] After the protection hearing, the mother agreed to participate in the SAFE program. She attended a few sessions with Dr. Durdle before leaving the program and requesting another service provider. On September 27, 2012, the Respondents were involved in another domestic violence incident. The mother was charged with assaulting the father. The Minister was recommending the Respondents not have any contact with one another in the presence of the child. The Respondents disagreed. The mother believed that they needed to communicate if they were going to parent their child even while separated.

[18] The first disposition hearing was scheduled for December 10, 2012. The Plan of Care filed on behalf of the Minister requested a supervision order. The child would remain in the care of the mother subject to the supervision of the Minister. The father's access would be supervised at the discretion of the Minister. The order would contain a condition that the Respondents not have contact with one another in the presence of the child. The Minister would provide the services of a protection case worker, an access facilitator and transportation costs. The plan proposed that the mother participate in the SAFE program, an anger management program, obtain a mental health assessment and engage with mental health services. The plan requested the father re-engage with mental health services. The goal of the Plan of Care was for the Respondents to complete the recommended services and demonstrate knowledge and understanding of the effects of domestic violence and sexual abuse on a family. Another goal was for the mother to recognize the signs of potential sexual abuse and develop a safety plan for the child's benefit.

[19] The disposition hearing scheduled for December 10th did not proceed as the Respondents were not in agreement with the plan filed by the Minister. The relationship between the mother and her counsel broke down. New counsel had to be appointed. The father had been self represented throughout the proceeding.

[20] The disposition hearing was rescheduled for January 10 and 11, 2013.

[21] During the summer of 2013, the father had relocated to [...] to manage a [...]with the intent of purchasing it. The mother planned on relocating to [...] with the father and their child. Child protection workers in Cape Breton contacted child protection workers in [...] with a request to obtain information on the father's circumstances.

[22] The interim order issued at the time of the protection hearing included a condition that the Respondents comply with all reasonable requests and directions of the Minister. The Minister wanted the Respondents not to have contact with one another in the presence of the child, not remove the child from the local area and have the father's access supervised in Cape Breton. Despite these directions the mother travelled to [...] with the child and resided with the father for more than a week. She advised the workers the father would be returning to Cape Breton over the Christmas holidays and they would be residing together. While in [...] the mother arranged

services of a doctor and obtained a referral to a psychiatrist. The mother and father attended a meeting with child protection workers in [...] expressing their dissatisfaction with the proceedings in Cape Breton. They requested their file be transferred from Cape Breton to [...].

[23] The Minister conducted a risk management conference on December 19, 2012, and concluded that least intrusive means which had been attempted to alleviate the protection risk, had failed. The Respondents were not accepting the Minister's direction, or recognizing the significance of the Minister's involvement as an attempt to reduce the protection risk to their child. The Respondent's plan to relocate to [...] and engage services in [...] did not provide a safety plan for the child in the meantime. The Minister decided to take the child into care and seek a temporary care and custody order.

[24] On December 20, 2012, the Respondents attended the offices of the Minister and met with the child protection worker and supervisor, Dave Brown. They were seeking an explanation why the child was taken into care. They claimed they did not breach any court order since the order did not specifically prevent them from having contact with one another in the presence of the child. During the course of the meeting the mother became aggressive and threatening towards the workers. She kicked and damaged a glass window. She was charged with two counts of assault as well as mischief and placed on an undertaking with conditions not to have contact with the worker or the supervisor and not to attend the building where the Minister's offices are located. The mother had previously completed an anger management program.

[25] A hearing on the Minister's application for temporary care and custody upon taking the child into care scheduled for December 27th was adjourned to January 10, 2013, with consent of the Respondents.

[26] The Minister filed a revised plan of care seeking temporary care and custody. The mother, who was represented by new counsel at the disposition hearing, agreed with the plan. She requested the withdrawal of an affidavit filed by her on December 24, 2012. The father, who continued to be self represented, also consented but requested the Minister arrange another sexual risk assessment. Counsel for the Minister took the request under advisement. By affidavit sworn January 23, 2013, Dave Brown, agent of the Minister, indicated the Minister would not provide

financial support for the father to undergo another risk assessment. After consulting with Dr. Connors, who prepared the prior risk assessment four years earlier, the Minister concluded that another risk assessment was unlikely to provide new information and was basically asking for a second opinion.

[27] The temporary care and custody order was reviewed on March 5th, June 4th, and August 26th, 2013. Prior to the March 5th, 2013 review hearing, the Minister filed a revised case plan which focussed on the mental health needs of the Respondents. The Minister thought there may be underlying mental health issues that was preventing the Respondents from progressing with services to reduce the protection risk. Despite completing an anger management program, the mother struggled with anger issues and impulse control. She was charged with an assault in September and December 2012. There continued to be volatility in the Respondents' relationship, neither recognized the risk that conflict posed to the child or the importance of developing a safety plan given the father's history and assessment. The mother was agreeing to services but wanted the child returned to her care.

[28] A placement hearing was scheduled for April 23rd, 2013, which had to be put over to April 29th, 2013, because not all of the health records had been received. The mother requested an adjournment of the April 29th hearing to complete the SAFE program.

[29] The hearing resumed on June 3rd, 2013. An agreement was reached. The child was to remain in the temporary care of the Minister. Terms of access to the Respondents were amended and the Minister agreed to find a psychotherapist that specialized in post traumatic stress disorders and separation to assist the mother with coping mechanisms. The father's request for community access had to be reviewed given his prohibition order restrictions. The father with the support of the mother, in January 2013, had applied to amend the prohibition order. The application was granted which allowed him to be accompanied by someone over the age of 18 in public areas where persons under the age of 14 were present. The amendment would allow him to increase his possible places of employment and the opportunity to take his daughter to public parks and swimming areas.

[30] The next review hearing was on August 26th, 2013. The mother was not in agreement with the Minister's plan to continue the existing order. The father was in agreement with the Minister's plan. He was seeking additional access and advised

he had arranged for another sexual risk assessment. The court noted the matter would have to be concluded by December 2013 and advised counsel to seek an early date if the mother wanted an early hearing. No further applications were made until the Minister filed a motion for review, which was scheduled for a docket appearance on November 19th, 2013. At that time, the Minister indicated they were seeking a permanent care and custody order.

[31] Final hearing dates were scheduled for November 28th, December 11th, 12th, 18th and 19th, 2013.

STATUTORY PROVISIONS/LAW:

[32] In ***F.(H). v. McDougall***, [2008] S.C.C. 53, Rothstein, J. affirmed there is only one civil standard of proof at common law, and that is proof on a balance of probabilities. The evidence must always be sufficiently clear, convincing, and cogent to satisfy the balance of probability test.

[33] The child, S.W., was found in need of protective services pursuant to section 22 (b) substantial risk of physical harm and (d) the child was sexually abused. In ***M.J.B v. Family and Children's Services of Kings County***, [2008] N.S.J. No. 299 (C.A.), at paragraph 77, Bateman, JA stated that the *Act* defines "substantial risk to mean a real chance of danger that is apparent on the evidence.... It is the real chance of sexual abuse that must be proved to the civil standard. That future sexual abuse will actually occur need not be established on a balance of probabilities."

[34] The test to be applied on a statutory review hearing in protection proceedings set out by the Supreme Court of Canada in ***Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)***, [1994] S.C.J. No. 37, is whether there is a need for a continual order for protection. The function of the status review hearing is not to re-try the original need for protection order.

[35] Section 2(2) of the ***Children and Family Services Act,*** supra provides that in reaching a decision regarding the future care of the child the Court must be guided by the child's best interests. Also, section 42(1) provides that at the conclusion of the disposition hearing, the Court shall make an order in the child's best interests.

[36] The factors to be considered when making a decision in the child's best interest are set out in section 3(2) of the *Act.*

[37] There are statutory time limits set out in the ***Children and Family Services Act***, supra. Section 45(1) provides that where a court makes an order for temporary care and custody, the total period of duration of all disposition orders, including supervision orders, shall not exceed where the child is under six years of age at the time of the application commencing proceedings, is twelve months. At the end of the maximum time limits prescribed by section 45, the only two possible disposition orders available are:

(a) Dismissal of proceedings; or

(b) An order for permanent care and custody.

[38] In ***G.S. v. Nova Scotia (Minister of Community Services),*** [2006] N.S.J. No 52 (C.A.), at paragraph 20, Roscoe, JA, stated, "If the children are still in need of protective services the matter cannot be dismissed." In this case, it was necessary to exceed the maximum time frames in order for all the evidence to be presented. The court was mindful of the legislative time lines. In August 2013, the court advised the parties to seek an early hearing. By late November the maximum time limits were reached. The father's sexual risk assessment had not been completed. Counsel were committed to other court proceedings. Nonetheless, the final disposition hearing began on November 28th, 2013, and was intended to be concluded by December 19th, 2013. All parties agreed and the court found that it was in the child's best interest to exceed the maximum time frames for the purpose of presenting the evidence and concluding the proceedings. The child had been in care for 11 months at this time.

[39] Prior to the court granting an order for removal of a child from the custody of a parent, the requirements of section 42(2), (3), and (4), of the ***Children and Family Services Act***, must be considered.

[40] Section 42(2) provides:

> 42(2) The court shall not make an order removing the child from the care of a parent or guardian unless the court is satisfied that less intrusive alternatives, including services to promote the integrity of the family pursuant to Section 13,(a) have been

> attempted and have failed;(b) have been refused by the parent or guardian; or (c) would be inadequate to protect the child.

[41] In ***Children's Aid Society of Shelburne County v. S.L.S.,*** [2001] N.S.J. No. 138 (C.A.), at paragraph 36, the court stated, "In any event the obligation of the Agency to provide integrated services to the appellant is not unlimited. Section 13(1) of the Act obligates the Agency to take "reasonable measures" in this regard."

[42] Section 42(3) of the ***Children and Family Services Act*** states:

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

In ***Children's Aid Society of Halifax v. T.B.,*** [2001] N.S.J. No. 225 (C.A.), at paragraph 31, the court stated, "The onus of presenting such a reasonable alternative must surely be upon the person or party seeking to have it considered. It is hardly the responsibility of the agency or the court to propose the alternative, provide the resources for its implementation, or shepherd the idea through to completion."

[43] Section 42(4) of the ***Children and Family Services Act*** states:

> (4) The court shall not make an order for permanent care and custody pursuant to clause (f) of subsection (1), unless the court is satisfied that the circumstances justifying the order are unlikely to change within a reasonably foreseeable time not exceeding the maximum time limits, based upon the age of the child, set out in subsection (1) of Section 45, so that the child can be returned to the parent or guardian. 1990, c. 5, s. 42.

[44] The maximum legislative time limit has been reached. The court must return the child to the care of the parents or place the child in the permanent care and custody of the Minister.

REVIEW OF EVIDENCE:

Assessments

[45] Dr. Angela Connors, a clinical and forensic psychologist, is program manager of the Provincial Community Sexual Offender Assessment & Treatment Program at the East Coast Forensic Psychiatric Hospital. She prepared a comprehensive risk assessment of B.W., dated January 27th, 2009. The assessment was requested to provide a sexual risk assessment for the purposes of informing B.W.'s suitability for access to a former partner's biological children. The report was not prepared in relation to his own child, who is the subject of this proceeding. Dr. Connors noted that B.W.'s risk for sexual recidivism had already been rendered during the course of his involvement with Correctional Services Canada. However, B.W. wanted a second opinion.

[46] In Dr. Connors opinion, B.W. was considered a high risk for future violent offending, including potential for sexual recidivism. Dr. Connors' evidence was presented at the protection hearing in September, 2012. She did not think it was necessary to complete an updated assessment for that hearing, as only a short time had elapsed since the preparation of her prior report. For the final hearing she filed a report (Exhibit #19) responding to the risk assessment prepared by Bernard Galarneau.

[47] Bernard Galarneau was retained by B.W.'s counsel to prepare a psychological risk assessment of B.W. (Exhibit #18). Mr. Galarneau is a clinical practica and internship coordinator at the Université de Moncton. Prior to his current position, he held positions as regional chief psychologist/institutional mental health manager, Atlantic region, Correction Services Canada (retired in July 2013) and clinical director of the High Intensity Sexual Offender Program and Challenge Program. In Mr. Galarneau's opinion, B.W.'s risk of sexual recidivism was in the upper end of the moderate range. He identified impulsivity, self-centeredness, sexual promiscuity and feelings of alienation as important risk factors. He testified that any risk assessment higher than the low range was concerning.

[48] Neither Dr. Connors nor Mr. Galarneau could say with certainty or identify the risk that B.W. would present to his biological child. In Dr. Connors earlier report she stated it would be important to facilitate a bond between B.W. and his child.

[49] The evidence of Dr. Connors and Mr. Galarneau is best summarized by the following paragraph from Dr. Connors' report (Exhibit #19):

> It appears that, despite Mr. Galarneau's attempts to outline the differences in our reports, in the end we both concluded that Mr. W poses risk for reoffense well in excess of the low end categories, and both concluded that he has some active risk factors (see fifth paragraph page 18 and eighth paragraph page 20 of Mr. Galarneau's report). It is acknowledged that my estimation of risk, and of active risk factors, was higher than that of Mr. Galarneau, yet neither found a low risk rating. I am unsure if the finding of 'high' risk versus 'moderate high' risk is particularly meaningful, given that the central question is application of risk level to the situation of parenting. Neither of us concluded that risk estimation can be taken to directly apply to risk to a biological daughter (as referenced in my prior testimony), and we both recommended focus on parental bond during the young years of his daughter's life as a potential protective measure (see second paragraph page 19 of Mr. Galarneau's report). Actuarial risk estimation does not allow for specificity in determining dangerousness to a specific person in specific circumstances, only allowing for broad-based estimations. It is the opinion of the undersigned that should questions still exist regarding the application of risk to the specifics of parenting a biological daughter, whether that risk be high or moderate-high, these might be best addressed in a parenting assessment conducted by an individual conversant with risk for sexual recidivism."

[50] Dr. Chimdi Uhoegbu was K.W.'s treating psychiatrist for a short time. He assumed her care from a prior psychiatrist who had retired. He did not file a report. K.W. was being treated for several diagnoses, including a history of abuse, post-traumatic stress disorder and traits of borderline personality disorder. One trait specific to K.W. was her quick mood changes. The treatment plan included engagement in self-therapy, as well as learning skills in group sessions to deal with stressful situations in non threatening ways.

[51] K.W. was also provided anti-depressants for sleep and eating difficulties. She was compliant with medication, indicating she was taking it, but stating that it was not helping her. At times she reported she did not need the medication. In April 2013, she wanted to switch medication, and she was advised to withdraw slowly. There were occasions when she was aggressive, verbal threatening and very angry, and would throw objects. This occurred when he was not open to changing her medication. On one occasion she requested ritalin which he said was not appropriate for her treatment. For her December, 2013 appointment she was accompanied by

B.W. who was present to provide support. She was angry with him because she believed he was not helping her. At that time they agreed he would transfer her treatment to another psychiatrist.

[52] Dr. Christians is B.W.'s treating psychiatrist. He did not address post traumatic stress disorder with B.W. in relation to his sexual abuse at age 12. They only discussed his diagnosis of A.D.H.D. and his relationship with a prior partner, not his current spouse. There did not appear to be any counselling or treatment to strengthen B.W.'s understanding of his sexual risk factors.

[53] Valerie Rule, M.A., is a registered clinical and forensic psychologist. She was requested to conduct a psycho-educational intervention with K.W. - specifically the SAFE program. She conducted an informal mental status examination and was satisfied that K.W. had the ability to report her situation correctly, and was reliable. Her report identified a number of the SAFE program components that were dealt with in the program, including child abuse - general information, denial, consent, grooming, cognitive distortions, fantasies, sexual offence cycle, the concept of risk and risk management, and family safety planning. The family safety plan included 11 rules. All the rules were provided by K.W. except the rule that stated "B cannot live with us" which was included at the insistence of Ms. Rule. K.W. stated she agreed to include this rule but disagreed with the wording of the rule that stated "I will tell 'S' that daddy has a touching problem".

[54] When discussing K.W.'s perception of her ability to protect her child, K.W. indicated she was afraid of B.W. and what he would do, and she needed to trust that the C.A.S. (the Minister) wanted to protect her daughter.

[55] Ms. Rule concluded that K.W. had a good understanding of the concepts contained in the SAFE program. She also concluded that K.W. required ongoing services to resolve past traumatic experience and poor life choices. Ms. Rule recommended that K.W. receive psychotherapy, focussing on her past traumatic stress symptoms so that she would be able to work more effectively with the Minister. She also recommended that K.W. not supervise B.W.'s access until she participated in psychotherapy to resolve these issues. Ms. Rule acknowledged that K.W.'s prior experiences with Dr. Durdle probably assisted her with some of the concepts.

[56] Marjorie MacDonald is a clinical therapist and social worker. She has experience working with individuals who have experienced trauma. She is providing counselling services to K.W. There have been eight sessions since August, 2013. Four other sessions were cancelled - three by K.W. and one by herself - either due to work or court commitments. She is in the process of developing a repour with K.W. As with many clients, developing a trust was difficult at first . K.W. is more accepting of the process and is opening herself up to counselling.

[57] They have discussed K.W.'s relationship with B.W., being sexually assaulted as a young child and teenager and emotional regulation issues. She is aware of recent criminal charges filed against K.W. in November, 2013.

[58] Although K.W. spoke little of her relationship with B.W. she did say he made her feel anxious and angry and she was sad at how their relationship was going. K.W. worries B.W. will prevent her child being returned to her care and that he recently began stalking her. However, she will not be in a relationship with him if it means having her daughter back.

[59] They have recently begun discussing ways to moderate her anger and frustration. She responds to unexpected touching with unexplained outbursts. It is hard to say how long it will take to overcome these issues as well as to deal with her past trauma.

[60] Helen MacNeil is an access facilitator and has been facilitating the Respondents' access since January, 2013, first in the offices of the Minister in Sydney, then at Peer House in Sydney and finally in the homes of the Respondents. Each Respondent had their own access.

[61] She reported that the access visits were always very good and she did not observe anything of concern in either home. Both Respondents enjoyed a great relationship with their daughter. The visits were restricted to the child and each Respondent separately. The November 6th, 2013, access visit with K.W. had to be cancelled. When she arrived, K.W. took some time answering the door explaining that she had slept in. It appeared a male person was present and the visit was cancelled.

[62] She had conversations with the Respondents during the access visits. B.W. and K.W. were in contact with one another until the end of August, when K.W. said they were no longer in a relationship. At that time B.W. began to speak more about his relationship with K.W. and her recent relationship with a new boyfriend. He sent K.W. a text message asking her to go to marriage counselling. B.W. did not attend court on November 13th to give evidence on K.W.'s assault charge of November, 2011 involving himself. The charges were dismissed. He said he was going to bail K.W. out after she was charged with threats and mischief for an incident on November 16th involving himself. B.W. told her after the November 16th incident with K.W. his plan was for his mother to apply for custody of S. and after six months he and K.W. would resume her care.

[63] Since the protection proceedings were initiated, K.W. has been charged with several offences pursuant to the ***Criminal Code***. She had never been charged with a criminal offence prior to these proceedings. Several police officers and the security guard at the Provincial Building testified about these events. The initial assault charge in November, 2011, has been dismissed since B.W. did not attend court to give evidence. They include an assault in relation to D.D. on August 18, 2012; two assault charges and a mischief charge stemming from the incident that occurred at the Minister's office on December 21, 2012; an assault in relation to her cousin which occurred on April 10, 2013; an assault involving B.W. on September 27, 2012, since dismissed; and the most recent charges dated November 19, 2013, of threats and mischief. Both Val Rule and Marjorie MacDonald did not consider K.W. to be a violent person and attributes stress, past trauma and poor emotional responses and not aggressive behaviour as the basis for these offences.

[64] C.M. is the mother of a ten year old child who has a Facebook account. Her daughter was a friend of a young relative of K.W. and once spent the night at the Respondent's home. C.M. testified that while monitoring her daughter's Facebook account, she entered into a chat with a person using the profile of B.W., who had been added as a friend of her daughter's. She did not identify herself and logged in under her daughter's account. The person using B.W.'s profile asked her to clear the chat history and added her to another Facebook account using the name of Bill Smith. When asked why he was using the name Bill Smith he stated "K. got mad because she seen u were on my Facebook so I made a new one. I put Bill Smith so noone would know it was me. Don't tell anyone about this Facebook. OK." The chat involved some explicit sexual references. At one time C.M. asked "is S. asleep" and the reply

from Bill Smith was “yup” . Also, Bill Smith mentions a “T” twice during the chat and “T” was her daughter’s friend.

[65] C.M. acknowledged she could not be certain it was the Respondent, B.W., that she was chatting with since she was pretending to be her daughter. However, she was concerned enough to send an email to both K.W. and B.W. telling them not to have any further contact with her daughter.

[66] B.W. denies having any conversation with C.M. The incident was referred to police for investigation. He was never contacted by the police or charged with any offence.

[67] At the protection hearing in August, 2012, K.W. testified that she told a worker with the Minister that she had been contacted by someone accusing B.W. of having inappropriate sexual discussions with a young girl (Exhibit #10, pages 228, line 9 to page 230, line 5). At the disposition review hearing in January, 2014, K.W. said she had not seen the Facebook chat and denied providing information and printouts of the chat to the Minister. Noelle Holloway/MacDonald, a child protection worker, testified at the protection hearing that K.W. advised her she received correspondence from a community member and two others with concerns that B.W. was having inappropriate sexual conversations with a 13 year old girl through Facebook messaging (Exhibit #10, page 15, lines 1 - 5).

[68] The child, S., has been residing in the same foster home since she was taken into care in December, 2012. She is described as a wonderful, healthy, well-mannered child. There has never been any concerns with her behaviour either in the care of the Respondents or in foster care.

THE RESPONDENT’S EVIDENCE:

[69] K.W.’s sister, L.W., testified that she is willing to be a placement for the child if the court determines S. cannot be returned to either Respondent. She is an older sister of K.W. and has a child of her own, age 3. After S. was taken into care she applied to be a kinship foster placement. She met with workers for the Minister and agreed to a criminal records check. She was unsure if one was completed. At the time she was unable to say if her residence was insured as she was renting and she did not have tenant’s insurance. The Minister never contacted her to confirm or deny her

application as a kinship foster placement. She did not take any further steps to pursue her application until giving evidence in court.

[70] Joanne Moss is a facilitator with the Elizabeth Frye Society. She confirmed that K.W. completed an anger management program in 2012 and then participated in 9 of 11 sessions of a self esteem program. K.W.'s daughter was taken into care while she was participating in the program.

[71] K.W., age 25, is the mother of S. She was residing at Transition House and not her normal residence at the time of the hearing due to a fear of her father. According to K.W., her father, who acted as her surety on recent criminal charges. "freaked out on her". She has not worked since July, 2013, because of stress resulting from the child protection proceedings.

[72] As a child she was placed in the permanent care and custody of the Minister at age 13 and remained in care until age 21. She met B.W. on Facebook while living with a friend and they were married within 6 months. She knew he had been charged with a criminal offence which she believed was related to porn. B.W.'s former girlfriend told the Minister they were expecting a child. He was questioned in the hospital by a representative of the Minister who asked if she knew about B.W.'s past criminal history. She agreed to meet with the workers after leaving hospital but was not contacted by them until more than a year later in November, 2011.

[73] In November, 2011, K.W. was charged with assaulting B.W. She was informed that he had fathered a child with another woman. She contacted the Minister and was advised not to allow B.W. unsupervised access with his daughter. The Minister wanted her to take an anger management program and both of them to access the services of a family support worker. Because of the circumstances, she did not feel up to it. She agreed to go to Transition House and subsequently was accepted into a regional housing unit. She then agreed to voluntary services including anger management, family support worker, marriage counselling and meetings with her psychiatrist. K.W. said all services were completed except marriage counselling. Initially she was afraid of and didn't trust the Minister because of personal experiences while in care. She had no family support at the time and B.W. was supportive and helpful to her in caring for their daughter. She kept changing her mind about attending the SAFE program with Dr. Durdle because she did not think it was necessary.

[74] She could not understand why her child was taken from her care in December, 2012. She told the Minister that she was going to [...] for a visit and would be returning. She never left S. alone in the care of B.W. They never breached the court order since it did not state that they were not to have contact. She acknowledged that she reacted poorly at the offices of the Minister because she was upset her daughter was taken into care and representatives would not talk to her or explain the reason for their actions.

[75] She does not agree with the Minister's direction and request for them not to have contact. In her opinion, S. needs both parents and they need to communicate better for her benefit. She acknowledged the relationship with B.W. was rocky. They asked the Minister for services to help them with their relationship many times but the Minister tried to keep them apart. When they spoke, it was about how to be good parents to their daughter.

[76] She told others she was scared of B.W. because he once threatened to take S. and she believed him. She agreed not to have contact with B.W. but there were times she did not follow her agreement and had contact with him. She asked B.W. to attend a medical appointment with Dr. Uhoegbu in December, 2013, to explain the situation since the doctor did not seem to understand her or want to listen to her. She was trying to tell the doctor her medication was not helping while he was telling her that stress was the cause of her behaviour. She does not want to be on medication and had never been on medication until these proceedings were initiated.

[77] She did not complete the program with Dr. Durdle in the spring of 2013 because of a failure in her relationships. Dr. Durdle told her she would not be a good parent if she allowed B.W. around the child.

[78] She agrees with rules in the SAFE program except for the rule that required S. be told that daddy has a touching problem. She wants to do that in her own way when S. is older. She doesn't want S. to be afraid of her father. However, she agrees its more important to protect S. than for her to have a relationship with B.W. She has never left S. alone with B.W. and she will explain to her, with the help of a professional, at an appropriate age why she can't have a normal relationship with her father. She agrees that B.W. has a power over her at times but this proceeding has changed the way she looks at protecting her child. She will continue with individual

counselling because its been beneficial in helping her cope with stressful situations. She is not an unfit mother. S. was appropriately cared for before being taken into care. The Minister never had any concerns about her parenting skills.

[79] She never saw B.W.'s prohibition order and therefore was not aware of its conditions before they attended court to vary it in January, 2013. She denies getting an email from C.M. about B.W.'s Facebook conversation with her daughter. Her recent requests for marriage counselling were for them to learn better communication skills for the benefit of their daughter and not because she intended to return to a relationship with B.W.

[80] K.W. feels she did everything the Minister wanted and more but it was not good enough. She has not had any contact with B.W. since December, 2013. If she needs support in parenting in the future, she will get it from others and not B.W.

[81] B.W. is the father of S. He had been incarcerated on a variety of charges until his release in February, 2007. He was on parole until December, 2009. The Department of Community Services sponsored him taking a diploma in business administration which was completed in 2010-11. He is self employed in the areas of marketing and management.

[82] He separated from K.W. in November, 2011. They tried to reconcile but finally separated in December, 2012. He never disclosed all the facts of his criminal offences to K.W. He initially intended to relocate to [...] after receiving his diploma in business administration to take advantage of a job opportunity. K.W. and the child were to relocate with him. He did not try to sabotage the protection proceedings by trying to have them moved to [...].

[83] The Minister was involved since the birth of the child. K.W. was advised not to allow him to be alone with the child and he agreed. The Minister had no contact with them from the time of S.'s birth until November, 2011, when K.W. was charged with assaulting him. This charge was later dismissed. S. was not present at the time of the incident. Until May, 2012, S. was in the care of K.W. with him assisting if required. In December, 2012, the child was taken into care. He was residing in [...] and K.W. resided in Cape Breton.

[84] He has complied with all services requested of him in the plan of care submitted by the Minister. He had an updated mental health assessment with Dr. Christians, attended Family Services of Eastern Nova Scotia which was subsequently discontinued, agreed to drug testing, signed releases for police and medical records. He had the conditions of his prohibition order changed to allow him and K.W. to parent the child in the community.

[85] He agreed to the conditions of the safety plan prepared by K.W. and Val Rule. Specifically he agrees not to live with K.W. and the child and his visits would be supervised.

[86] The business opportunity in [...] did not work out. Since relocating from [...] he has resided at three addresses. He recently moved in December, 2013. He did not give this address or his phone number to K.W. He is trying to show that he can stay away from her and the child if required.

[87] He initially supported his mother as a placement but she is unable to put forward a plan for health reasons. He was upset with K.W. at the time. Now he supports the child being returned to K.W.'s care. She has always been S.'s primary caregiver and there has never been any concerns about her parenting skills. He would like to have some contact with the child whether it be online or whatever the court would order.

[88] According to B.W. the Minister has not made available the appropriate services to assist the family alleviate the risk. He had to fight to get an updated assessment and believes that the report of Mr. Galarneau shows that there have been changes in the risk assessment based on changes in his circumstances. He believes a proper parenting assessment as recommended by Dr. Connors would have allowed him to be part of his daughter's life. He has provided support to K.W. in her personal life and in the parenting of S. He has taken K.W. to the crisis centre on 2 - 3 occasions. She needed someone to talk to and he is not the best person to talk at times. K.W. does not have family support and he is able to provide support to her at times. That is why they have contact now and not because they intend to resume a relationship. Recent requests for marriage counselling is to assist them in their communications and not with reconciliation.

[89] He also supports a placement with K.W.'s sister L.W. or her friend A.E. if S. can't be returned to K.W. or his own care. He believes the Minister has not done enough to seek a family or community placement.

[90] Although he is prepared not to have any contact with K.W. now, he does not rule out a resumption in their relationship in the future.

CREDIBILITY:

[91] Child protection proceedings are extremely stressful on parents. Their responses are often formed by life experiences and circumstances. K.W. had a difficult experience as a child in care and difficulty regulating her emotions. Regrettably, these factors have influenced her response to the protection proceeding and the credibility of her evidence. There were occasions she could not recollect events. It is understandable that a witness could easily be confused on dates and times but there were significant inconsistencies in her testimony at the protection and final disposition hearings.

[92] K.W. testified in September, 2011, that she was contacted by a person accusing B.W. of having inappropriate sexual conversations with a young girl and she provided a copy of that conversation to the Minister. At this hearing she denied being contacted by anyone and said she did not receive a copy of the conversation. This evidence is in sharp contrast to the evidence of child protection worker, Noelle Holloway MacDonald, at the protection hearing and C.M. at this hearing.

[93] She also testified at the protection hearing that family activities included visits to the playground near where they lived. At the time, B.W. was restricted from access to this location by the terms of his prohibition order which was not amended until January, 2013. K.W.'s evidence at this hearing was that she was confused by the questioning at the protection hearing and now states they never went to the playground as a family.

[94] Therefore, I prefer the evidence of the child protection workers, Noelle Holloway MacDonald and Sherry Johnston, as well as Valerie Rule, C.M. and Dr. Uhoegbu when it conflicts with the evidence of K.W.

CONCLUSION:

[95] The Minister has the burden to satisfy the court on a balance of probabilities that it's plan for permanent care and custody is in S.'s best interest and that less intrusive alternatives have been attempted and failed, have been refused or would be inadequate to protect the child.

[96] After considering all of the evidence and the relevant sections of the ***Children and Family Services Act*** including sections 2, 3(2) and 42, I'm satisfied that it is in S.'s best interest that she be placed in the permanent care and custody of the Minister.

[97] S. has not suffered any actual harm, either physical or sexual. The Minister does not have to wait until actual harm occurs before acting. In this case, B.W.'s past history and convictions for sexual related offences; the opinions of Dr. Connors and Mr. Galarneau of B.W.'s risk for recidivism; the mother's lack of insight about the danger to S. of that risk; her poor judgment in relying upon the opinions of B.W. over the child protection workers and the failure of services to alleviate the protection risk would place S. at substantial risk of physical and/or sexual harm should the application be dismissed. If K.W. had been receptive to the direction and advice of the child protection workers and was able to remove herself from a dysfunctional relationship with B.W. sooner, the outcome may have been different.

[98] As stated by Bateman, J.A. in ***M.J.B. v. Family and Children Services of King's County,*** supra, " it is the real chance of sexual abuse that must be proved to civil standard. That future sexual abuse will actually occur need not be established on a balance of probabilities."

[99] In this case the opinion evidence of Dr. Connors and Mr. Galarneau establishes on a balance of probabilities that B.W.'s current circumstances present a significant risk for sexual recidivism. It can't be said when it'll occur or if S. will be a victim. The opinion of Mr. Galarneau that B.W.'s risk of sexual recidivism in the high end of the moderate range is still a significant risk and not evidence that the risk of sexual recidivism has been reduced to an acceptable level. Therefore, there is a real chance that S. is at risk of sexual abuse.

[100] K.W.'s ability to protect S. from this substantial risk of sexual harm is doubtful. She has shown poor judgement when presented with reasonable directions by the Minister and a lack of insight into the significance of the risk posed by B.W.

[101] K.W. completed the SAFE program with Ms. Rule who stated that she had insights into the concepts, was open and honest and was not paying lip service to the program. Ms. Rule also stated that some of the insight could be attributed to her prior participation in a similar program with Dr. Durdle. I have also considered K.W. was resistant to participating in the SAFE program for a long time, failed to complete the program when she started with Dr. Durdle and, according to Ms. Rule, was reluctant to include a rule that B.W. not reside with her and S. and was concerned telling S. that B.W. had a touching problem would cause her to be afraid of him.

[102] The sexually explicit conversation between a person who claimed to be B.W. and later Bill Smith and C.M. is disturbing and should be a red flag to any parent of the risk to their child's safety. The person using B.W.'s Facebook profile thought he was talking to C.M.'s daughter, was aware she was a friend of a young relative of K.W., knew the name of B.W.'s and K.W.'s daughter and changed the Facebook profile to Bill Smith because K.W. was mad the young girl was added to B.W.'s Facebook profile. The person using B.W.'s Facebook profile was certainly familiar with B.W.'s and K.W.'s circumstances. I find that K.W. received an email from C.M. with a copy of this conversation and she initially ignored it. She provided it to representatives of the Minister after her separation from B.W. in January, 2012. She did not take any steps to check the validity of the conversation or confront B.W. in a meaningful way about the conversation. In January, 2013, without informing the Minister she supported B.W.'s application to amend the terms of his prohibition order allowing him to attend previously restricted locations if in the presence of an adult over 18. What is now concerning is that at the disposition hearing she denied receiving the email and a copy of this conversation. K.W. continues to demonstrate a lack of insight into the need to protect S. from the dangers of B.W.'s risk of recidivism. The benefits achieved by K.W.'s successful completion of the SAFE program are tenuous at best.

[103] K.W. has shown poor judgement in failing to follow the reasonable directions of the Minister not to have contact with B.W. which frequently ends in conflict and criminal charges against her. The most recent conflict occurred in November, 2013, after more than a year of their involvement with the Minister and resulted in K.W.

being remanded on new charges which required a posting of a surety before her release. The conflict between them adds to her stress which leads to mental instability requiring visits to the crisis centre at the hospital and treatment from her psychiatrist. The continuing conflict is bound to cause instability in K.W.'s home environment and a disruption to her care of S.

[104] K.W. reported to several individuals, including Ms. Rule, Marjorie MacDonald and Sherry Johnston, child protection worker, that she is afraid of B.W. but maintains a relationship with him because of her belief that they need to get along for the benefit of their daughter. She accuses the Minister of failing to provide marriage counselling services to help them communicate better for the benefit of S. By not following the reasonable directions of the Minister, she fails to appreciate B.W. is the source of her difficulties and not the child protection workers.

[105] The evidence of K.W. and B.W. that they would not have contact with one another if it meant the return of S. to K.W.'s care is not credible. This is a recent commitment and made in the face of the child being removed permanently from their care. They both left open the possibility of reuniting at some point in time in the future if circumstances change. B.W. told the access worker that he intended his mother to apply for custody and they would resume care of S. after a six month period. In December, 2013, both parties were continuing to ask for couples counselling in order to help them communicate better.

[106] K.W. has demonstrated an inability to work with the Minister and other service providers during the course of this protection proceeding. A difficult childhood while in care has left her mistrustful of the Minister and its workers. The anger management program she took was not beneficial in reducing her conflict with B.W. and others. This may be due to the fact that she has underlying personality difficulties. She has not been diagnosed with borderline personality disorder but is being treated for traits of borderline personality disorder, one of which includes inability to regulate her emotions. K.W. is just beginning her therapy sessions with Marjorie MacDonald and is awaiting the referral to a new psychiatrist. Any benefit she will receive from this therapy will take a long time and certainly will not be completed within the time lines set out in the Statute.

[107] Therefore, I am satisfied the Minister has established on a balance of probabilities that S. is still in need of protective services pursuant to s. 22(2)(b) and 22(2)(d) of the ***Children and Family Services Act***, supra.

[108] I am satisfied the Minister has met its duty pursuant to s. 13 of the ***Children and Family Services Act***, supra, to take reasonable measures to provide services to the Respondents that promote the integrity of the family. These services included individual counselling, mental health services, non offending parenting program, anger management program, access coordination and facilitation and family support worker. The services provided have not been successful in reducing the degree of risk that justified the finding that S. is in need of protective services.

[109] The Respondents question the lack of a parenting assessment by a person familiar with the risk of sexual recidivism to determine the dangerousness to B.W.'s biological daughter. The Respondents capacity to parent was not an issue throughout the proceeding. The main focus of the proceeding was the risk S. would suffer harm through being returned to or allowed to remain in the care of the Respondents given her father's high moderate or high risk for sexual recidivism. There is no time remaining to complete such an assessment. It is not clear whether such an assessment is possible given the evidence of Dr. Connors and Mr. Galarneau that actuarial risk assessment does not allow for a specificity in determining dangerousness to a specific person in specific circumstances. The Minister facilitated prior recommendations to focus on the parental bond through meaningful access visits. Therefore, the lack of a parental capacity assessment by a person familiar with the risk of sexual recidivism does not mean the Minister failed its duty to provide reasonable services to the Respondents that promote the integrity of the family.

[110] I am satisfied the circumstances which justify the earlier temporary care and custody order have not changed. The court must make a final disposition order placing the child in the Minister's permanent care and custody or return the child to the care of one or both of the Respondents.

[111] I have considered the possible placement of S. with a relative as required by s. 42(3). The Respondents have suggested K.W.'s sister, L.W. and S.'s godmother, A.E., as possible family or community placements. A.E. did not testify at the hearing and did not make an application for custody of S. L.W. testified at the hearing that she was prepared and able to assume the care and custody of S. She applied to be a

kinship foster placement in December, 2013, but did not follow up with her application when she did not hear back from the Minister. It is questionable whether she supplied all the information necessary for her application to be completed. Her brief testimony is not sufficient to determine whether her plan is a reasonable alternative to the Minister's plan of care. I, therefore, find a family or community placement is not possible.

[112] S. 3(2) of the ***Children and Family Services Act***, supra, lists a number of factors to be considered in determining the child's "best interest". These include importance for the child's development of a positive relationship with a parent and a secure place as a member of the family, the continuity of the child's care and effect on a child of disruption of that care, the bonding that exists between the child and the child's parents, the child's level of development, the relative merits of each plan, and the degree of risk that justifies the finding that the child is in need of protection.

[113] The Respondents have strengths as parents. S. was well cared for when she was in K.W.'s care and the access visits show a positive relationship between the Respondents and S. However, the degree of risk that justified the finding that S. was in need of protective services, the risk she may suffer harm through being returned to the care of either Respondent and the likely disruption to the continuity of her care occasioned by the dysfunctional relationship between the Respondents outweighs the positive aspects of the Respondents relationship with S. The Respondents ongoing relationship, whether as a couple or as separated parents communicating about the care of S. present a significant risk to S.'s safety. The Minister's plan for S. is better able to ensure her safety than the Respondents' plan.

[114] I find that it is in S.'s best interest that she be placed in the permanent care and custody of the Minister. The Minister has indicated that it is seeking a permanent placement in a family setting for S. and that access would impair the child's opportunities for such a placement. The child in care worker, Ryan Ellis, testified that S.'s prospects for adoption are high given her age. The Respondents have not shown any special circumstance that would justify making an order for access in these circumstances. The court declines to make an order for access as it would impair a future permanent placement for S.

J.