FAMILY COURT OF NOVA SCOTIA

Citation: *Nova Scotia (Community Services) v. C.D.,* 2019 NSFC 4

Date: 2019-03-22
Docket: FAMCFSA-110931
Registry: Amherst

Between:

Minister of Community Services

Applicant

v.

C.D., R.M. and M.T.

Respondent

Restriction on Publication:

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

Section 94(1) provides:

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

Editorial Note: Identifying Information has been removed from this electronic version of the judgment.

Judge:	The Honourable Judge Timothy G. Daley
Heard:	February 15 and March 7, 2019
Written Decision:	March 22, 2019
Counsel:	Andrew Melvin, for the Applicant, M.C.S.
	Bruce Muir for the Respondent, C.D.
	Jim O'Neil, for the Respondent, R.M.
	Tara Smith, for the Respondent, M.T.

Introduction

[1] This decision deals with an application under the *Children and Family Services Act* ("the *Act"*) brought by the mother, C.D., seeking the return of two of her children, S.T., who is five years old, and L.D., who is seven years old, to her care under the supervision of the Minister of Community Services ("the Minister" or "the Agency"). She proposes that her son, J.F., who is 17 years old, leave her home and reside with his maternal aunt, A.D., during these proceedings. I must determine if the test for such variation has been met and, in doing so, whether the variation sought is in the best interests of these two children at this stage of the proceedings.

[2] These proceedings began on August 10, 2018 when the Minister filed a protection application and notice of hearing with respect to L.D. and S.T. On August 14, 2018 the interim hearing began, and the court found that there were reasonable and probable grounds to believe that L.D. and S.T. were children in need of protective services. The court ordered that L.D. be placed in the care of his father, R.M., under the supervision of the Minister and that S.T. be placed in the care of the maternal grandmother, S.D., under the supervision of the Minister.

[3] C.D. has five other children who are not the subjects of these proceedings. Her eldest, M.F., is an adult who lives on his own. J.F., age 17, resides with C.D. in her home. Se.D., age 16, Sm.D., age 14, and Sl.D., age 12, are in the care of their father, M.L., under a *Parenting and Support Act* order.

Applicable Test on Variation Application

[4] Before reviewing the historic and current protection concerns in detail, I will first deal with the legal test to be applied in this application. The application to vary the current order was filed by the mother after the interim hearing under s.39 of the *Act* was complete but before the disposition hearing took place. Had the present hearing been completed at that time, prior to disposition, the parties agree that test under s.39(9) of the Act would apply. That section reads as follows:

> **39 (9)** The court may, at any time prior to the making of a disposition order pursuant to Section 42, vary or terminate an order made pursuant to subsection (4).

[5] If so, it is important to consider the relevant provisions of s.39 as follows:

> **39 (1)** As soon as practicable, but in any event no later than five working days after an application is made to determine whether a child is in need of protective services or a child has been taken into care, whichever is earlier, the Agency shall bring the matter before the court for an interim hearing...
>
> **(2)** Where at an interim hearing pursuant to subsection (1) the court finds that there are no reasonable and probable grounds to believe that the child is in need of protective services, the court shall dismiss the application and the child, if in the care and custody of the Agency, shall be returned forthwith to the parent or guardian.
>
> **(3)** Where the parties cannot agree upon, or the court is unable to complete an interim hearing respecting, interim orders pursuant to subsection (4), the court may adjourn the interim hearing and make such interim orders pursuant to subsection (4) as may be necessary pending completion of the hearing and subsection (7) does not apply to the making of an interim order pursuant to this subsection, but the court shall not adjourn the matter until it has determined whether there are reasonable and probable grounds to believe that the child is in need of protective services.
>
> **(4)** Within thirty days after the child has been taken into care or an application is made, whichever is earlier, the court shall complete the interim hearing and make one or more of the following interim orders:
> …
> (b) the child shall remain in, be returned to or be placed in the care and custody of a parent or guardian or third party, subject to the supervision of the Agency and on such reasonable terms and conditions as the court considers appropriate, including the future taking into care of the child by the Agency in the event of non-compliance by the parent or guardian with any specific terms or conditions;
> …
>
> **(6)** In subsection (7), "substantial risk" means a real chance of danger that is apparent on the evidence.
>
> **(7)** The court shall not make an order pursuant to clause (d) or (e) of subsection (4) unless the court is satisfied that there are reasonable and probable grounds to believe that there is a substantial risk to the child's health or safety and that the child cannot be protected adequately by an order pursuant to clause (a), (b) or (c).
> …

[6] From this section it is clear that, prior to a disposition order, an application to vary an order is made pursuant to the provisions of section 39. The issue is what test is to be applied.

[7] In this circumstance, I adopt the reasoning of Justice Beryl MacDonald in her decision of ***M.C.S. v C.L.D.,*** 2014 NSSC 21 respecting the burden and standard of proof in such a variation application at paragraph [7] as follows:

> [7] Professor Rollie Thompson, in "The Annotated Children and Family Services Act" discusses variation pursuant to section 39 (9) and he says at page 162:
>
> > What of the burden and test on any application to vary an interim order? Consistent with basic principles, the party seeking the variation should bear the burden of proving a change in circumstances since the initial order. That said, what of section 39 (7) on a variation application? Section 39 (7) plainly applies to any order under clauses (d) or (e) of subsection (4), whether made initially or on a variation application. Thus, were an Agency to apprehend and seek a variation under subsection (5), the substantial risk test would apply. Conversely, where a removal order is made initially, the burden on a parent seeking a variation would be the "lighter" one of showing a significant change in either the "substantial risk" in future or the adequacy of in-home measures. This apparently asymmetrical allocation of the burden flows logically from subsection (7) and the broader principles of least intrusive intervention.
>
> I agree with Professor Thompson's analysis. As a result the requirements of section 39(7) still apply to a variation proceeding under 39 (9). Section 39(7) sets out the burden of proof to be based upon "reasonable and probable grounds to believe" not on a "balance of probabilities". An application by a parent requires proof, from the parent, that there are reasonable and probable grounds to believe there have been significant changes since the date of the last order that indicate supervision will adequately protect the child.

[8] In this circumstance, the original hearing for this variation application was scheduled during the time between the interim hearing and the disposition hearing. Unfortunately, due to the length of the evidence, the matter was adjourned for completion until after the disposition hearing took place and the disposition order was granted.

[9] Given that circumstance, the question arises as to whether I should apply the test set out above in ***MCS v CLD*** supra, or that set out in section 46 of the *Act* for review of a disposition order. The relevant portions of section 46 are as follows:

> **46 (1)** A party may at any time apply for review of a supervision order or an order for temporary care and custody, but in any event the Agency shall apply to the court for review prior to the expiry of the order or where the child is taken into care while under a supervision order.

[10] It is well understood that the standard of proof of "reasonable and probable grounds" applied at the interim stage of the proceedings under s.39 is modified at disposition under section 42 to the standard of "balance of probabilities". Thus, the standard of proof on an application to vary the disposition order under s.46 is the higher standard of "balance of probabilities". This means that, while the burden of proof remains with the party seeking any variation of an order, whether interim, protection or disposition, the standard of proof rises after disposition.

[11] In the present case, I am satisfied that the standard of proof applicable under s.39 applies. The hearing of the evidence had begun prior to disposition, at which time that standard was applicable. That standard of proof was applicable at that time. The delay in completing the evidence was not the fault of any party but rather the result of the length of the evidence and the unavailability of the court for earlier dates. It would be unjust to find that the mother must now satisfy a higher standard of proof due to this delay when she was not at fault.

[12] Thus C.D. bears the burden to prove "that there are reasonable and probable grounds to believe there have been significant changes since the date of the last order that indicate supervision will adequately protect the child(ren)." ***MCS v CLD*** supra.

Prior Referrals

[13] The Minister says there is a long history of protection concerns respecting these children and their mother dating back to 2005. There was a total of 18 referrals which included allegations of physical neglect, sexual abuse, emotional neglect, inappropriate discipline, unfit living conditions, inadequate supervision, poor hygiene, dirty clothing and inadequate meals.

[14] At least some of these referrals were substantiated but most were not. It was the evidence of the Agency social worker, Beverly Dimmick, that the use of the phrase "unsubstantiated" did not mean that there were no concerns, only that, on investigation, the Minister was unable to find any corroborating evidence for these concerns. Ms. Dimmick explained that the weight to be assigned to such concerns often depended upon the type of referral and the source of the referral. Those that have been provided anonymously, were repetitious and added no information were

given little weight. On the other hand, referrals from professionals involved with the children, including teachers and schools or other professionals who would have no personal investment in the family and would tend to be more objective, would be given greater weight.

[15] For example, a referral was made in June 2009 by Se.D.'s teacher who described him and his clothes as dirty and he had a poor lunch provided for him.

[16] In January 2010 there was a referral from Se.D.'s school which described him as filthy with a dirty face, hands and clothing and he had a cut under his chin with blood on his sleeve. Sm.D. and J.F. were described as aggressive in their play and had no sneakers for gym class.

[17] In April to July 2012 there was a referral from the school which alleged that several of the children had inadequate lunches for months, their hygiene was poor, they were dirty, and the school and other children provided food and soap for them. The school claimed it had tried to address the issues with the mother.

[18] In April 2014 there was a referral from Sl.D.'s school alleging he had arrived on a couple of occasions without lunch and this was addressed with the mother.

[19] There were other referrals over those years but the ones identified in the evidence were made by teachers or schools who had little reason to mislead or lie and greater weight should be given to consideration of these referrals, historic though they may be, in assessing the current protection concerns and the application by the mother for a variation of the placement of S.T. and L.D.

[20] Though many of these referrals were unsubstantiated and in no case was a protection application made to the court, I find that they are material and relevant to this proceeding in assessing what is in the children's best interests and whether the variation application should be granted.

Current Protection Concerns

[21] Respecting the current concerns in this proceeding, the Agency social worker Jennifer Cormier, who is the caseworker for the parents and these two children, provided evidence in her affidavit and viva voce testimony. She said that the Agency was concerned about a chronic pattern of neglect, unfit living conditions, inadequate supervision by the mother, the children's poor hygiene, dirty

and undersized clothes, incidents of sexual abuse and exploitation, and the history of 18 referrals including four substantiated investigations since 2005.

[22] The core issue arising from this application by the mother is the Agency's position that she has not yet gained enough insight into these protection concerns and her role over many years in allowing these issues to continue. The Agency says that the mother minimizes the chronicity and seriousness of these issues, denies some of them outright and frequently deflects responsibility to others for these concerns.

[23] The current protection application was triggered by a referral from the local police department when Sm.D.'s father and his partner reported that Sm.D. had been taking sexually explicit photos and videos of herself on her cell phone including photos and images of her penetrating herself. Her father said that Sm.D. told him that she posted these videos on various social media sites and sent them to men, and she been doing this for a year. At the time of the referral Sm.D. was 13 years old.

[24] In the course of the investigation, the mother said that she was aware that Sm.D. had been taking inappropriate pictures and videos of herself prior to this referral to the police. She said that she had spoken very clearly and directly with Sm.D. about the risks of such behaviour, had taken away her access to the internet for one month as discipline and believed that it was behind them. Unfortunately, the evidence also makes it clear that Sm.D. had not stopped this behaviour and when internet access resumed, she resumed this activity.

[25] In that same referral, it was alleged as follows:

- When S.T. and L.D. were in the home on weekends for visits, they smelled bad, were wearing clothing that was too small and dirty and the children reported not being fed supper until late at night.

- S.T. and L.D. told him that the child J.F. climbed into bed with them at night and that L.D. reported he did not like this but had not reported anything inappropriate had occurred.

- L.D. had been urinating in bed more frequently and his behaviour had become more aggressive and angrier in the last few months. L.D. reported to them that he had not told his mother about J.F. getting into bed because he felt that the mother would not do anything about it.

- C.D. was drinking alcohol when caring for the children and was not supervising the children.

- J.F. may be violent with the children.

[26] In the course the investigation, the Agency workers interviewed the mother and she stated the following:

- She denied that J.F. hurt the children but that he roughhouses with them and they may be bruised from play.

- She explained that when she found out about the intimate photos taken by Sm.D. of herself, she "blew up" at Sm.D. and took away access to the internet for one month. She thought the punishment was enough and Sm.D. had stopped.

- She denied that she spent a lot of time in her room and denied that the children were not being supervised, saying that the internet and TV are in her room and the children watch movies with her every night there.

- She dismissed concerns about J.F. sleeping with L.D., saying the video game system was in L.D.'s room and J.F. went there to play it, laid on the bed and it was rare that he would spend all night. She did not believe that J.F. would do anything inappropriate to L.D.

- She denied hygiene issues, saying the children were bathed every second day.

- When asked about clothing, she replied that she believes in allowing the children to choose their own clothing as long as their bodies are covered.

- She denied alcohol use when caring for the children, saying that she only drinks when the children are away for the weekend.

Children's Statements and Admissibility

[27] In the course of the investigation, the Agency workers, alone or jointly with the police, interviewed the children at various times. The Minister wishes to put

before the court the children's statements arising from these interviews for the proof of the truth of their contents. While this is not the only evidence before the courter, it is a significant part of the Minister's case on which she relies in seeking to maintain the current placements.

[28] All the statements made by the children in this matter are clearly hearsay. Such statements may be considered pursuant to s.96 (3) of the *Act* which reads as follows:

> 96(3) Upon consent of the parties or upon application by a party, the court may, having regard to the best interests of the child and the reliability of the statements of the child, make such order concerning the receipt of the child's evidence as the court considers appropriate and just, including
> …
> (b) the admission into evidence of out-of-court statements made by the child.

[29] There is a two-part test to be applied to the admissibility of children's statements. The Minister must first establish the statements meet the threshold test for admissibility. In this case, none of the parties have contested that the statements do meet that threshold test, and the statements have been admitted for consideration by the court.

[30] The next stage of the analysis requires that I determine the ultimate reliability of these out-of-court statements by the children.

[31] In the decision of ***Mi'kmaw Family and Children Services of Nova Scotia v. H.F.,*** 2013 NSSC 310, Justice Forgeron considered the Agency's request for a finding that three out-of-court statements made by a child were reliable for the truth of their contents. As in this case, the application for admission of the statements was made pursuant to section 96(3)(b). Commencing at paragraph 49, Justice Forgeron found as follows:

> **49** Section 96(3)(b) of the *Act* was the subject of appellate review in **G.A. v. Children's Aid Society of Cape Breton-Victoria**, 2004 NSCA 52 (N.S.C.A.). In this decision, Hamilton J.A. noted the important distinction between criminal and child protection proceedings. She further held that the application of rigid formulas was not appropriate in the child protection context at para. 15, wherein the following was stated:

> 15 Bearing in mind the context and purpose of the trial judge's exercise of discretion to admit child hearsay pursuant to s. 96(3)(b) of the Act, I am not persuaded it is appropriate to impose any rigid formula for the receipt of such evidence. These are not criminal proceedings where the protections and concerns described in the governing jurisprudence such as **R. v. Khan** (1990), 79 C.R. (3d) 1 (S.C.C.), **R. v. Smith**, [1992] 2 S.C.R. 915 (S.C.C.), and **R. v. Starr**, [2000] 2 S.C.R. 144 (S.C.C.) necessarily arise. Here in the context of child protection proceedings, the discretion granted a trial judge to admit such evidence, whether or not the child in fact ever actually testifies in court, is found in s. 96(3)(b) ...

50 It is not necessary for me to consider whether necessity remains a factor to be proven in light of the specific wording of s. 96(3)(b) because the parties did not advance that argument. Necessity was admitted. Reliability was the sole battle ground. Further, and although I am directed not to apply rigid rules, I must nonetheless consider the issue of reliability in the context of the case law which has developed under the principled approach to hearsay.

51 The starting point of the analysis is the premise that hearsay statements are presumptively inadmissible: **R v. Couture**, ***supra***, para. 85. The court has the discretion to nonetheless admit the hearsay statements if the Agency proves admissibility through *indicia* of reliability: **R v. Couture**, para. 85.

52 This assessment of reliability involves a two stage process. The first stage, threshold reliability, was discussed and resolved previously. During the second stage, the trier of fact, in this case the court, must assess ultimate reliability based upon the totality of the evidence presented. In **R. v. Khelawon**, ***supra***, the Supreme Court of Canada held that a functional approach should be adopted when determining factors relevant to the assessment of reliability. In particular, the court should focus on "the particular dangers raised by the hearsay evidence sought to be introduced, and on those attributes or circumstances relied upon by the proponent to overcome those dangers:" para. 93. The presence of corroborating or conflicting evidence is appropriate to consider at both the threshold and ultimate reliability stage: paras. 4, 100.

53 Paciocco and Stuesser in the *Law of Evidence*, sixth edition, 2011, list factors that can be considered when determining the inherent trustworthiness of a statement, at p. 125, which factors include statements that are made:

- spontaneously,
- naturally,
- without suggestion,

- reasonably contemporaneously with the events,
- by a person who has no motive to fabricate,
- by a person with a sound mental state,
- against the person's interest in whole or in part,
- by a young person who would not likely have knowledge of the acts alleged, and
- whether there is corroborating evidence.

54 The authors also list safeguards surrounding the making of the statement that could expose inaccuracy or fabrications at p. 125 of their text, which provides the following list of questions:

- Was the person under a duty to record the statements?
- Was the statement made to public officials?
- Was the statement recorded?
- Did the person know the statement would be publicized?

[32] In determining the ultimate reliability of the out-of-court statements, I will adopt a more functional approach and I confirm that I have reviewed each of the statements carefully. I also confirm that I am not obligated to utilize a rigid formula when exercising the discretion to admit evidence under section 96(3) given the Court of Appeal decision in ***G. A. v. Children's Aid Society of Cape Breton-Victoria***, 2004 NSCA 52.

[33] I also note that neither party raises the issue of necessity. I will deal with that briefly. I find that each statement meets that test. It would be antithetical to the purposes of the *Act* to call any of these children to give evidence in this matter. I find that there is no other method by which this evidence can be considered, and it is therefore necessary to admit these statements for assessment of their ultimate reliability.

June 27, 2017 Joint Interview of Sm.D.

[34] On June 27, 2017, an Agency social worker and police officer conducted a joint interview of Sm.D. Sm.D. told them the following:

- She been posting photos and videos of her body but not her face since the end of grade 6.
- She sends them to random people she does not know. Most of the people report they are 16 to 17 years old and one person said he was 21 years old

- She takes them in her bedroom. The photos and videos are not taken at her father's house because someone is always watching and paying attention
- This school year she started touching herself and putting things inside herself in the videos.
- J.F. hits and punches her and that her mother tells him to stop.
- J.F. babysits everyone when the mother is at work.
- J.F. makes the younger children cry, yells at them for no reason, doesn't let them eat when they are hungry and hits L.D.
- J.F. started sleeping with L.D.
- J.F. touched her buttocks, has flicked her breasts and commented that she has “small tits".
- J.F. comes in her room and she is getting dressed and sits on her bed.
- J.F. doesn't want her to take showers.
- She keeps the bathroom door locked but J.F. tries to get in.
- Her mother is always in her room, smoking with her boyfriend, watching a movie and not paying attention.

June 28, 2018 Interview of S.T.

[35] Agency social worker Beverly Dimmick met with S.T. alone on June 20, 2018. S.T. stated the following:

- J.F. hurts her a lot and he does not talk to her very nicely.
- J.F. never sleeps in her bed, just L.D.’s.
- J.F. has said "I need L.D. with me or L.D. will die".
- J.F. will hurt her at the table and their mother will tell him to stop but he doesn't.
- There is lots of food at her mother’s home.
- She has lots of baths and clothes at her mother's home.
- When asked if she had been hungry at her mother's home, she said yes, lots of days, her mother will say that she doesn't care and S.T. will find food.

June 28, 2018 Interview of Sl.D.

[36] On June 28, 2018 social worker Beverly Dimmick interviewed Sl.D. who stated the following:

- The mother spent a lot of time in the bedroom and "never paid attention to us".

- The mother was never around and did not feed the children on time.
- His clothes tended to be dirty or too small.
- Laundry was not done often enough.
- In their previous home, clothes were from wall to wall in the laundry room.
- The house caught on fire because of a dirty lint trap.
- His mother drinks and smokes in bed.
- J.F. started drinking alcohol around age 10.
- His aunt, A.D., showed up at the home and started yelling at his father. They were all in the car and he was scared. His father called the police.
- He adjusted to the rules and routines at his father's home and he had none at his mother's home. He was not used to having a bedtime at all.

June 28, 2018 Interview of Se.D.

[37] On June 28, 2018 Agency social worker Beverly Dimmick interviewed Se.D. who stated the following:

- He was sick a lot at his mother's home and missed a lot of school.
- He is 15 years old and has lived with his father since he was seven.
- He had a lot of anger issues with his mother, they fought a lot and she decided he needed to live with his father.
- His mother spent a lot of time in her bedroom.
- His mother only had dinner when people were coming over, otherwise she would have the children get something to eat or she would make the older children make food. They did not seem to eat much.
- His mother would not get up most mornings and the children would see to themselves.
- He had fights with J.F. and only saw J.F. hit the other children by accident.
- He got along well with L.D. and Sm.D. and he did not note any concerns living with his father.

June 29, 2018 Joint Interview of L.D.

[38] On June 29, 2018 Agency social worker Katelyn Walsh and a police officer interviewed L.D. who stated the following:

- He spoke about who lives in the home with him and his mother and spoke of summer activities.
- He said that "mom doesn't hit me".
- J.F. had been sleeping in his bed since last summer.
- J.F. does not bother him when they sleep.
- J.F. will ask his mother for cigarettes until she gives them to him.
- J.F. used to babysit them until his mother's boyfriend, S., moved in.
- J.F. was not a good babysitter, he scared the children and watched scary movies with them.
- J.F. tortured them and always picked on them.
- J.F. slapped them with an open hand and hit them, doing the same to S.T.
- His mother was always in her room on her phone. The children asked her for things and she said she was busy.

[39] In considering the ultimate reliability of these various statements made by the children, I will first consider those circumstances and factors which mitigate against ultimate reliability. These include that the statements made by each of the children were not made under oath, there is no indication that the interviewers discuss the distinction between truth and lies for these interviews and none of the statements were audio or video recorded.

[40] As well, there is no evidence that the workers or officers conducting the interviews used the Stepwise interview technique, which generally requires the use of open-ended, non-leading questions, and many, if not all, of the disclosures made were not contemporaneous with the alleged events. Further, it is difficult to assess if the statements were made spontaneously or naturally as they were not recorded and there was no evidence from the two social workers who testified on this issue.

[41] I also consider that there are some inconsistencies among the statements of the children. For example, when S.T. says there was always food in her mother's home yet denies this later and most of the children say food was a challenge. As well, some say that J.F. was more aggressive and violent than others do.

[42] I consider that any motive to lie or mislead is always a relevant factor in assessing such statements. That said, there is no evidence before me to suggest that there is any motive to lie or exaggerate by any of these children. I consider the possibility of collusion among the children as a factor. There is always some risk of this but there is no evidence before me to suggest that this has occurred. This is

particularly so given that most these interviews occurred on the same date, giving little opportunity for any discussion among the children to come up with common stories.

[43] I also consider circumstances that would tend to support ultimate reliability. Among these is the fact that each of the interviewers, whether a social worker or police officer, is trained and experienced in conducting such interviews.

[44] I also consider that many of the allegations, while not immediately contemporaneous, were reasonably so. This would include allegations of being hit by J.F., the ongoing issue of the mother spending time in her bedroom, the chronic issues surrounding food and the video and photographs being taken by Sm.D.

[45] I consider that there is nothing to suggest that any of the children are of unsound mind. Though some are young, all of them would likely have knowledge of the acts alleged as they witnessed or experienced those stated in the interviews.

[46] As well, there is corroborating evidence for some of the allegations. Among these is the fact that the allegations among the children are almost entirely consistent on issues of parental neglect, food challenges, lack of supervision and J.F.'s violent behaviour. As well, Sl.D. noted a confrontation with the maternal aunt, A.D., and his father in a vehicle which is also alleged by the father and his partner in their statements to the Agency. Finally, there is corroboration to be found in the earlier referrals over many years from schools and teachers consistent with the current allegations.

[47] Considering all those factors which tend to support and negate the reliability of the statements, and particularly the internal consistencies among the statements of the children and the consistency between those statements and the history of referrals and the current evidence before the court, I find that the statements are ultimately reliable and admissible in this proceeding. They paint a clear picture of chronic parental neglect, lack of supervision, food insecurity, lack of attention to hygiene, clothing fit and cleanliness and general parenting of the children.

[48] The statements also support the finding that J.F. has been physically abusive of the children at various times, was left to babysit them when he should not have been, and that he presented a risk to the other children.

[49] The statements also indicate the significant risk to Sm.D. of her sexualized behaviour in photographing and filming herself and posting those images and videos online and distributing them to older males. The statements of Sm.D. that she only did these activities in her mother's home and could not do them in her father's home because of the supervision there reinforces the concern of inadequate supervision by the mother.

Evidence of Significant Change

[50] Is appropriate to consider the evidence of any significant change since the date of the interim order under section 39 of the *Act* that indicate that supervision will adequately protect the children if they are returned to the care of their mother.

[51] It is helpful to note that J.F. resides with the mother, L.D. resides with his father and S.T. resides with her maternal grandmother.

[52] C.D. has significant access with S.D. but her time with L.D. is more limited. C.D. says that she is gained enough insight and acquired enough new parenting skills such that it would be safe to return these children to her care. She says these changes have mitigated the protection concerns sufficiently. As well, she says that their return to her care would allow her to put into action the skills that she has acquired and to demonstrate her insight both to the Agency and the court.

[53] As part of her plan, C.D. says that that J.F. would leave her home and reside with his maternal aunt, A.D., during these proceedings. She says this change will address the risk that J.F. poses and both that she and the maternal aunt support this plan for J.F.'s care.

[54] The Minister says that the plan for J.F. to reside with his maternal aunt is short term at best and does not address the long-term best interests of the two younger children. The Minister is also concerned that, though J.F. was initially placed out of her home for a time, he has since returned to C.D.'s care and that this new plan is not sustainable. The plan is described as a "quick fix" to the problem and only attempts to address one part of the protection concerns. It also does not address the long-term question of where J.F. will reside in the future.

[55] As evidence of change, C.D. points to the many services she has participated in and the insight she says she has gained. These include therapeutic services with Jylian MacLeod, a registered counselling therapist. Two reports by Ms. MacLeod were filed with the court and she provided viva voce evidence at the hearing.

[56] In her first report, Ms. MacLeod notes that C.D. had attended for six sessions between November 14 and December 19, 2018. She described her as presenting as open and honest.

[57] She says that the mother "described unhealthy parenting approaches and patterns utilized when she was a child and appeared to minimize the effect that these experiences have had on her." C.D. went on to describe her own parenting style and Ms. MacLeod said

> C.D. shared that she believes that her parenting style is encouraging the children to be independent, and productive adults. C.D. feels that her parenting style is different than most as she does not feel that children should be coddled. C.D. references her children clothing often in conversations; she feels that if she tells the children that if they were dirty or small clothing the other children will make fun of them, and they still choose to wear it, then they face a natural consequence of either being cold or made fun of by others.

[58] Ms. MacLeod described how the mother at times focused on the past behaviour of one former partner with whom some of the children had been placed and comments

> We have discussed that how her view of the current situation cannot be minimized by these historical events and that moving forward she would need to adequately address the concerns in order to have the Agency allow her children to return home. This conversation is an ongoing one throughout our sessions, as C.D. has just begun to resolve these past emotions.

[59] In that report, Ms. MacLeod described that much time in these initial sessions was focused on gathering background information. She felt that C.D. appeared to take responsibility for her actions, was exploring remedies for the future and that she appears open in these conversations. Respecting C.D.s

confusion about former partners being deemed to be appropriate placements for the children, Ms. MacLeod comments

> It is my opinion that this concern of C.D.s can present as her deflecting responsibility but instead is more of a result of personalization, fallacy of fairness and polarized thinking patterns. During sessions, C.D. is engaging in cognitive behaviour therapy techniques to assist her with these patterns.

[60] Ms. MacLeod described C.D. has appearing motivated to engage in the therapeutic process and participate in conversations about concerns of the Agency. She recommends an addiction assessment as she was unsure about the presence of any alcohol addiction. She also recommended individual weekly therapy for the next few months.

[61] In her second report of January 31, 2019 Ms. MacLeod says that C.D. does not agree with the allegation of the Agency that she has a permissive parenting style that poses risk to the children. C.D. says that she is lenient but says her parenting style is not as problematic as the Agency believes it to be. C.D. feels the concerns of the Agency are embellished.

[62] On the other hand, Ms. MacLeod says that C.D. "willingly accepts responsibility for historical concerns and has described how she has worked towards bettering her life and the children's". C.D. alleges that the Agency always becomes involved at the point where she has already made changes to improve her and the children’s circumstances and is never recognized for this.

[63] Ms. MacLeod comments that C.D. has a clear understanding of self-awareness but because of the history and current involvement with the Agency, C.D. presents as guarded and distrustful. As noted,

> Due to this, she has a tendency to present as dismissive and uncaring, but in fact the opposite is happening. It is evident in session once she lets down that guard that C.D. is caring and concerned about her children's well-beings.

[64] In her summary, Ms. MacLeod notes that C.D. takes responsibility for some of the concerns presented by the Agency and is willing to resolve those concerns.

But C.D. also believes there are concerns that are unfounded or inflated and will not accept responsibility for those. Unfortunately, the ones to for which she accepts no responsibility are not identified.

[65] Ms. MacLeod describes C.D. as motivated to engage in therapeutic processes and conversations about the Agency's concerns. C.D. is concerned about the mental health of J.F., LD and ST and Ms. MacLeod recommends individual counselling for them.

[66] Finally, Ms. MacLeod strongly recommends a parenting assessment be completed which would allow for C.D.'s parenting style to be evaluated and therapeutic sessions to be targeted more specifically. As she notes

> With this assessment completed, the sessions would also be able to determine if C.D. has taken accurate accountability in sessions and if the strategies to prevent further conditions would be adequate.

[67] In her viva voce evidence, Ms. MacLeod described continuing to work in building rapport with C.D. and working on the concerns raised by the Agency, repeating that C.D. does not acknowledge all the concerns. She expanded on her view that a parenting assessment would be helpful, noting that it would assist in how to approach therapy with the mother, would assist in dealing with the discrepancies in versions of events and the mother's distrust of the Agency.

[68] In cross-examination, Ms. MacLeod expressed her concerns that the mother engages in black-and-white thinking, using the example of recommendations to spend 10 minutes with each child as meaning literally 10 minutes and no more. I took this concern to go to the question of whether the mother could employ the recommended parenting strategies in a more flexible way or would should be rigid in applying each recommendation which could cause difficulties.

[69] When asked about the mother's level of insight on a scale of 1 to 10, Ms. MacLeod offered her view that her insight was at about 6.5 and that the parenting assessment would help to clarify the issues for both the therapist and the mother. On redirect, she gave her opinion that she did not know with any accuracy the level of insight of the mother without a parenting assessment.

[70] In her own evidence, C.D. says in her first affidavit that she took appropriate steps when she discovered that her daughter was taking inappropriate sexual pictures of herself. She spoke to the child, explained the risks and took away her internet access for one month. Though she thought this had dealt with the issue, she acknowledged it did not.

[71] Respecting the risk of J.F. harming the other children, C.D. says that when this issue was raised with her, she stopped allowing him to babysit the children. She says that J.F. did not sleep often in the other children's room and acknowledged that J.F. occasionally falls asleep in the same bed as LD. The statements appear to minimize the allegations respecting J.F. and his behaviour respecting the other children.

[72] C.D. also says that she doesn't think J.F. would do anything sexually inappropriate. I take this to be a statement denying anything sexually inappropriate about his flicking of SmD's breast and his comments about their size, seeming to minimize that concern as well.

[73] She does acknowledge placing responsibility on the older children to care for the younger ones and now says she understands the need for an increased supervisory role.

[74] In that same first affidavit, she denies the issues raised in the children's statements and the referrals from the schools with respect to clothing and food.

[75] She acknowledges making mistakes over the years and that she has things to work on. Unfortunately, she does not identify all the concerns that are present in the matter.

[76] She does acknowledge that issues putting the children in harm's way are a serious risk, she recognizes she has very little control over her children and that they don't listen to and respect her. She says she needs to change this.

[77] She says that she now recognizes the risk that J.F. presents to the other children and that it is her responsibility to remedy that. She acknowledges placing

too much responsibility on the older children and that she failed to supervise the children as she should.

[78] She acknowledges the failure to supervise internet activity by her daughter and that unsupervised contact between J.F. and the younger children should not happen. In saying these things, C.D. has certainly put on the record acknowledging many of the concerns and her deficiencies.

[79] In discussing services and her engagement, she notes she has been meeting with a family support worker since late September 2018 on a weekly basis for the Positive Parenting Support Program. She says she is learning that while she has some strategies available, there are important strategies she is missing. In her second affidavit she notes working on organizational skills, structure and routine.

[80] She confirms attending a parenting workshop at Maggie's Place in October 2018 which addressed the “cons" children use to manipulate parents.

[81] C.D. has made significant effort to find a cyber safety course and explains all the attempt she made in the community, finally reading materials online to obtain those strategies to protect her children from predators.

[82] In her affidavit sworn January 8, 2019 she details the work done with Ms. MacLeod on a weekly basis and says she is open to this therapy and to taking what she learns and applying it as a parent. She says she is open to an addiction assessment as well.

[83] At the conclusion of her second affidavit, she says that while she does not fully agree with the Agency's concerns, she acknowledges there are serious matters to deal with, that she has made mistakes and says she is willing to correct them. These include increasing her supervisory role as a parent.

[84] As an aside, there was some evidence from witnesses about alleged conversations or comments made outside of the courtroom which might be perceived as a veiled threat. Having examined that evidence carefully, I cannot conclude that any such threat is made out and I will not consider this portion of the evidence in this decision.

[85] In her direct evidence, C.D. acknowledged that her communication with R.M. has been poor in the past, including when she refused to speak with him which also prevented her from seeing L.D. for some time. She acknowledges that her pride prevented this.

[86] In that same evidence, and despite saying in her affidavit that she acknowledges the risk that J.F. posed to S.T. and L.D., she said that he did not pose a risk to them. She acknowledged that he was rough with them and that she has spoken to him about this and sought help. She then went on to say that all the children were rough but not aggressive to one another.

[87] She addressed the issue of J.F. touching his sister's breasts and said that he flicked upward on her breast on one occasion at the kitchen table in the spring of 2018. She said this was months prior to the Minister's application and minimized its importance. She believed it was not sexual.

[88] On an allegation that she had had a party at her home one evening and then left for a trip to P.E.I. before cleaning up alcohol bottles, some of which were in the children's bedrooms, she minimized this incident by saying the children were not present and it was only because one of them came home early that this became an issue.

[89] To the issue of neglect and failure to supervise, she said that she spent a lot of time in her bedroom with the children. She said she was not neglectful but should have supervised Sm.D more closely.

[90] She specifically said that she never neglected S.T. and L.D., supervised them and they were fed their meals but there were times when the older children were left prepare some meals.

[91] Her description of these circumstances is in contrast with the statements made by many of the children of neglect, failure to supervise and poor food security.

[92] She acknowledged that she needed to improve her attentiveness to her children and her maintenance of the home though she said that the latter was not much of an issue.

[93] Respecting clothing and the allegation that the children were often wearing clothes too small for them which were dirty or filthy, she said that she had to choose her battles and, as long as the children were covered and warm, that was satisfactory. She said that they never left the home dirty. This was in sharp contrast to the description of the children's presentation at school by teachers on many occasions in the past.

[94] There was also evidence from the paternal grandmother, S.D., who swore an affidavit on January 8, 2019 in which she said that she had no concerns whatsoever regarding C.D.'s parenting based on her observations. It was her view that S.T. and L.D. were under more stress being away from their mother and siblings and would benefit from being reunified with their mother.

[95] In cross-examination, S.D. said that she had no issues at all with C.D.s parenting style, that there was no neglect apparent to her, the mother paid good attention to the children and that the children were always fine. When asked why the Agency was involved, it was her view that someone had made false accusations.

[96] When asked if she had spoken C.D. about the matter and why the Agency was involved, S.D. said that C.D. told her that she had no issues with parenting and that there would be no concerns if everything returned to the status quo before the Agency's involvement.

[97] In redirect, S.D. was asked if she knew why the children were taken and she replied that C.D. told her that the was no reason for this.

[98] This evidence of what the paternal grandmother says the mother told her about any concerns of the Agency is in stark contrast to the evidence of the mother respecting her alleged insight into the protection concerns and her acknowledgement of many of these concerns.

[99] The maternal aunt, A.D., provided evidence by affidavit and at the hearing. She confirmed her willingness to take J.F. into her care under the plan proposed by the mother.

[100] She was asked if she knew about the protection concerns around J.F. and said that she didn't know what they were but still maintained that she disagreed with those concerns. She testified that when she spoke to her sister, C.D. told her she didn't know why the Minister was involved with her family. Her evidence overall minimized any alleged protection concerns and suggested, from her conversations with her sister, that C.D. did not believe there were any protection concerns which need to be addressed.

[101] On the issue of any confrontation between her and Sl.M.'s father in the driveway as described earlier, she denies blocking him or yelling or screaming at him, claiming she was calm and that he screamed at her at the top of his lungs. This is contrary to the statement of the child who was present.

Analysis and Decision

[102] The mother urges this Court to allow S.T. a L.D. to return to her care under the supervision of the Agency. She says that, as part of the plan, J.F. will live with his maternal aunt during these proceedings.

[103] She says that she is engaged with services, has gained insight and tools as a parent both respecting the protection concerns and how to improve her parenting going forward. She also says that the return of the children would allow her to employ these techniques to prove to both the Agency and the court that she can adequately parent at least these two children.

[104] She notes that, if the children are returned to her care, they can continue to receive supports and services. Her counsel notes the decision in ***FCS of Lunenburg County v. T. S. L.,*** [1999] N.S.J. No.434 in support of that proposition.

[105] C.D. urges this Court to resist the Minister's argument is that it is too early to return the children to her care, saying that the return will be the least intrusive alternatives under the *Act* and that she has established, on reasonable and probable grounds, that she has mitigated the substantial risks sufficiently to permit that return. She cites the decision of Judge Wilson in ***Children's Aid Society of Pictou County v. A.J.G.***, [2009] N.S.J. No. 636 at paragraph 67 in support of this as follows:

> ... The purpose of the *Act* is not to substitute good enough parenting for better parenting but to ensure that all parenting is good enough to protect children from harm. The court also acknowledges that it is the philosophy of the the *Act* that parents be provided with services that will enable them to maintain the children within the family of origin if at all possible. The court further understands that services are for a limited time and it is the responsibility of the parents to demonstrate progress so their children's lives can be stabilized and nurtured.

[106] To the issue of insight, C.D. urges the court to consider the reports and evidence of Ms. MacLeod and her comments regarding the progress of C.D. in gaining insight and parenting skills. These have been reviewed earlier in this decision.

[107] She also points to the various services she has engaged with and her acknowledgement of various risks and her role in those matters over significant time.

[108] The Minister says that C.D.'s plan is shortsighted, focusing on the risk J.F. poses and that his relocation to his maternal aunt’s home is a temporary solution that does not address the remaining areas of concern.

[109] The Minister also urges the court to consider the evidence of the therapist which she says indicates some progress by C.D. but also a significant absence of insight, rated at 6.5 out of 10, and the therapist's recommendation that a parenting assessment is required to both identify the level of insight and to plan a path forward for therapy with the mother.

[110] The Minister notes that though C.D. has acknowledged some historic and current safety and protection concerns, she denies or minimizes many of them including those around clothing, hygiene, food preparation, lack of supervision and general neglect of the children.

[111] Both parties note that the children's best interests are the paramount consideration under the *Act* both in sections 2 and 3 as follows:

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

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

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

(b) the child's relationships with relatives;

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

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

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

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

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

(ga) the child's sexual orientation, gender identity and gender expression;

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

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

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

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

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

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

(n) any other relevant circumstances

[112] As noted by Minister's counsel, courts in Nova Scotia have found that the existence of the family placement option and the desirability of preserving familial relationship does not in any way "trump" other factors which must be weighed by the court in deciding a matter in the child's best interests. See ***Nova Scotia (Minister of Community Services) v. D.C.***, [1994] N.S.J. No.659; DM CFSA 93-63 (Fam. Ct.), at para. 116; upheld on appeal; ***Nova Scotia (Minister of Community Services) v. D.L.C.***, [1995] N.S.J. No. 74; C.A. No. 11836/76 (C.A.)

[113] I am mindful of the comments of the Supreme Court of Canada in ***Winnipeg Child and Family Services v. K.L.W.***, 2000 SCC 48 at paragraph 72 on the issue of interference by the state with parenting as follows:

> **72** The mutual bond of love and support between parents and their children is a crucial one and deserves great respect. Unnecessary disruptions of this bond by the state have the potential to cause significant trauma to both the parent and the child. Parents must be accorded a relatively large measure of freedom from state interference to raise their children as they see fit.

[114] But the court also held at paragraph 80

> **80** Ultimately, however, as the Alberta Court of Appeal recently observed in *T. v. Alberta (Director of Child Welfare)* (2000), 188 D.L.R. (4th) 603, at para. 14, child protection legislation "is about protecting children from harm; it is a child welfare statute and not a parents' rights statute". While parents' and children's rights and responsibilities must be balanced together with children's right to life and health and the state's responsibility to protect children, the underlying philosophy and policy of the legislation must be kept in mind when interpreting it and determining its constitutional validity.

[115] In arriving at a decision this matter, I confirm that I have carefully reviewed all the evidence, both that reviewed in this decision and otherwise, I have carefully reviewed and considered all the relevant provisions of the *Act*, particularly the provisions of sections 2 and 3 as noted herein, and the case law provided to me.

[116] C.D. deserves significant credit for acknowledging some of her deficiencies found in the chronic and serious history of protection concerns of many types over many years. She also deserves credit for the work she has done to begin to develop alternative strategies for her parenting and changing her view of her role as a parent.

[117] She has acknowledged many of the protection concerns. She has identified the services in which she is engaged and says that she has gained some insight from these. Some of this is confirmed by her therapist.

[118] Her plan does address the immediate protection concern respecting J.F. by placing him with another family member. Certainly, her request for the return of S.T. and L. D. the into her care is, from her perspective, a reasonable one to allow her to employ the strategies she says she has learned through services and to demonstrate her insight.

[119] That said, I find that C.D. has not established that there are reasonable and probable grounds to believe there have been significant changes since the date of the last order that indicate supervision will adequately protect the children. I arrive at this conclusion for several reasons.

[120] While she has acknowledged many of the protection concerns, she has denied many of the serious concerns as well. Her evidence on this is been somewhat mixed, at times acknowledging protection concerns and at other times, both in her affidavit and in her viva voce evidence, minimizing or dismissing many of the same concerns.

[121] This issue is amplified by the evidence of her mother and sister who say, based on their conversations with her, that C.D. does not believe there are any protection concerns or parenting deficiencies at all. Even allowing for some misunderstanding and considering that some of these conversations may be from earlier in the protection proceedings, it appears that the mother is, at best, not clear whether she truly understands the many protection concern and risks apparent on the evidence. This leads me to doubt her level of insight.

[122] I also consider that Ms. MacLeod has worked extensively with C.D. and, while acknowledging the progress she has made, she expresses her views that C.D. has not yet accepted full responsibility for all the protection concerns. Respecting insight, she assigns a rating of 6.5 of 10 to that issue which is a concern to the court. She then says that a parenting assessment is necessary to properly assess the level of insight and to plan for therapy. This leaves me in doubt respecting the current level of insight of the mother.

[123] As well, I have concerns about the level of improvement in her parenting skills. It is true that she has engaged with a family support worker and other services to address these deficiencies. But Ms. MacLeod's description of her being a black-and-white thinker and the very serious and chronic parenting deficiencies identified repeatedly over the years I find will require significant change in both insight and parenting skills that have yet to be demonstrated to my satisfaction such that it would be appropriate to return the children to her care even on a reasonable and probable grounds basis.

[124] It is true that children should be returned to a parent's care as soon as possible in child protection proceedings. The standard to be met is not perfect parenting but adequate parenting. There may be circumstances where, even when there is evidence of parenting deficiencies or some lack of insight into risk, it is appropriate and in the children's best interest that they be returned to parent's care to allow implementation of parenting strategies and to demonstrate insight. But in this case, I am not satisfied that the mother has proven that it is appropriate at this stage and in the children's best interest for that to occur.

[125] I make this finding taking into account paramount consideration of the children's best interest and all of the factors set out in the *Act* under sections 2 and 3. I have considered the importance of these children's development of a positive relationship with their mother and a secure place as a member of that family, their relationship with their mother and relatives and the importance of continuity in their care. I have considered the possible effect on a disruption of that continuity.

[126] I have considered that there is a strong bond between these children and their mother as well as other members of their family and considered their physical, mental and emotional needs and the appropriate care or treatment to meet those needs. These are younger children and I have carefully considered their physical, mental and emotional level of development.

[127] I have paid careful attention to the merits of the plan proposed by the Agency and compared that to the merits of the plan of the mother in returning the children to her care as well as the effect of the delay on the children in implementing the mother's plan.

[128] I have also carefully considered the risk to the children in being kept away from their mother's care and balanced that against the risk to them of returning them to her care. I have also weighed the degree of risk for these children that has justified the finding that they are in need of protective services. I find that risk to be very significant, chronic and complex.

[129] In all the circumstances, and in considering the position of each of the parties, the evidence before me and the law, I do not find that the mother has met the burden of proof and I dismiss her application.

Daley, J.F.C.