IN THE SUPREME COURT OF NOVA SCOTIA

Citation: *Minister of Community Services v. F.*, 2004 NSSF 079

Date: 20040902
Docket: SFHCFSA 23490
Registry: Halifax

Between:

Minister of Community Services

Applicant

v.

J.F.

Respondent

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on August 7, 2008.

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 a 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."

Judge: The Honourable Justice Deborah K. Smith

Heard: July 20, 21, 22, and 26, 2004, in Halifax, Nova Scotia

Counsel: John S. Underhill, Esq. for the Minister of Community Services
D. Brian Newton, Q.C. for the Respondent

By the Court:

[1] This case involves an Application by the Minister of Community Services (hereinafter referred to as "the Minister") for permanent care and custody of M.D.M. who was born [in 2003]. The Respondent to the Application is twenty-eight year old J.F. who is M.D.M.'s mother.

BACKGROUND TO THE PROCEEDING

[2] According to the evidence filed by the Minister, J.F. first came to the attention of the Applicant in September of 2001 in relation to J.F.'s first child, C.J.F., who was born [in 1997]. The particulars of the original referral to the Minister are contained in the Affidavit of Tracey Louvelle sworn to on January 29, 2002 and include the suggestion that C.J.F. had recently ingested Javex and required medical attention. The matter was investigated and the decision was made to terminate the investigation at intake.

[3] J.F. and C.J.F. were again brought to the attention of the Minister a short time later in January of 2002. At that time, the Minister received referral information which raised concerns about C.J.F.'s living arrangements and care. On January 24, 2002, agents of the Minister

received a Child Welfare Referral Form from the Halifax Regional Police. Information contained in this form suggested that J.F. and C.J.F. may have been living out of a car at [Street Name Changed] and were currently in an apartment with no electrical power. The information contained in this form also indicated that the apartment that C.J.F. was staying in was "in complete disarray", there were "deplorable living conditions" and C.J.F. was hungry.

[4] That same day (January 24, 2002) representatives of the Minister met with J.F.. During this meeting, J.F. advised that she had been evicted from her apartment at the end of October, 2001 and had been staying at a number of different addresses since that time. J.F. further advised that she, C.J.F. and her boyfriend (D.W.) were living in an apartment leased to another woman who had apparently left for Toronto the previous week and had left her key for J.F.. According to the notes of Tracey Louvelle (one of the individuals that met with J.F.), J.F. reported that the apartment that she was staying in was being used as a "drop in" for people who live in shelters. J.F. further advised that there had been no electrical power in the apartment for the previous two weeks, nor was there any food in the apartment. Ms. Louvelle observed the apartment to be "filthy with garbage, clothes, dirt, empty bottles all over the kitchen".

[5] During that visit, Ms. Louvelle spoke privately with C.J.F. who was then four years old. According to Ms. Louvelle's Affidavit filed with the Court, when she asked C.J.F. where he was sleeping he replied, "on the floor in the garbage". When asked to show Ms. Louvelle his bed, he took her out into the

hall and pointed out a bed on the floor. According to Ms. Louvelle's Affidavit, the bed appeared to consist of some clothes lying on the floor with a pillow at one end.

[6] During the course of this meeting, J.F. advised that she and her boyfriend were planning to move in the near future with C.J.F. to [name of place changed], Newfoundland although their plans in this regard seemed uncertain. When asked if she or D.W. had any money to make the trip to Newfoundland, J.F. advised that they had received a cheque from Welfare to cover their moving costs, but the cheque had been lost or stolen. According to the Worker's Affidavit, J.F. advised that she was panhandling0 to make money for food as well as the trip to Newfoundland.

[7] During the course of J.F.'s January 24, 2002 conversation with Ms. Louvelle, J.F. advised that C.J.F. had eaten two sandwiches earlier that day. According to Ms. Louvelle's notes, C.J.F. advised that he had eaten a ketchup sandwich with some onions on it that day - but nothing else.

[8] The decision was made to take C.J.F. into care. J.F. was asked to pack a bag for C.J.F. with his belongings. According to Ms. Louvelle's Affidavit, J.F. advised that C.J.F. did not have any clothes at the apartment. J.F. did retrieve a stuffed animal from the floor and gave it to C.J.F. before he was taken into care.

[9] According to the Agency Plan dated January 2nd, 2004, the child protection concerns at that time related to J.F.'s transience and inability to adequately provide the basic necessities for C.J.F..

[10] C.J.F. was placed in a registered foster home and a Protection Application was filed with the Nova Scotia Supreme Court (Family Division). The Minister alleged that C.J.F. was in need of protection under sections 22(2) (b), (g), (j), (ja) and (k) of the *Children and Family Services Act*. The Respondents to that Application were J.F. and her estranged husband, T.F..

[11] The Application relating to C.J.F. first came before the Court on January 31, 2002. The Court found that there were reasonable and probable grounds to believe that C.J.F. was a child in need of protective services and issued an Order placing C.J.F. in the temporary care and custody of the Minister with J.F. being granted access to this child.

[12] On February 12, 2002, with the consent of both J.F. and T.F., the Court confirmed it's previous finding that there were reasonable and probable grounds to believe that C.J.F. was in need of protective services and further found that there was a substantial risk to the child's health or safety that could not be adequately protected by an Order pursuant to Sections 39(4)(a), (b) or (c) of the *Children and Family Services Act*. C.J.F. was ordered to remain in the care and custody of the Minister with access to J.F..

[13] On April 18, 2002, C.J.F. was found to be in need of protective services pursuant to Section 22 (2)(k) of the *Children and Family Services Act* the finding being made with the admission of both of the Respondents to that application pursuant to Section 40 (3) of the said *Act*. C.J.F. was ordered to remain in the care and custody of the Minister with access being granted to J.F..

[14] During the course of the application relating to C.J.F., J.F. was assessed by a number of professionals.

[15] David Cox, a psychologist, prepared a Psychological Assessment of J.F.. In his report dated June 10th, 2002 he indicated that some of J.F.'s statements about her history and circumstances were quite unusual and at times appeared improbable or in need of confirmation. He referred to J.F.'s belief that she had a "sixth sense" which she said allowed her to predict when something was going to go wrong. He reported that J.F. also believed that C.J.F. has a "sixth sense". He noted that J.F. mentioned an aunt who was said to be a "white witch" and said that she believes that as a child she lived in a haunted house and recalls demons around her bed.

[16] Despite the above, Mr. Cox indicated that when seen for assessment, J.F. did not display strong outward signs of psychopathology other than the content of some of her conversation and some apparent difficulty with concentration. Mr. Cox conducted a number of psychological tests on J.F. and concluded that the pattern of clinical findings suggested a number of

maladaptive personality traits and a "significant possibility" of a personality disorder. In Mr. Cox's report he concluded "There are increasing questions about her level of psychological stability, possible Psychiatric diagnoses, health issues, and her relationship with C.J.F.. In my opinion, these are serious questions which should be resolved before consideration is given to returning C.J.F. to J.F.'s care, or permitting unsupervised visits." Mr. Cox concluded by saying that a psychiatric consultation was essential to help resolve the various issues that had been raised by his report.

[17] J.F. was then assessed by Dr. John Curtis who is a psychiatrist. Dr. Curtis prepared a report dated September 18th, 2002. In this report, he concluded that J.F. did not have a formal psychotic disorder however, he stated that she operates mentally at a very immature level "almost believing like a child in many incidences". Dr. Curtis stated in his report:

> "I did not find J.F. [sic] to have any formal psychiatric diagnosis at this point in time. I do believe in the past that she has been depressed on a few occasions, though this has been untreated. I did not find her to have a psychotic disorder, which was of concern I think to others. Neither does she appear to have a significant disassociative disorder.
>
> What I did find was an individual who seems to have a lot of the evidence that one would expect to see from a background of trauma and neglect. There are problems of sleep, appetite, emotional disconnectedness, easily switching states, inability to soothe oneself, and

almost child-like belief about many things about the world.

It is my opinion that J.F. probably should be thought of as being developmentally delayed in an emotional sense, and that she has not really grown up emotionally. She seems to be unable to take the position for instance of her son, to assess danger towards him, and actually seems to impose on him her own peculiar belief systems. Part of this is being emotionally disconnected, and making judgements from somewhat individual distinct states of mind."

[18] Dr. Curtis questioned whether J.F. had the ability or desire to grow and change.

[19] In September of 2002, Mr. Martin Whitzman prepared a Parental Capacity Assessment relating to J.F.. Mr. Whitzman was qualified at the hearing as a therapist with an expertise in assessing parental capacity. The purpose of his assessment was to determine J.F.'s ability to provide and meet the needs of her son, C.J.F..

[20] In Mr. Whitzman's initial report dated September 30th, 2002 he reviewed J.F.'s history in detail. Mr. Whitzman suggested that the information provided by J.F. throughout the assessment had been "inconsistent and unreliable" but in any event revealed a family history which was "bizarre and controlling". Mr. Whitzman is of the view that this family history has certainly impacted on J.F..

[21] At the time that Mr. Whitzman began his assessment, J.F. was living with D.W. and was presenting D.W. as part of her plan to regain custody of C.J.F.. Mr. Whitzman therefore involved D.W. in his initial Parental Capacity Assessment. On July 12, 2002, Mr. Whitzman observed an extended home visit between J.F., D.W. and C.J.F.. Mr. Whitzman noted that J.F. and D.W. were residing in an apartment that contained minimal furnishings (a broken table, sofa and a stereo). J.F. apparently explained that they had more furniture but it was stored at her step-father's home and that they had no means of transporting it to their apartment. A table was apparently delivered from the furniture bank during Mr. Whitzman's visit that day. Limited food supplies were observed in the apartment with J.F. or D.W. apparently indicating that they planned on attending the Food Bank in the near future. According to Mr. Whitzman's report, C.J.F. was in a very good mood and happy throughout the visit. Mr. Whitzman noted in his report "My observations revealed that J.F. and D.W. were capable of meeting his [C.J.F.'s] physical, emotional and educational needs throughout this visit". Nevertheless, Mr. Whitzman concluded in this report:

".....In many ways J.F. is still emotionally, behaviourally and cognitively behaving like a very young adolescent. It is as if the developmental maturity was stunted at a young age and has never been allowed to fully develop. This does create a significant problem as these issues are extremely difficult to treat and progress is often years in the making. As a result, C.J.F. would presently remain at risk if he were returned to his Mother's care, unless she was supervised on a constant basis. J.F. is clearly capable of providing the

necessary care on a short term basis, but appears to lack the psychological maturity to provide the long-term consistency that is required."

[22] C.J.F. was assessed by Maria MacKenzie-Cann who is a Child and Family Therapist. In Ms. MacKenzie-Cann's report dated July 22nd, 2002 she stated "C.J.F. is a very bright and naturally creative little boy who lacks self-confidence and obviously has a great need for addressing his personal security needs". Mr. Whitzman referred to this comment in his September 30th, 2002 report and stated at the final page of this report:

> "I am very concerned that this child will continue to experience the same degree of instability if returned to his Mother, at this time. The fact that J.F.'s visits remain supervised at the Agency after several months in care does not speak well for the degree of progress that has been accomplished.
>
> To conclude, I do not believe that J.F. has been able to reach the level of psychological maturity required to parent C.J.F.. As a result, I cannot recommend that this child be returned to his mother. I doubt very much that the necessary changes can be made in the time that remains."

[23] T.F. (C.J.F.' father) eventually made an application under the *Maintenance and Custody Act* for custody of C.J.F.. J.F. had previously advised a number of professionals (and the Court) that T.F. had been

extremely abusive (primarily to her). T.F. disputed these allegations. T.F., who had been living in Alberta, came to Nova Scotia and was reintroduced to C.J.F.. Eventually, a home study was prepared on T.F. and his present spouse, L.W.. Following receipt of that home study the Minister took the position that placing C.J.F. in the custody of T.F. would be the least intrusive arrangement that would be consistent with C.J.F.'s best interests. On July 30th, 2003 a Consent Order (signed by J.F.) was issued out of the Nova Scotia Supreme Court (Family Division) providing T.F. with custody of C.J.F. and awarding J.F. access to the said child. The *Children and Family Services Act* proceeding relating to C.J.F. was then terminated.

[24] In 2002 (after C.J.F. was taken into care), J.F. became pregnant with the child that is the subject of this proceeding. [In 2003] (approximately [...] months prior to J.F. giving up custody of C.J.F.) M.D.M. was born. M.D.M. was taken into care by the Minister upon birth.

[25] A Protection Application was filed with the Nova Scotia Supreme Court (Family Division) in relation to M.D.M. [in] 2003. In the documentation filed with the Court in support of this application, the Minister took the position that M.D.M. was in need of protective services pursuant to sections 22(2) (b), (e), (g), (ja) and (k) of the *Children and Family Services Act*.

[26] J.F. was the only Respondent named in this Application. D.W. is said to be M.D.M.'s father. D.W. was not named as a Respondent (the position having been taken by both the Minister and J.F. that D.W. does not satisfy the definition of "parent or guardian" as set out in Section 3(1)(r) of the *Children*

and Family Services Act). I am satisfied from the evidence that has been given, that D.W. is fully aware of this proceeding but has not taken any steps to be joined as a party.

[27] The Protection Application relating to M.D.M. first came before the Court on March 18th, 2003. At that time the Court found that there were reasonable and probable grounds to believe that M.D.M. was a child in need of protective services. The Court placed M.D.M. in the temporary care and custody of the Minister with supervised access being awarded to J.F.. The matter was then adjourned.

[28] On March 31st, 2003, with the consent of J.F., the Court confirmed its previous finding that there were reasonable and probable grounds to believe that M.D.M. was in need of protective services and also found that there were reasonable and probable grounds to believe that there was a substantial risk to the child's health or safety which could not be adequately addressed by means of an Order pursuant to s. 39 (4) (a), (b) or (c) of the *Children and Family Services Act*. M.D.M. was ordered to remain in the care and custody of the Minister with J.F. being granted supervised access. With the consent of both parties, the evidence from the previous proceeding relating to C.J.F. was admitted into evidence in this proceeding pursuant to section 96(1) of the *Children and Family Services Act*.

[29] On May 21st, 2003, with the consent of J.F., M.D.M. was found to be in need of protective services pursuant to section 22 (2) (k) of the *Children and Family Services Act*. This section indicates that a child is in need of protective services where:

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

[30] At the time of the Protection Hearing, J.F. admitted that M.D.M. was in need of protective services pursuant to s. 40(3) of the *Children and Family Services Act*. The Court reserved to the Minister the right to lead further evidence concerning the allegations under the other sections of section 22(2) of the said *Act* relied on by the Minister and reserved to J.F. the right to cross-examine on the affidavit evidence and all other documents on file. M.D.M. was ordered to remain in the care and custody of the Minister with supervised access to J.F..

[31] On July 30th, 2003 a Disposition Order was issued (again by consent) which directed that M.D.M. remain in the temporary care and custody of the Minister with supervised access to J.F..

[32] A number of services were provided to J.F. after both C.J.F. and M.D.M. were taken into care. Initially, J.F. was said to be "open and cooperative with services and consistent with regards to

follow through" (Exhibit # 1, Vol. 1, Tab 6, p.140). However, over time, difficulties were encountered in this regard.

[33] J.F. was offered individual therapy with a therapist by the name of Peggy Beaton. Therapeutic work with Ms. Beaton began on April 23rd, 2002 but terminated in February of 2003 due to J.F.'s lack of follow-through with this service.

[34] In addition, J.F. was provided with support from two Family Skills Workers (Marsha Hudson and Jody Hann). These individuals were to provide J.F. with information and support in areas such as stable housing, budgeting and parenting issues such as child care, safety, child development and appropriate discipline. J.F.'s work with a Family Skills Worker was suspended in November of 2003 as she had missed a number of scheduled sessions with Ms. Hann. In addition, in September of 2003, J.F.'s access visits with M.D.M. were suspended due to non-attendance.

[35] In the Spring of 2003, the Minister agreed to refer J.F. to another therapist by the name of Marilee Burwash-Brennan. On September 15th, 2003, J.F. advised Ms. Burwash-Brennan that she had decided to discontinue her fight for M.D.M. and was going to agree to him being placed for adoption. J.F. subsequently changed her mind and advised the Minister that she was prepared to participate with services and was committed to having M.D.M. returned to her care.

[36] A case conference was held on November 21st, 2003. A number of individuals attended that meeting including J.F. (and her counsel), the main worker on the file (Johneen Kelly) and her counsel, Mr. Whitzman, Ms. Burwash-Brennan and Jody Hann (one of the Family Skills Workers). During that meeting, J.F. confirmed her commitment to having M.D.M. returned to her care and agreed to contact another therapist by the name of Joyce Lyons to arrange for therapy. She also agreed to contact Ms. Kelly to arrange a meeting to sign an Access Agreement. The Minister agreed to make a decision regarding the resumption of a Family Skills Worker towards the end of December, 2003 pending J.F.'s follow-through with access and counselling. Finally, it was agreed that an updated Parental Capacity Assessment would be put on hold until it was determined whether J.F. would follow-through with services and access with M.D.M..

[37] On January 2nd, 2004 the Minister prepared a revised Agency Plan for M.D.M.'s care seeking permanent care and custody of M.D.M. pursuant to section 42(1) (f) of the *Children and Family Services Act.* The Minister proposed that M.D.M. be placed for adoption with no further access to his mother.

[38] Following the November 21st, 2003 meeting, J.F.'s attendance at her access visits with M.D.M. improved significantly. J.F. delayed in following up with Ms. Lyons in relation to counselling although

counselling did eventually begin with Ms. Lyons and was subsequently continued with a therapist by the name of Jack Landreville.

[39] In the Spring of 2004, the Minister agreed to once again provide J.F. with a Family Skills Worker. Family skills training recommenced in late March of 2004. J.F. has not missed any of her appointments with the Family Skills Worker since this service was put back in place in March of 2004.

[40] Martin Whitzman subsequently prepared an updated Parental Capacity Assessment. In his assessment dated July 9th,2004, Mr. Whitzman focussed on the changes that had occurred in J.F.'s life since the initial Parental Capacity Assessment was prepared. One of these changes was a relationship that J.F. now had with K.N.. J.F. and K.N. met in the spring of 2003 and began living together in the fall of 2003. (It is difficult to know the exact date that they began living together. At the time of the November 21, 2003 Case Conference, J.F. advised Ms. Kelly that K.N. had been residing with her since September of 2003. In K.N.'s affidavit sworn to on July 8, 2004 he indicates that he and J.F. have been living together since November 1, 2003.) J.F. has presented K.N. as part of her plan to parent M.D.M..

[41] At the conclusion of Mr. Whitzman's updated Parental Capacity Assessment he stated:

"J.F. continues to have weekly supervised access which has not progressed to the point of extended

contact. She has remained more stable regarding place of residence, but her rent is being paid directly by Assistance. She does not appear to have been involved in any problems in the community but is careful on what information is volunteered. In other words, J.F. has been on a short leash and has done better than during the period when the Agency initially became involved. What cannot be answered is how J.F. would respond on the long-term once the leash has been extended and the daily stresses have increased. The relationship with K.N. does appear to have some positive qualities but the same could have been said about D.W.. I still have absolutely no idea how J.F. would cope if on her own, with or without a child. I do concur with Mr. Landreville, and believe that J.F.'s problems have been long term personality issues which will require significant time and effort to resolve. There are many areas which J.F. finds emotionally difficult to discuss and has been successful at avoiding both in life and in therapy. There areas will continue to impact on her both individually as well as a Mother, especially during times of stress. I do believe that J.F.'s reluctance to send gifts or communicate directly with C.J.F., exemplifies her difficulty in dealing with painful situations. I am pleased that J.F. is finally more committed to the therapy process but there is a long way to go before she can adequately parent a child. I am still not convinced that she can adequately care for herself! Her lack of follow through with Dr. Knight clearly reinforces my belief.

J.F. states that the thyroid problems are impacting on her life and yet she fails to place her appointments at the highest priority. The difficulty remains that time has now passed with only minor

> therapeutic progress noted. As the professionals have already stated, it is difficult to know how long it will take for the level of psychological maturity to be obtained that will ensure that J.F. is in a position to provide the long-term care for a child. I can clearly state that I do not believe that J.F. is presently in a position to safely care for her son, nor do I believe that this can be accomplished in the time that is remaining. As a result, I would recommend that M.D.M. be made a permanent ward and placed for adoption as soon as possible. I do hope that J.F. continues to be committed to dealing with her issues and receive the necessary help that will free her up for future children."

[42] During the course of the hearing Mr. Whitzman acknowledged that J.F. had shown some improvement in recent months. However, he felt that the issues surrounding her level of maturity were only beginning to be dealt with and he questioned her ability to cope and properly care for M.D.M. when under stress.

[43] In Mr. Whitzman's updated Parental Capacity Assessment he referred to J.F. having thyroid problems. The evidence at the hearing indicates that in 1999 J.F. was diagnosed with an over-active thyroid. Expert evidence provided by Dr. Deborah Knight indicates that an over-active thyroid can cause sleep disturbance, fatigue and poor concentration. According to J.F.'s affidavit evidence, she believes that her thyroid condition negatively contributed towards her physical and mental well being. Dr. Knight has

recently adjusted J.F.'s medication and as a result, some improvement has recently been noted in J.F.'s thyroid condition.

[44] The Permanent Care Hearing relating to M.D.M. was held on July 20th, 21st, 22nd and 26th, 2004. The Court's decision was reserved.

STATUTORY CONSIDERATIONS

The following provisions of the *Children and Family Services Act* are applicable to this application:

> **Purpose**
> **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.
>
> **Paramount consideration**
>
> **(2)** In all proceedings and matters pursuant to this Act, the paramount consideration is the best interests of the child. 1990, c. 5, s. 2.
> ....
>
> **Best interests of 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 childs development of a positive relationship with a parent or guardian and a secure place as a member of a family;
> (b) the childs relationships with relatives;
>
> (c) the importance of continuity in the childs care and the possible effect on the child of the disruption of that continuity;

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

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

(f) the childs physical, mental and emotional level of development;

(g) the childs cultural, racial and linguistic heritage;

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

(i) the merits of a plan for the childs 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 childs 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.

.....

Disposition hearing

41 (1) Where the court finds the child is in need of protective services, the court shall, not later than ninety days after so finding, hold a disposition hearing and make a disposition order pursuant to Section 42.

.....

Duty of court upon making order

(5) Where the court makes a disposition order, the court shall give
(a) a statement of the plan for the childs care that the court is applying in its decision; and

(b) the reasons for its decision, including

(i) a statement of the evidence on which the court bases its decision, and

(ii) where the disposition order has the effect of removing or keeping the child from the care or custody of the parent or guardian, a statement of the reasons why the child cannot be adequately protected while in the care or custody of the parent or guardian. 1990, c. 5, s. 41.

Disposition order

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

(a) dismiss the matter;

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

(c) the child shall remain in or be placed in the care and custody of a person other than a parent or guardian, with the consent of that other person, subject to the supervision of the agency, for a specified period, in accordance with Section 43;

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

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

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

Restriction on removal of child

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

(a) have been attempted and have failed;

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

(c) would be inadequate to protect the child.

Placement considerations

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

Limitation on clause (1)(f)

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

.....

Total duration of disposition orders

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

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

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

.....

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.

.....

Matters to be considered

(4) Before making an order pursuant to subsection (5), the court shall consider

(a) whether the circumstances have changed since the previous disposition order was made;

(b) whether the plan for the childs care that the court applied in its decision is being carried out;

(c) what is the least intrusive alternative that is in the childs best interests; and

(d) whether the requirements of subsection (6) have been met.

Powers of court on review

(5) On the hearing of an application for review, the court may, in the childs best interests,

(a) vary or terminate the disposition order made pursuant to subsection (1) of Section 42, including any term or condition that is part of that order;

(b) order that the disposition order terminate on a specified future date; or

(c) make a further or another order pursuant to subsection (1) of Section 42, subject to the time limits specified in Section 43 for supervision orders and in Section 45 for orders for temporary care and custody.

Consequences of permanent care and custody order

47 (1) Where the court makes an order for permanent care and custody pursuant to clause (f) of subsection (1) of Section 42, the agency is the legal guardian of the child and as such has all the rights, powers and responsibilities of a parent or guardian for the childs care and custody.

Order for access

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

(a) permanent placement in a family setting has not been planned or is not possible and the persons access will not impair the childs future opportunities for such placement;

(b) the child is at least twelve years of age and wishes to maintain contact with that person;

(c) the child has been or will be placed with a person who does not wish to adopt the child; or

(d) some other special circumstance justifies making an order for access.

THE APPLICANT'S POSITION

[45] The Minister relies on the various expert's reports that have been tendered and submits that J.F. has medical, emotional and therapeutic issues which significantly impair her ability to safely care for a young child (see p. 10 of the Pre-Hearing Memorandum filed on behalf of the Minister). The Minister notes that M.D.M. has never been in his mother's primary care (having been apprehended at birth) and that J.F. has never progressed beyond supervised access visits with her son.

[46] In Ms. Kelly's affidavit sworn to on January 5th, 2004 she indicated that the Minister was not confident that J.F. would be able to address the outstanding child protection concerns within the time limits remaining under the *Children and Family Services Act* for the following reasons:

a) There has been a considerable lack of progress demonstrated since J.F. first became involved with the Agency in January, 2002;
b) The assessments which were conducted with J.F. did not support the return of her child to her care nor did they support the premise that J.F.'s issues will be resolved in a timely fashion through individual therapy;
c) J.F. has not consistently followed the Agency case plan despite numerous discussions stressing the importance of doing so, and, in M.D.M.'s case, the necessity of doing so without delay; and

that she has already once made the decision to "place" him for adoption and that, in the two month period her access was suspended, she did not ire [sic] his health or well-being." p. 14

[47] The Minister acknowledges that J.F. has made some recent improvements in her attendance with the Family Skills Worker and in her access visits but suggests that these recent improvements are "too little - too late".

[48] It is the Minister's position that "M.D.M. requires the long term security of parents who are mature, committed and fully able to meet his emotional, physical and developmental needs" (page 9 of the revised Agency Plan for M.D.M.'s care dated January 2nd, 2004) and that it would be in M.D.M.'s best interests that he be adopted with no access by J.F..

J.F'S POSITION

[49] J.F. acknowledges that in the past she lacked maturity and failed to put her son first. She further acknowledges exercising bad judgement and making "very big mistakes" which resulted in both of her children being taken into care. She also acknowledges that in the past she was not committed to working towards change and was inconsistent in her dealings with the Minister. However, she notes that she is now actively participating in counselling and has been regularly attending her appointments with the Family Skills Worker. She also refers to the fact that her access visits with M.D.M. are now consistent. She says that she has matured and feels that she will be able to properly care for M.D.M. if he is placed in her care. J.F. has asked the Court to give her a "second chance" and allow her to show that she is able to parent M.D.M..

ANALYSIS AND CONCLUSIONS

[50] The purpose of the *Children and Family Services Act* is to protect children from harm, promote the integrity of the family and assure the best interests of children (s. 2(1)). The *Act* acknowledges the importance of family (see for example s. 3(2)(a) and (b)) and requires the Court to consider the least intrusive option that is available in the circumstances (s. 42(2)). These provisions of the *Act*, however, must be read in conjunction with the paramount consideration of the Court when dealing with the *Act* -ensuring the best interests of children (s. 2(2)).

[51] The Supreme Court of Canada has made it clear that the determining factor in cases concerning children, including child protection cases, is the child's best interests. In **C.(G.C.) v New Brunswick (Minister of Health and Community Services) [G.C.C.],** [1988] 1 S.C.R. 1073 L'Heureux-Dubé J. stated at ¶ 11:

> .....Historically, the best interests of the child was read subject to the right of the natural parents to custody of their child. In that context, it was only when evidence of moral turpitude, abandonment or severe misconduct was proven that parents could see their rights terminated (Hepton v. Maat, [1957] S.C.R. 606; Re Baby Duffell: Martin v. Duffell, [1950] S.C.R. 737; In reAgar: McNeilly v. Agar, [1958] S.C.R. 52). In recent years, the legislature and the Courts have considered the welfare of the child as the predominant factor (see amongst others: Re

Moores and Feldstein (1973), 12 R.F.L. 273 (Ont. C.A.); Talsky v. Talsky, [1976] 2 S.C.R. 292). No longer is it necessary for the court to find abandonment or other severe misconduct on the part of the natural parents to terminate parental rights....."

[52] In **Catholic Children's Aid Society of Metropolitan Toronto v. C.M.,** [1994] 2 S.C.R. 165 the Supreme Court of Canada quoted the following from **King v. Low,** [1985] 1 S.C.R. 87 at p. 101**:**

....the dominant consideration to which all other considerations must remain subordinate must be the welfare of the child....The welfare of the child must be decided on a consideration of these and all other relevant factors, including the general psychological, spiritual and emotional welfare of the child. It must be the aim of the Court, when resolving disputes between rival claimants for the custody of a child, to choose the course which will best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult. Parental claims must not be lightly set aside, and they are entitled to serious consideration in reaching any conclusion. Where it is clear that the welfare of the child requires it, however, they must be set aside."

[53] In both the **Catholic Children's Aid Society of Metropolitan Toronto v. C.M.**, *supra*, and in **C.(G.C.) v. New Brunswick (Minister of Health and Community Services) [G.C.C.]**, *supra*, the Court confirmed that these principles apply to child protection proceedings.

[54] While the determining factor in decisions concerning children is their best interests it must be remembered that a child cannot be placed in permanent care unless the Court is satisfied that the child continues to be in need of protection. In **Catholic Children's Aid Society of Metropolitan Toronto v. C.M.**, *supra*, L'Heureux-Dube J. Stated at ¶37:

> "The examination that must be undertaken on a status review is a two-fold examination. The first one is concerned with whether the child continues to be in need of protection and, as a consequence, requires a court order for his or her protection. The second is a consideration of the best interests of the child, an important and, in the final analysis, a determining element of the decision as to the need of protection....."

[55] The burden rests upon the Minister to satisfy the Court that M.D.M. continues to be in need of protection and that an Order for Permanent Care would be in his best interests. A Permanent Care and Custody Order is the most intrusive remedy available under the *Act* and accordingly, the onus on the Minister is a heavy one.

[56] In the case of **Children's Aid Society of Halifax v. Lake** (1991), 45 N.S.R. (2d) 361 the Court of Appeal dealt with the burden of proof in a child protection proceeding. The Court held that the burden is the same as in Civil cases ie: by a preponderance of evidence or on the balance of probabilities.

[57] In **J.L. and R.L. v. Children's Aid Society of Halifax and Attorney General of Nova Scotia** (1985), 44 R.F.L. (2d) 437 (N.C.A.) Jones A. stated at pp. 449-450:

> "With reference to the burden of proof *Lake* case, this court held that the rule in Civil case applied. However, in coming to a conclusion on the evidence, a court must have regard to the gravity of the consequences of the finding. I quote from my judgement in *Lake* at p.377:
>
> > In the words of Cartwright, J., in *Hepton et al. v. Maat et al., supra,* 'very serious and important reasons' are required in order to disregard the parental rights. The gravity of the consequences of the finding must be viewed in that sense in proceedings under the *Act*.'

[58] As was recognized by the Supreme Court of Canada in the subsequent case of **C.(G.C.) v. New Brunswick (Minister of Health and Community Services) [G.C.C.]**, *supra*, (at ¶ 11) in recent years there has been a shift away from focussing on a parent's "right" to custody - towards the welfare of the child being the predominant consideration. Nevertheless, it is clear that in light of the serious

consequences of a Permanent Care Order "very serious and important reasons" are still required before such an Order will be granted.

APPLICATION TO THE FACTS OF THIS CASE

[59] The evidence that has been presented to the Court does not show an extensive history of child welfare concerns. In fact, the only evidence of either of J.F.'s children actually having been placed at risk is limited to the period 2001 and January of 2002 when C.J.F. was taken into care (both of the children were in the care of the Minister after this time). Having said that, it is clear that the circumstances that existed when C.J.F. was taken into care were serious and clearly placed C.J.F. at risk. C.J.F. was living in filth, was residing in an apartment with no electrical power in the winter and was hungry.

[60] J.F. herself has acknowledged that both C.J.F. and M.D.M. were children in need of protective services as defined by s.22(2)(k) of the *Children and Family Services Act*. The question that the Court has to answer is whether J.F. has changed to the extent that she is able to properly care for M.D.M.. In other words, have the circumstances that supported the finding that M.D.M. was in need of protective services changed so that M.D.M. is no longer in need of protection and can be returned to his mother's care.

[61] It appears from the evidence presented that J.F. has had a difficult upbringing and life. It is difficult to know exactly how her past experiences have affected her but a number of the professionals that have assessed J.F. consider her to be emotionally immature. Dr. Curtis opined that J.F. "probably should be thought of as being developmentally delayed in an emotional sense, and that she has not really grown up emotionally." Joyce Lyons (one of J.F.'s therapists) described her as "an adolescent with an idealistic plan quite removed from the reality facing her." In Martin Whitzman's report of September 30th, 2002 he stated ".....In many ways J.F. is still emotionally, behaviourally and cognitively behaving like a very young adolescent. It is as if the developmental maturity was stunted at a young age and has never been allowed to fully develop....." Mr. Whitzman went on to say that while J.F. is clearly capable of providing care to a child on a short term basis she appears to lack the "psychological maturity" necessary to provide the long-term care that a child requires.

[62] Mr. Jack Landreville is a clinical social worker (therapist) that recently started working with J.F.. Mr. Landreville's testimony indicates that the Respondent does not have any major mental` illnesses; however, she has many therapeutic issues including a number of "maladaptive personality traits". Mr. Landreville acknowledged that J.F. has been very forthcoming and truthful with him during their recent sessions but suggests that her therapy may be difficult due to the fact that she employs a number of defence mechanisms such as denial, intellectualization and minimization of her problems. Mr. Landreville suggest that J.F.'s therapy

will be long term in nature and highly dependent on her desire to change and her commitment to the therapeutic process.

[63] J.F. points out that since C.J.F. was taken into care her housing situation has stabilized considerably. She notes that she has lived in the same apartment since May of 2002 (acknowledging that Social Assistance pays her rent directly to her landlord).

[64] At the Hearing, J.F. acknowledged that until recently her commitment towards change was lacking and further acknowledged a lack of consistency in her access visits with M.D.M. and in taking advantage of the other services offered by the Minister such as counselling and the Family Skills Worker. However, in J.F.'s affidavit sworn to on July 8th, 2004 she states that her "home lifestyle has stabilized over the past several months" and that her emotional well being has stabilized as well. She further states that during the past few months she has made "real efforts" to improve as a person and as a mother in the hope that M.D.M. will be returned to her. She acknowledges that there are "emotional issues" that she has to deal with both now and in the future and says that she is prepared to continue counselling to deal with these issues.

[65] It is important to note that we are at the end of the time limits set out in section 45(1) of the *Children and Family Services Act*. It is clear from both the statute and the Court of Appeal decision in **Minister of Community Services v. B.F.**, [2003] N.S.J. No. 405 that at this stage

of the proceeding the Court has but two options - dismiss the proceeding or order that M.D.M. be placed in the Permanent Care and Custody of the Minister. The Court is not able to order that further services be provided to J.F. or M.D.M. and must recognize that at this stage any further services that J.F. may take advantage of will be used by her on a voluntary basis.

[66] J.F. notes that in recent months she has been actively participating in counselling and has been regularly attending her access visits with M.D.M. as well as her appointments with the Family Skills Worker. She suggests that this bodes well for her voluntary use of services in the future.

[67] The Minister submits that the Court should consider J.F.'s use services (or lack thereof) since she moved back to Nova Scotia with C.J.F. in 1999 and in particular, J.F.'s lack of consistent use of services since January of 2002 when C.J.F. was taken into care. The Minister suggests that J.F.'s track record in this regard does not bode well for her voluntary use of services in the future.

[68] I am satisfied that in recent months J.F. has made significant efforts to follow through and consistently exercise access with M.D.M. and use the services offered by the Minister. However, I must consider the global picture since C.J.F. and M.D.M. were taken into care and cannot limit my inquiry to only the last few months.

[69] I am satisfied that J.F. is psychologically immature and that on a balance of probabilities this has affected her ability to care for her children. J.F. has the basic skills necessary to parent

(this is evident from the notes of the individuals that supervised J.F.'s access with M.D.M.). The issue is whether she is mature enough to parent M.D.M. on a long-term basis including the inevitable periods in her life when she will undergo stress. J.F. herself notes that a number of stressful events had occurred in her life around the time that C.J.F. was found to be in such poor living conditions and was taken into care. The question is whether she has now developed to the point that she will be able to properly care for M.D.M. even in times of stress.

[70] The counselling that J.F. is presently participating in is at its initial stages and will require an ongoing commitment by J.F. if she is to gain from this process. While J.F.'s efforts over the past number of months are to be commended, I am not satisfied that she has yet reached the stage where she can provide M.D.M. with the type of long-term care that he requires.

[71] The opinions of the experts that J.F. has therapeutic issues which require long term treatment, that she has not yet reached the level of psychological maturity necessary to provide the long-term care for a child, her previous lack of commitment towards undergoing therapy and her inability (until the last number of months) to exercise access with M.D.M. on a committed basis all lead me to conclude that the circumstances that supported the initial finding that M.D.M. was in need of protective services have not changed to such an extent that it would be appropriate to return M.D.M. to his mother's care.

[72] While maintaining and promoting the integrity of the family is clearly one of the main objectives of the *Children and Family Services Act*, the Court's paramount concern must be M.D.M.'s best interests. After carefully considering the evidence presented as well as the factors set out in s.3(2) of the *Act*, I have concluded that M.D.M. continues to be in need of protection and that it is in his best interests to be placed in the Permanent Care and Custody of the Minister with a view to being placed for adoption.

[73] In arriving my decision I have also considered s.42(2) of the *Act*. I am satisfied that less intrusive alternatives, including services to promote the integrity of the family, have been attempted and have failed (in the sense that J.F.'s counselling is only in its initial stages and the benefits that had hoped to be achieved within the time frames set out in the *Children and Family Services Act* have not yet had an opportunity to accrue) and would be inadequate to protect M.D.M..

[74] In the case of **Nova Scotia (Minister of Community Services) v. L.L.P.**, [2003] N.S.J. No. 1 Bateman J.A. speaking for the Court of Appeal stated at ¶ 25:

> The goal of "services" is not to address the parents deficiencies in isolation, but to serve the children's needs by equipping the parents to fulfill their role in order that the family remain intact. Any service-based measure intended to preserve or reunite the family unit, must be one which can effect acceptable change within the limited time permitted by the Act. *If a stable and safe level of parental functioning has not been achieved by the time of final disposition, before returning the children to the parents, the court should generally be satisfied that the parents will voluntarrily [sic] continue with such services or other arrangements as are necessary for the continued protection of the children, beyond the end of the proceeding.* Ultimately, parents must assume responsibility for parenting their children. The Act does not contemplate that the Agency shore up the family

indefinitely. [Emphasis added]

[75] In light of J.F.'s reluctance to use services in the past (particularly counselling), I have serious concerns as to whether she will voluntarily continue to use services in the future.

[76] In relation to s.42(3) of the *Children and Family Services Act*, I refer to the Court of Appeal decision in **Children's Aid Society of Halifax v. T.B.**, [2001] N.S.J. No. 225 and note that the maximum time lines set out in s.45(1) of the said *Act* have been reached and accordingly, temporary placement with a relative, neighbour or other extended family member is no longer available.

[77] In relation to s.42(4) of the *Act*, I again note that the maximum time lines under the *Act* have been reached. As indicated previously, I am not satisfied that J.F.'s circumstances have changed to the extent that it would be in M.D.M.'s best interests to be returned to her care.

[78] Finally, I have considered the provisions of s.47(2) of the *Act* and conclude that access by the Respondent should not be ordered in the circumstances of this case. I therefore grant the application for a Permanent Care and Custody Order with no order for access.

Smith, J.