

FAMILY COURT OF NOVA SCOTIA

Citation: *Minister of Community Services v. DS, CS*, 2023 NSFC 2

Date: 20230911

Docket: SFTCFSA-127988

Registry: Truro

Between:

Minister of Community Services

Applicant

-and-

DS, CS

Respondent

DECISION

Judge: The Honourable Judge Timothy Daley

Heard: February 21, 2023

Written Decision: September 11, 2023

Counsel: Cherie Wheeler-McLeod, counsel for MCS
Allison Kouzovnikov, counsel for DS
Jim O'Neil, counsel for CS
Heather Mills, counsel for GAL, Beth Archibald

Introduction

[1] This decision concerns three children, LS, (14 years old), AS, (11 years old) and ES, (eight years old) and whether or not they remain in need of protective services at the date of the protection hearing in this matter. The Minister of Community Services ("the Minister" or "the Agency") must meet the burden of proof to establish on a balance of probabilities that, on the date of the hearing, the children remain in need of protective services on at least one of the grounds pled or any other ground under the Children and Family Services Act ("the Act"). The parents, DS and CS, oppose these findings, saying the children are not in need of protective services on any of the grounds pled or any other ground under the Act.

[2] In this matter each of the parents is represented by counsel and a Guardian ad Litem, Beth Archibald, was appointed to represent LS's interest with counsel.

[3] This matter began because of allegations made by LS that her father had been sexually abusing her on many occasions over an extended period. These are all alleged to have occurred within the home where she, her parents and siblings resided.

[4] The Minister therefore says there was sexual abuse committed by the father against LS and there is ongoing substantial risk of sexual abuse for all three children. The Minister also says that LS has suffered emotional abuse because of this alleged behaviour and because her mother did not believe her or support her after those allegations came to light. The Minister also says that both parents caused her to suffer emotional abuse and there is a substantial risk that all three siblings will suffer emotional abuse in the future. As noted, the parents deny all of these allegations.

[5] The Minister made an initial application before this court respecting this family on October 27, 2022. The respondent parents requested a hearing on jurisdiction, specifically whether the children had been constructively taken into care months prior to the application and the court therefore lacked jurisdiction to hear the matter under that proceeding. At the conclusion of a one-day hearing, I provided a decision that I found that the minister had engaged in a constructive taking into care some months before, and the court did not have jurisdiction at that time to hear the matter because the Minister failed to bring the matter before the court within the statutory timeline. In that decision, I dismissed the application of the Minister on a without prejudice basis, indicating that she could bring an application again before the court, which she did shortly thereafter. I also indicated

I would provide written reasons.

[6] Since that decision was made and before I provided written reasons, the Court of Appeal has overturned that decision respecting jurisdiction, reserving its reasons for written decision later. I therefore did not provide the written reasons, as I felt I was functus in the matter.

[7] The Minister then made a fresh application on the same grounds and the respondent parents did not contest the findings at the interim hearing stage on a without prejudice basis, reserving to them the right to oppose the grounds at the protection stage or a later stage of the proceeding.

[8] It is at the protection stage that they have sought a hearing, from which this decision arises.

Evidence

[9] The genesis of this application was a disclosure by LS to her mother that she had been sexually abused by her father. This disclosure took place on August 18, 2021, at which time the mother and father met with LS and LS refused to discuss the matter further.

Joint Interview – Evidence of Sexual Abuse

[10] Once the mother made the referral to the police on August 18, 2021, Constable Trent Lafferty and Agency worker Allison Smith met with LS for a joint video and audio recorded interview.

[11] In that interview, there was some attempt at rapport building, and LS became engaged in the discussion. There was no review of the difference between telling the truth or telling a lie or using any examples, both of which strategies would be consistent with the Stepwise technique for such interviews. Ms. Smith later gave evidence that the Stepwise recommendations has changed and exploration of truth telling could happen at the end of the interview.

[12] LS said that the first time her father abused her occurred when she was in grade 5 or 6, she was about 11 years old, that it took place in “maybe October-ish” but was a long time ago for her. On that occasion, her father was in her bed and put his hands over her clothes and on her breast. She described facing into the room and her father was facing her and the wall.

[13] On the second occasion she was sleeping with her parents due to having a nightmare and her mother left the room for a time. She says her father told her the next morning her hand was on his penis the night before.

[14] Another occasion she described taking place in the basement in the “movie room”, which I understand to be a room in the basement of the home. She and her father were playing a video game, and the rest of the family were upstairs asleep. He went upstairs and brought down pillows and blankets, placed them on the floor and placed LS on the blankets. He forced her to “let him lick her”, and says he tried to lift her shirt.

[15] LS went on to say in the interview that this sexual abuse, in one form or another, took place almost every night. She initially tried to say no, but eventually gave up resisting. This included her telling her father to stop and that it wasn't right.

[16] The locations of the abuse were in the house, typically in her bedroom or in the movie room, but occasionally in the parents’ bedroom and the bathroom, and involved touching her over and under her clothes on her breasts and vagina.

[17] She described occasions when the father would go to the bedroom with the mother, come back to her room with his penis out and move her to another room in the home. She describes that two occasions he took her by the wrist to touch his penis and she pulled away and did not touch it.

[18] She also described him coming into the bathroom every time she showers to watch her shower, directing her to wash her breasts and she would tell him to get out, but he would stay.

[19] She described her father using his finger to penetrate her vagina on one occasion. She said it took place in the movie room on a king-size mattress on the floor with the father, mother, and her sleeping there. She says her father lifted the leg of her shorts and underwear and inserted a finger into her vagina.

[20] In that interview, LS reported that she had woken up with her father touching her every night beginning in October 2020. On the first occasion her father touched her breast over her clothing. She described other occasions when playing video games at night and her father would pick her up off the couch and put her on the floor, lifting her shirt and touching her, licking her breasts.

[21] LS said that she had told her close friend C of these instances of abuse and recently told her father that she had done so. He became angry and told her not to tell her mother.

[22] LS was asked how many times these things happened to her between the first time and the last. She replied, “two or three, maybe?” and then said it occurred “pretty much every night.”

[23] She said that generally her father licked her breasts but also touched her vagina sometimes.

Parents’ Evidence - Sexual Abuse

[24] Both the father and mother filed affidavits and were cross-examined. They are consistent in their positions denying any abuse, whether sexual or emotional, or any risk of abuse in their family.

[25] In addition to their denials, their arguments follow two lines of reason. First, they say that LS had a motive to fabricate this evidence. She had formed a relationship with the child, C, and the parents’ thought C was not an appropriate person for LS to spend time with and were concerned that she was a bad influence on LS. It is their view that these allegations were prompted by the parents’ refusal to allow LS to go on a trip with C and that C likely encouraged LS to make these allegations.

[26] The second line of reason is based on the improbability that this many incidents of sexual abuse occurred in their home without the mother or the other children noticing anything amiss. Specifically, the father testified by affidavit that the family resides in a two-story home which totals 728 ft.² of living space prior to an expansion of the home. After the expansion, the total was raised to approximately 1000 ft.², 500 ft.² on the main and 500 ft.² on the upper floor.

[27] Attached to his affidavit the father includes the diagrams for the permit application with the building permit issued on October 14, 2020. Prior to that date, and until construction was complete, the father's uncontroverted evidence is that in the two-story home, total 728 ft.² at the time, all three children shared one bedroom with LS and AS having bunk beds. It is both the father’s and mother's evidence that the mother is an extremely light sleeper and would wake easily at any disturbance.

[28] In that smaller footprint home, the evidence is that the bedrooms are on the second floor and were close to one another. The father argues that it would simply be improbable that he could have committed any of the sexual abuse alleged in the child's bedroom at night prior to renovation because all three girls share the same bedroom. The mother never observed or had any concerns respecting such abuse at any time, including prior to the renovation. Put simply, he says he could not do what is alleged to have been done without someone noticing.

[29] In the new floor plan, it is uncontroverted that the expanded main floor consists of the living room, the only bathroom of the house, a kitchen and what appears to be a utility/laundry room.

[30] The stairs to the second floor run along the bathroom wall and the father describes this area as a "high traffic" part of the house.

[31] The second floor contains the bedrooms. The parents' bedroom is at one end of the home, ES's is adjacent on the same side of the home, LS's bedroom is at the other end of the floor and AS's bedroom is in between, adjacent to the stairwell.

[32] The father's evidence is quite straightforward. He says that, for example, the allegations that he watched LS take showers every time in the bathroom and told her to wash her breasts while he watched is improbable at best. The door to the bathroom is adjacent to a heavily travelled part of the house. He says the shower curtain is not see-through, implying it would have to be open for him to watch her. Given that LS says this occurred on many occasions, each time she showered, over a period of a couple of years, it would be improbable that the mother would never notice this occurring at any time.

[33] He also says that most, if not all, of the times that his daughter showered, he was already at work at 7:15 AM. It would therefore be improbable that he would engage in this behaviour.

[34] Respecting the allegations of abuse in LS's bedroom, the parents both say these could only occur after the renovation to the home was complete in December and LS had her own room. Both parents say that the mother sleeps lightly and the father says she can "wake on a pin drop". They both confirm that their dog sleeps with them as well.

[35] It is the parents' evidence that it is highly improbable that the father could

have left the bed with the mother without disturbing her or the dog sufficient to wake the mother, crossed the hallway area to LS's bedroom and committed the sexual abuse as alleged on a nightly basis without his wife being aware of his movements.

[36] In challenging the Minister's evidence, the father noted some inconsistencies or improbabilities in the joint statement of LS.

[37] For example, he says that at the time of the first alleged incident of sexual abuse in her bedroom, LS shared a bunk bed with her sister and all three girls were in the same room. Her own bed was not put into her new room until well into 2022. His evidence is that it is entirely improbable that he could have done what he is alleged to have done in that room at any time without waking one of the other children or his wife or dog.

[38] Respecting the allegation that abuse took place when LS slept in the bed with him and her mother, he and the mother note the improbability of this given her light sleeping behaviour. They both also deny any recollection of LS sleeping in that bed with them prior to her new bedroom being completed.

[39] The father's evidence regarding the last alleged incident, which would have occurred on August 16, 2022, include describing the events leading up to his return home that evening and putting the girls to sleep, playing some video games beside his wife before heading downstairs to play a game in the theatre room.

[40] He said LS came down and asked if she could play with him and he agreed. She watched him play on her account while she watched YouTube videos and was in and out of the room.

[41] In the course of their time together they discussed her plan to go away that upcoming weekend with her friend C to Halifax. The father says he was on edge with the idea and reminded her she needed to make good decisions and not running the streets with her friend, concluding that he would discuss it with her mother the next day.

[42] He says LS then brought down her blankets while he was playing video games, and when asked, she said she was sleeping in the movie room on the floor. She said it was too hot in her room, and when he reminded her she had air conditioning in the room, she said it bothered her. He then went to bed. The father denies any sexual abuse of LS that night, or any other time.

[43] It was the next day that the allegations of sexual abuse were made by LS to her mother. The mother says this was after she informed LS that she could not go with C for the trip to Halifax.

[44] The mother provides evidence by affidavit that she was concerned about C being a friend of LS's and the influence she would have on her. These concerns were because of conversations she had with LS about things C had told her about her own behaviours including claims she had sex, drinks alcohol and smokes at ten years old.

Sexual Abuse

[45] There can be no doubt that the primary consideration in any proceeding under the Act is the best interests of the child. This is clear in section 2 of the act 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.

[46] As to criteria for consideration. Respecting the best interests of the child, section 3 (2) provides guidance to the court which I consider carefully.

[47] With respect to the allegation of sexual abuse by the father, I must carefully consider the provisions of section 22 (2)(c) which reads as follows.

22(2) A child is in need of protective services where

(c) The child has been sexually abused by a parent or guardian of the child or by another person, where a parent or guardian of the child knows or should know of the possibility of sexual abuse and fails to protect the child.

[48] In this circumstance, the allegations of sexual abuse are made against the father, not the mother. Thus, in make a finding under this section, I must find that the Minister has proven, on the balance of probabilities, that the father has sexually abused LS in order to find that she is a child in need of protective services. While there are other grounds pled, I will begin here as the evidence centres largely around the question of whether such sexual abuse occurred or not.

[49] In assessing the evidence regarding these allegations, I will first note that a significant number of out-of-court statements made by LS met the threshold test for admissibility and are before the court for consideration. That said, it is now for the court to determine the ultimate reliability of those statements admitted into evidence.

[50] In doing so, I must consider the twin factors of necessity and reliability. In this matter, there is consensus among the parties that the out-of-court statements meet the test for necessity as it would be antithetical to the goals of the Act to require LS to attend a court and provide her evidence under oath, and then be subject to cross-examination. Her out of court statements are therefore necessary.

[51] The only factor to be considered is the reliability of the statements.

[52] 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. Commencing at paragraph 53, Justice Forgeron found as follows:

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?

[53] 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.

[54] When considering the assessment of credibility, I am also mindful of the comments of Forgeron, J. in *Baker-Warren v. Denault* 2009 NSSC 59 in which she provided the following helpful guidance:

18 For the benefit of the parties, I will review some of the factors which I have considered when making credibility determinations. It is important to note, however, that credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:" *R. v. Gagnon* 2006 SCC 17, para. 20. I further note that "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" *R. v. R.E.M.* 2008 SCC 51, para. 49.

19 With these caveats in mind, the following are some of the factors which were balanced when the court assessed credibility:

- a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony, and the documentary evidence, and the testimony of other witnesses: *Re: Novak Estate*, 2008 NSSC 283 (S.C.);
- b) Did the witness have an interest in the outcome or was he/she personally connected to either party;
- c) Did the witness have a motive to deceive;

- d) Did the witness have the ability to observe the factual matters about which he/she testified;
- e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;
- f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: *Faryna v. Chorney* [1952] 2 D.L.R. 354;
- g) Was there an internal consistency and logical flow to the evidence;
- h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant, or biased; and
- i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?

20 I have placed little weight on the demeanor of the witnesses because demeanor is often not a good indicator of credibility: *R v. Norman*, (1993) 16 O.R. (3d) 295 (C.A.) at para. 55. In addition, I have also adopted the following rule, succinctly paraphrased by Warner J. in *Re: Novak Estate, supra*, at para 37: There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See *R. v. D.R.*, [1996] 2 S.C.R. 291 at 93 and *R. v. J.H.*, [2005] O.J. No. 39, *supra*).

[55] In assessing the evidence of LS through her out-of-court statements, I find the factors which favour reliability and credibility include that the statements, particularly in the joint interview, appeared to be made spontaneously, naturally and without suggestion. There is no indication that LS was not of a sound mental state.

[56] Likewise, I am satisfied that the recording of the joint statement assists in the assessment in favour of credibility and reliability. The interview was conducted by appropriate officials, specifically the police and the Agency. LS was aware that the recording was being made.

[57] Those factors which weigh against reliability and credibility include that there is an allegation that LS had a motive to fabricate the allegations. This arose in the evidence of the parents who said that her relationship with her friend C may

have influenced her to make the allegations once permission was denied for her to travel with C. Their description of C's behaviours and history, and the adverse affects she has had on LS, they suggest establishes a motive to fabricate.

[58] Further, there is no corroborating evidence of the sexual abuse alleged.

[59] Finally, the court must be mindful that this evidence cannot be challenged by way of cross examination and must be assessed very carefully as to its reliability and credibility in that context.

[60] Further factors weighing in favour of credibility and reliability included that LS had fairly good powers of recollection as to what she alleged occurred, though there were some challenges with her timeline and the circumstances, particularly the locations, of the alleged abuses.

[61] These issues arose when considering the evidence of the parents that the abuses alleged to have taken place in the children's bedroom prior to the completion of the renovations of the home would be impossible given that the other two children would be present in that room. This, combined with the parents' evidence that the mother was a light sleeper, and the dog was in the bed with the parents, and no one noticed anything occurring challenges the credibility of LS's statements.

[62] Similar inconsistencies arose between the evidence of the parents and LS wherein her mother and father testified that, even after the home expansion was completed, the home was quite small and compact. The bathroom, where repeated alleged sexual abuse took place was right off the kitchen and movie room area and in a high traffic location. As a result, this raises the question of whether it is likely that these abuses that took place as frequently or in the same way as described by LS.

[63] Further, even after the renovations were complete and LS's bedroom was at the opposite end of the upper floor, this is a quite small house with an approximate 500 square-foot upper level. The mother and father say it is improbable that the father would be able to repeatedly leave their bedroom without waking the mother, a light sleeper, and without disturbing the dog who might awaken her as well, walk to LS's bedroom and abuse her virtually every night and return to their bed unnoticed.

[64] Specifically, I have carefully considered " [i]s the testimony in harmony

with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions." (*Supra*) This concern is reflected in the questions arising from the parents' evidence about the location, frequency, and circumstance of the repeated alleged abuses over a long period of time in a small home occupied by this family.

[65] In assessing all the evidence, I must also consider that of the parents. The father gave evidence by affidavit and viva voce and when questioned about his relationship with the mother and his feelings towards LS since the allegations were made, he seemed uncertain and somewhat evasive. The Minister suggests this is evasion and avoidance in dealing with the real issue of sexual abuse.

[66] Similarly, the father denied at one point of the proceeding having any issues with the children. He later alleged LS was viewing pornographic videos on her phone, had been lying and when she was much younger, had been to a behavioural specialist. It was the father's evidence that he believed the question was generally about the children and when it became more specific, he was able to identify the concerns with LS.

[67] There is also no doubt that the father has a motive to deceive and a direct interest in the proceeding. A finding against him on this ground would ensure that the father is placed on the Child Abuse Register and the Sex Abuse Register, likely affecting employment and volunteer opportunities, and other aspects of his life. It may also end his relationship with the mother and the children.

[68] On the other hand, the evidence he gave with respect to the layout of the home, the circumstances of renovation, the timeline of same, the location of the children when asleep, his and his wife's sleeping habits and the presence of the dog in their bedroom were all unchallenged.

[69] When assessing the evidence of the mother, I will first say that the Minister has never alleged that she was aware of any of the sexual abuse. I find that generally her evidence was given in a straightforward and forthright manner. It was internally and externally consistent with the evidence before the court in other respects as well.

[70] She, like the father, expressed concerns about the relationship between LS and C. She said that relationship ended shortly after the disclosures were made.

[71] In her evidence the mother was clear that she did not really know why LS

would make up sexual abuse claims against the father but did believe it had to do with her relationship with C and the denial of permission to spend time with her.

[72] It is alleged that the mother's failure to believe LS's allegations is evidence that she is not credible or trustworthy as a witness in the matter. Moreover, as would be discussed below, the minister alleges this is evidence of emotional abuse or risk of same, respecting LS and the other children.

[73] I do not agree. In my view it is not necessary for a parent to accept every statement made by a child in a circumstance such as this. The mother does not know what has happened between the father and the child as a matter of fact. It would be surprising if she was not conflicted.

[74] On the other hand, after the initial period of shock and interaction with the Agency, she did support LS attending therapy and as will be discussed below, the therapist has informed the mother that she believes she was supportive of LS. The mother says she has since apologized to LS for not being supportive.

[75] When assessing the credibility of the parents' evidence, given that they deny any allegations of sexual abuse, they are clearly inconsistent with LS. That said, I find few, if any, internal inconsistencies or inconsistencies between their evidence or the documentary evidence available to me.

[76] Both parents have an interest in the outcome of the proceeding. As noted before, respecting the father, each has a motive to deceive given the impact any finding would have on their family.

[77] I am satisfied that they both could observe the factual matters about which each testified and had good power of recollection respecting events, the circumstances of their living arrangements, the interactions they have with LS, both before and after the allegations were made.

[78] In considering all the evidence and the reliability and credibility of the evidence of LS and her parents, I am mindful that these are very serious allegations made by a young child. The court must be very careful to avoid the temptation to favour any finding under the Act based on sympathy for a child or on an emotional reaction to any allegations made. The court must be very deliberate and cautious in ensuring that the correct law is applied to the appropriate facts in any circumstance.

[79] All findings of the court must be based on evidence and the law. In this circumstance, I am also mindful of the comments of Justice Forgeron in *Baker-Warren v. Denault*, 2009 NSSC 59 at paragraph 18 where she notes the relevant test set out by the Supreme Court of Canada:

“ ... that "credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events.” ... "I further note that "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.”

[80] In assessing all the evidence and considering the Act and the guidance in the jurisprudence respecting assessment of reliability and credibility, I find that the Minister has failed to prove on a balance of probabilities that LS was sexually abused by her father. I find the Minister has failed to meet that standard of proof based on the improbabilities that the type, circumstances and frequency of abuse alleged within the home of this family went completely unnoticed by the mother or the other children for a very long period.

[81] LS's evidence through the joint interview is that this abuse began and continued for approximately two years. It was almost every day and occurred in her bedroom, the media room on the main floor, in the one bathroom in the home and once in her parents' bed.

[82] Given the evidence, which I accept, respecting the tight confines of that home both before and after renovation, I find that the allegations of abuse are improbable. Specifically, before the renovations were complete, the uncontroverted evidence is that the three girls shared a bedroom, and it would be extremely unlikely that the abuse could have occurred in the manner and with the frequency alleged by LS in that bedroom while her two sisters were present at night.

[83] I also find it improbable that such abuse would have continued after the renovations were complete with the father exiting the bed he occupied with the mother and the dog without waking either and abuse LS regularly in her bedroom a short distance away.

[84] Similarly, given the location of the bathroom immediately adjacent to the living area and kitchen, I find it improbable that the father would repeatedly enter that bathroom while LS was in the shower, open the shower curtain and direct her

to wash her breasts as alleged, without it being observed or noted by the mother in that home. I found the mother to be credible that she has no knowledge of any sexual impropriety by the father, and I accept that she would have stepped in should any concern had arisen. None were apparent to her in those circumstances.

[85] As to LS's motive in making up these allegations, I have assessed the parent's evidence, particularly the viva voce evidence in this matter and I find credible that LS may have been prompted to make these allegations by her friend C, who had a negative influence over her. Once the allegations were made, LS did not change her point of view, but I do find there is sufficient evidence to support a motive for LS to fabricate these allegations, particularly in light of the highly improbable circumstances in which the alleged abuse took place in the home.

[86] I therefore find that the Minister has failed to prove the ground of sexual abuse on a balance of probabilities.

Risk of Sexual Abuse

[87] The second ground alleged by the Minister is that the children are at substantial risk of sexual abuse pursuant to s.22(2)(d) of the Act as follows:

22 (1) In this Section, "substantial risk" means a real chance of danger that is apparent on the evidence.

(2) A child is in need of protective services where

(d) there is a substantial risk that the child will be sexually abused as described in clause (c);

[88] In considering this ground, I will be brief. Given that I found that the Minister has failed to prove on a balance of probabilities that LS was sexually abused by her father, I further find there is no substantial risk that she or the other children will be sexually abused.

[89] In making that finding, I consider the definition of "substantial risk" which means "a real chance of danger that is apparent on the evidence." In this matter, I find there is no real chance of danger that is apparent on the evidence respecting sexual abuse of the children. I find therefore that the Minister has failed to prove this ground on the balance of probabilities as well.

Emotional Abuse

[90] The third ground alleged by the Minister is that LS has suffered emotional abuse pursuant to s.22(2)(f) of the Act as follows:

(2) A child is in need of protective services where

(f) the child has suffered emotional abuse, inflicted by a parent or guardian of the child or caused by the failure of a parent or guardian to supervise and protect the child adequately;

[91] The Minister says that the mother has inflicted the emotional abuse upon LS as a result of her failure to protect LS adequately in dealing with the aftermath of these allegations. The Minister alleges that, because the mother does not believe the allegations made by LS, this alone may constitute emotional abuse. At the very least she is not committed to or is incapable of providing the appropriate support to LS as she proceeded through this difficult experience.

[92] I agree with the Minister that there is no dispute that LS informed her mother that she had been sexually abused by her father, and that the mother would be well aware of the details of the allegations as a result of the disclosure of the joint interview of LS conducted on August 18, 2021.

[93] I agree that regardless of whether the court accepted LS's evidence for the truth of its contents, which I did not, that does not change the fact that LS is a child who reported sexual abuse by her father. The Minister's position in this circumstance is that the mother did not provide appropriate support to her daughter by both believing her statements and engaging in appropriate supports for her daughter.

[94] I accept the evidence before me that, for some time after the allegations were made, the mother struggled with what to do. She did not want to disbelieve her daughter. Yet, based on her own observations and experience, she struggled with whether these allegations could be true or not. She was likewise concerned that LS may have been led to make these allegations because of influence by her friend C, and the denial of a trip with C as described earlier in the evidence. The mother admitted that she did not provide proper support for LS immediately after the joint interview.

[95] The mother did give evidence that she supported her daughter and ultimately

apologized to her for the mother's past behaviours and being unsupportive. She said she was there for LS, making sure she was okay. There is also clear evidence that the mother ensured that LS attended her therapy sessions with Rose Degenhardt.

[96] It is important to note that the question of whether a child has suffered emotional abuse must be seen within the context of the overall timeline of any matter. I accept, for example, that the mother was not emotionally supportive of the child and did not express her belief that the child required therapy and counselling until sometime after the involvement of the Minister.

[97] That said, if there is evidence that a parent has evolved their thinking over time and begins to substantially support the child and thereby protect the child adequately from any emotional abuse, the court must acknowledge that circumstance. The test is whether, at the time of the hearing, emotional abuse is proven.

[98] In her evidence, the mother described the approximate 18 months between the date of the allegations until the hearing of the matter as "unimaginable". This included a time that the father was charged criminally, and those charges being dismissed months later.

[99] Though not specifically argued by the Minister in submission, there is some suggestion that the fact that the father began residing again at the home after the criminal charges were dismissed is evidence that the mother was engaging in emotional abuse of LS. It is the evidence of the parents that they understood, perhaps incorrectly, that once the charges were dismissed, the father could indeed return home as there was no legal proceeding preventing them from doing so.

[100] The Minister claims that she was unaware the criminal charges were dismissed. Yet the evidence is that one of the social workers for the Agency was subpoenaed in the criminal trial and that subpoena would later have been released when the charges were dismissed. There is also evidence that a supervisor for the Agency was aware that the mother was speaking to the Crown on April 12, 2022, about the criminal proceeding.

[101] It was after the charges were dismissed and the father returned home that the Agency became more intrusive in the lives of the parties and again required the father not to reside in the home. Ultimately, this led to the two proceedings, the latter of which is before the court now.

[102] I accept the evidence of the parents respecting their understanding of the circumstances in place after the criminal charges were dismissed and their genuine belief that the father could return to the family home. I also find that the Minister knew, or ought to have known, that the criminal charges had been dismissed, in part because a worker was subpoenaed and would have been released from that subpoena, triggering some question as to why, and the fact that the Agency was aware of ongoing discussions between the mother and the Crown about these charges.

[103] I do not find that the mother permitting the father to return to the home after the dismissal of the criminal charges constitutes emotional abuse.

[104] On the more specific allegations of the Minister, it is alleged that because the mother does not believe the allegations made by the child against the father, she cannot protect the child adequately and this amounts to emotional abuse in and of itself. I disagree.

[105] First, I have already made the finding that the Minister has failed to prove on a balance of probabilities that the child was sexually abused by the father. This bears some consideration in determining whether failure to believe by the mother constitutes a form of emotional abuse.

[106] As well, on its face, I do not accept that it is a requirement that a parent accept each allegation made by a child to provide appropriate and adequate support and protection for the child and thereby avoid emotional abuse of the child. The mother has been clear in her affidavit and viva voce evidence on the two threads. First, she does not believe the allegations made by her daughter. Second, she supports her daughter in obtaining appropriate therapy, including ongoing therapy as recommended.

[107] In this circumstance, the mother admits that she was not supportive initially, but later apologized to LS for that lack of support. The evidence is clear that the mother ensured that LS attended for therapy with Rose Degenhardt as scheduled and did nothing to interfere with that therapy.

[108] Rose Degenhardt was retained to provide counselling and therapy to LS. In her direct viva voce evidence, she confirmed that the therapy ended because the funding provided terminated, and she had left her therapeutic practice. She said that she advised clients they could reach out to her and informed the mother of this.

[109] In cross-examination she confirmed that she last saw LS in October 2022, and last communicated with the mother on October 12, 2022.

[110] She also confirmed an email she had sent to the mother in early October 2022, wherein she informed the mother that she had cancelled LS's appointment for next week and told the mother. "She is doing fine, and we finished our work. Please know if you need anything I'm always here."

[111] In cross-examination, she explained it was not up to the therapist to require further therapy and that all options were given to the mother. She had not made any referrals or otherwise directed the mother on what to do next. This is itself consistent with the email in which she indicates that LS is doing fine and that they had finished their work.

[112] During that therapeutic relationship, LS made various disclosures to Ms. Degenhardt, which took place over a period from March 17, 2022, to September 21, 2022. Those allegations include the following:

- Her mother cries a lot and that LS felt that she had done something wrong.
- The father took down all of the pictures of her on Facebook.
- She was asked by her mother if she thought she was a mean mother.
- She was worried about the family's financial situation and whether they could keep the home.
- She told the mother's friend that no one believes her disclosures, including her mother.
- Between May 6 and May 13, 2022, she disclosed the father was returning home and had moved home. This was during the time that the criminal charges were dismissed and before this proceeding was commenced.
- LS stated her mother and father blamed her friend for her disclosures but that she said what she needed to say.
- She did not want her parents to forget what it happened, and she wanted her

- mother to believe her and for the father to tell the truth.
- The family went to PEI in June 2022, and she was left alone with the father when the mother went for food.
 - Her mother was speaking to her in August 2022 about how she is upset that the father is not in the home, and how hard it is not having him around.
 - On the same day, LS said her mother blamed her for the father not being in the home.
 - In September she said her mother was crying a lot and feels bad for the father. A week later she disclosed that the mother was continuing to cry a lot, was not sleeping well and is spending an hour crying in the closet while sometimes not letting LS hug her.

[113] In correspondence from Ms. Degenhardt to the mother, provided at the end of the therapy for LS, Ms. Degenhardt does indicate that;

In October 2022, LS's funding came to an end, and I was moving into my new office. At that time, LS communicated a feeling that she was ready to end sessions and she was willing to rebuild a relationship with her father.... She was, not experiencing any suicidal thinking or reporting any depressive episodes. I explained to LS that her social worker will assist her with rebuilding the relationship when the Agency feels it is safe for her to have visits with her dad. Moreover, I extended an invitation to both LS and DS to continue therapy with myself at my new location.... Additionally, I would like to add that although LS does have lots of work ahead of her to heal from this dramatic event at the time of closing, she did present a much better mental health than when first beginning therapy.

Thus, I am recommending that LS or DS must seek out individual therapy when she feels she needs to return to therapy or becomes emotionally dysregulated.

[114] In direct evidence, Ms. Degenhardt testified she trusted the mother to seek out therapy for LS if and when needed.

[115] At the first hearing on November 22, 2022, the mother gave viva voce evidence that she was really struggling and at the beginning it was hard on their relationship. She acknowledged that LS didn't feel supported. The mother had a deep conversation with Ms. Degenhardt and the mother was told that for quite some time LS didn't feel supported, but by the end of the therapeutic process she

was feeling much more supported. It was then that the mother laid in bed with LS that night and apologized for not making her feel supported in the past.

[116] Interestingly, at this hearing, Ms. Degenhardt testified when asked if at the end of her sessions with LS that the child had told her that she was feeling much more supported by her mother, Ms. Degenhardt responded firmly, "no". At that point, the mother was emotionally distressed and left the courtroom briefly, returning when she calmed.

[117] It was then that counsel for the mother began impeachment of that evidence. It was disclosed that the conversation between the mother and Ms. Degenhardt of November 19, 2022, had been recorded and transcribed by a certified court transcriber. Copies of the full transcript were shared with counsel.

[118] During the questioning respecting that conversation reflected in the transcript, Ms. Degenhardt adopted some of her statements from the phone call. She agreed that she had told the mother that on LS's closing sessions, LS spoke about how supportive the mother had been, and that LS didn't need Ms. Degenhardt to help her build a bond with the mother because LS had always communicated how much she loves her mother. Ms. Degenhardt adopted the statement from the phone call that Ms. Degenhardt felt that at the end of the sessions, LS was in a good place and ready to be finished with counselling. She went on to say that she felt that if LS were suicidal or anything else occurred, the mother would have reached out and called her.

[119] While Ms. Degenhardt did not adopt some of the statements, they were placed in the evidence, and I find them to be an accurate reflection of that telephone call. In those statements, Ms. Degenhardt confirmed she would write that she was comfortable ending the sessions at that time, that she didn't think the mother was a bad parent, and that if she didn't think so, she would tell her. She went on to say that if she did think that the mother was a bad parent, the matter would not be closed, and she would make sure that LS continued in therapy.

[120] Similarly, social worker Dami Adewoyin was asked in cross-examination, whether Ms. Degenhardt had told her that LS was reporting that she was feeling more supported by her mother towards the end of their sessions during the phone call between them. On November 22, 2022, the worker denied recollection of the conversation. She was then shown risk management conference minutes of the same date and acknowledged that in fact she had been told this by Ms. Degenhardt.

[121] This review of the evidence is sufficient for me to conclude that, by the time of the hearing of this matter, the mother was acting in a supportive and protected manner with respect to LS. She had ensured that LS completed her therapeutic process with Ms. Degenhardt who confirmed that LS did not require further therapy at that time. The mother had engaged in her own therapeutic process as well.

[122] LS herself was reporting to Ms. Degenhardt that she was doing well as confirmed in the evidence.

[123] Based on this review of the evidence, I find that the Minister has failed to prove on the balance of probabilities that, at the time of this hearing, LS was suffering emotional abuse inflicted by a parent or caused by the failure of the parent to supervise and protect the child adequately. While the mother did not act in a fully supportive manner and her behaviour might be interpreted as emotionally abusive at the beginning of this process, by the time the hearing took place, I find the evidence is clear that she had undertaken all the required steps and acted as a reasonable and protective parent to ensure that LS was not suffering emotional abuse.

[124] As well, for clarity, I find that the other two children did not suffer any emotional abuse. There is no evidence before me that the mother or the father cause them emotional abuse in any fashion.

[125] I therefore find that the Minister has failed to prove this ground on a balance of probabilities.

Substantial Risk of Emotional Abuse

[126] The fourth ground alleged by the Minister is that all three children are at substantial risk of emotional abuse pursuant to s.22(2)(g) of the Act as follows:

(2) A child is in need of protective services where

(g) there is substantial risk that the child will suffer emotional abuse and the parent or guardian does not provide, refuses or is unavailable or unable to consent to, or fails to co-operate with the provision of, services or treatment to remedy or alleviate the abuse;

[127] On this ground I will be brief. I have previously found that the Minister failed to prove on a balance of probabilities that the children were suffering

emotional abuse at the time of the hearing. My findings were clear that the mother was taking appropriate steps to address the emotional needs of LS and had mitigated fully any emotional abuse that may have existed prior to the hearing. I similarly found that the other two children were never exposed to emotional abuse.

[128] Given the history of the mother's care of the children, I see no basis on which to make a finding that there is a substantial risk of emotional abuse in this circumstance.

Other Grounds

[129] I have considered whether there are other grounds for a protection finding not pled by the Minister and I find none.

Conclusion.

[130] The Minister's application is therefore dismissed.

Timothy G. Daley, JFC