

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Nova Scotia (Community Services) v. M.T.*, 2021 NSSC 338

Date: 20211207

Docket: 116599

Registry: Sydney, NS

Between:

The Minister of Community Services of Nova Scotia

Applicant

v.

M.T and C.G

Respondents

LIBRARY HEADING

Restriction on Publication

Judge:	The Honourable Justice Pamela Marche
Heard:	October 8, 12, 13, 2021 in Sydney, Nova Scotia
Submissions:	November 12, 2021 – Nicholas Burke, Counsel for Respondent. M.T November 17, 2021 – Adam Neal, Counsel for Applicant, Minister of Community Services November 17, 2021 – Lisa Fraser-Hill, Counsel for the Litigation Guardian
Written Decision:	December 7, 2021
Subject:	Child Protection; Permanent Care
Summary:	The Minister sought permanent care of two children: NT who is now 12 and CT who is now 16, due to protection concerns related to MT’s substance abuse, including inadequate parenting skills, violence, and housing instability. The evidence from two prior child protection proceedings was

	<p>considered. The Minister asked the Court to draw a negative inference in terms of MT's substance abuse due to MT's failure to participate in addictions counselling and her failure to engage with child protection workers.</p> <p>MT argued that she had fully addressed any protection concerns as evidenced, primarily, by her ongoing participation in an opiate recovery program.</p> <p>The Litigation Guardian conveyed the views and wishes of CT to be returned to the care of his mother and NT to remain in the care of the Minister. The Litigation Guardian supported the views and wishes expressed by the children as being in their best interests.</p>
Issues:	<p>(1) Does child NT remain in need of protective services and if so, it is in their best interests that a permanent care and custody order issue?</p> <p>(2) Does child CT remain in need of protective services and if so, it is in their best interests that a permanent care and custody order issue?</p>
Result:	<p>The Court found that both children had significant anxiety related issues that had been negatively compounded by the inability of the adults in their lives to adequately protect them from harm over the course of many years. MT's admitted relapse was, therefore, particularly traumatic for the children.</p> <p>The Court found MT had not fully addressed her substance abuse issues. This created a substantial risk of emotional and physical harm for NT, given NT's unique circumstances. The Court weighed the best interests factors relevant to NT's situation and ordered that NT be placed in the permanent care and custody of the Minister.</p> <p>The Court found that the risk of harm to CT was not substantial, given CT's unique circumstances. The Court</p>

	weighed the best interests factors relevant to CT's position and ordered that CT be returned to the care of MT.
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SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Nova Scotia (Community Services) v. M.T.*, 2021 NSSC 338

Date: 20211210

Docket: 116599

Registry: Sydney, NS

Between:

The Minister of Community Services of Nova Scotia

Applicant

v.

M.T and C.G

Respondents

Restriction on Publication: s. 94(1) of the <i>Children and Family Services Act</i>
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Judge:	The Honourable Justice Pamela Marche
Heard:	October 8, 12, 13, 2021 in Sydney, Nova Scotia
Submissions:	November 12, 2021 – Nicholas Burke, Counsel for Respondent. M.T November 17, 2021 – Adam Neal, Counsel for Applicant, Minister of Community Services November 17, 2021 – Lisa Fraser-Hill, Counsel for the Litigation Guardian
Written Decision:	December 7, 2021

Restriction on publication: Pursuant to s. 94(1) *Children and Family Services Act*, S.N.S. 1990, c. 5.

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

By the Court:

[1] The Minister is seeking a permanent care and custody order in relation to CT, who recently turned 16, and NT, who recently turned 12. MT is the mother of both children. CG is the father of NT. CT does not have a father figure that meets the definition of parent or guardian under the *Children and Family Services Act*, 1990, c. 5, s. 1 (the *Act*).

[2] The Minister claims the children remain in need of protective services because MT continues to struggle with substance abuse, violence, and inadequate parenting skills. The Minister cites extensive historical involvement with MT in relation to these same issues as relevant to the Court's consideration of the current protection concerns. The Minister puts forth a plan for permanent care with foster placements for both children.

[3] The mother, MT, argues that any risk of harm to the children has been sufficiently reduced and she seeks to have both CT and NT returned to her primary care.

[4] NT's father, CG, did not participate in the permanent care hearing and did not put forward a position.

[5] Both CT and NT were represented by a Litigation Guardian, Mr. David Brown. Mr. Brown was supportive of CT's wish to be returned to the care of his mother and of NT's wish to remain in the care of the Minister.

Issues

1. Does NT remain in need of protective services? If so, is it in NT's best interests that a Permanent Care and Custody Order be issued?
2. Does CT remain in need of protective services? If so, is it in CT's best interests that a Permanent Care and Custody Order be issued?

Background and Procedural Facts

Past Involvement

First Child Protection Proceeding - December 2014 to May 2016

[6] The first child protection proceeding in relation to this family started in December 2014 and terminated in May 2016.

[7] Protection concerns at that time related primarily to MT's substance abuse. MT had admitted to a serious drug addiction and her efforts to address that issue were slow to start. The Minister was also concerned about MT's involvement with a partner who was violent and involved with criminal activity, including drugs. Police seized a gun and ammunition belonging to MT's partner from MT's home.

[8] CT and NT were first placed by MT in the care of SM as part of a safety plan. SM is the paternal grandmother of CT. SM soon fell ill, however, and could no longer care for the children.

[9] The children were then placed in the care of MT's grandparents. This placement was terminated, however, when it was discovered that MT's grandparents were allowing MT unsupervised access to the children, contrary to court order.

[10] CT and NT were then taken into the care of the Minister and placed into foster care. CT was eventually returned to the care of his paternal grandmother, SM. NT, however, remained in foster care while her placement was the subject of dispute between the parties.

[11] In May 2015, SM put forth a plan for NT to be placed in her care. NT's father, CG, disagreed with SM's position and argued that NT should be placed in his care. NT spent the summer of 2015 with her father in Alberta, as part of an extended access arrangement. In September 2015, after a contested disposition hearing, it was ordered that NT be placed in the care of SM.

[12] By December 2015, the Minister was satisfied that MT had been maintaining her sobriety and was engaging in services and programs sufficient to support a discretionary access clause in MT's favour.

[13] Although MT appeared to be making progress in addressing identified protection concerns, other troubling issues were nascent. At the February 2016 disposition review it was clear that there was a significant amount of discord brewing between SM, MT and CG. Concerns were emerging that the children were being exposed to the adult conflict.

[14] At the April 2016 disposition review, however, the Minister reported that MT had demonstrated sobriety for a period of time sufficient to support unsupervised parenting time between MT and her children.

[15] In May 2016 the Minister terminated upon an Order being issued under the *Parenting and Support Act, 2015, c. 44, s. 2*, placing CT and NT in the day to day care of SM. The Minister took no position on the issue of parenting time for the children with MT or CG. SM, MT and CG could not agree on parenting time, and they continued to litigate their escalating disputes under the *Parenting and Support Act*.

Private Litigation - May 2016 to August 2017

[16] Unfortunately, the conclusion of the child protection proceeding did not herald a time of safety and security for the children.

[17] From May 2016 to August 2017, conflict between CG, MT and SM over parenting arrangements careened and resulted in multiple court appearances, protection referrals and police involvement. This was a time of continued chaos for the children.

[18] By June 2017 the Minister was becoming increasingly concerned that the children were at risk of emotional harm while in the care of SM. Consequently, the Minister returned both CT and NT to the primary care of MT. The Minister commenced a second child protection proceeding in August 2017.

August 2017 to October 2018 – Second Child Protection Proceeding

[19] At the interim hearing stage, the Minister obtained orders that both CT and NT would remain in the supervised care of MT. By that time, the relationship between SM and all other parties, including the Minister, had become highly acrimonious. The children had been exposed to a great deal of the bedlam as a result of the conflict between the parties.

[20] By the protection docket appearance of October 2017, CG had moved out of province and SM had withdrawn completely from the child protection proceeding. The children remained in the supervised care of MT with CG having supervised parenting time with NT. Several disposition orders were issued throughout much of 2018 to reflect this arrangement.

[21] In May 2018 the Minister reported concerns that MT was presenting with symptoms indicative of impairment and it was noted that MT was missing multiple appointments with service providers for both herself and the children (school, probation, mental health etc.). MT denied abusing drugs and attributed her

presentation to dosage issues with her methadone. MT could not provide a reason for the missed appointments.

[22] A theme emerging from the evidence filed by the Minister during this period of time was the children were very anxious and afraid. Both children were being seen by Child and Adolescent Services and presented with significant mental health and behavioural issues as well as learning difficulties. By October 2018, however, the Minister was satisfied that the protection concerns had been sufficiently addressed and moved to terminate.

Current Involvement – November 2019 to Present

[23] The most recent involvement with this family began in the fall of 2019. Referral information was received that MT appeared to be under the influence and was falling asleep while attending with NT at a party for one of NT's friends.

[24] MT initially denied any substance abuse and attributed her groggy presentation to her methadone dosage. Eventually, however, MT admitted to taking valium to Child Protection Worker Josey Lovett. In her testimony, MT confirmed she had been abusing valium for a period of approximately six weeks. MT also admitted to misusing valium on the day of the aforementioned party.

[25] Based on MT's extensive history with child protection and her admission to misusing valium, the Minister made the decision to take the children into care. On November 12, 2019, child protection workers attended at the children's school to exact this purpose. The children were extremely upset by the situation and their reaction to being taken into care once again can best be described as traumatic.

[26] A protection finding on this matter was made on March 4, 2020 pursuant to Section 22(2)(b) with the first Disposition Order being issued on May 26, 2020. During the fall of 2020 and into the spring of 2021, there was discussion about CG possibly putting forward a plan for the care of NT. Ultimately it was determined that such a plan could not be supported by either the Minister, NT's Guardian or MT. CG did not file a plan for NT, and he stopped participating in the proceeding.

[27] Hearing dates were scheduled for June 22-24, 2021. In early June, unfortunately, the litigation guardian appointed for both CT and NT fell critically ill and was no longer able to participate in the proceedings. It was acknowledged that the new Litigation Guardian, yet to be appointed, would have insufficient time to adequately prepare for the June hearing dates. Given the situation, the parties agreed

to participate in a Settlement Conference in June 2021. The matter did not resolve, and hearing dates were scheduled for October 2021.

[28] The Court heard from five witnesses: Ryan Ellis (Child in Care Worker), Bobby Newman (Case Aide), Josey Lovett (Long Term Social Worker), Dave Brown (Litigation Guardian for both CT and NT) and MT.

[29] Evidence from prior child protection proceedings was admitted, by the consent of the parties, pursuant to s. 96 of the *Act*. Also entered into evidence and considered by the Court were the mental health records for both CT and NT, medical records of MT and MT's pharmaceutical records.

[30] Closing submissions were received from counsel for MT on November 12, 2021 and from counsel for the Minister and counsel for the Litigation Guardian on November 17, 2021.

Position of the Parties

Position of the Minister

[31] The Minister notes the current proceeding marks the third court intervention with this family and that current issues are similar to past protection concerns. The Minister acknowledges that MT has demonstrated periods of sobriety in the past but adds that MT had been advised the Minister would likely pursue permanent care if MT was incapable of maintaining sobriety.

[32] The Minister claims MT has not fully addressed her substance abuse issues. The Minister points out that MT was not initially honest about her relapse. MT denied drug misuse on several occasions citing, as she had done in the past, a methadone dosage issue as the reason for her intoxicated affectation. MT only admitted to drug misuse after several interventions by the child protection worker.

[33] After MT admitting to using in November 2019, the Minister requested that MT participate in addictions counselling through Drug and Addiction Services. MT did not do so but continued to participate in the New Horizons Opiate Recovery Program (ORP). The Minister is not satisfied that MT's ORP participation provided a counselling component substantive enough to address her addiction issues.

[34] The Minister claims that MT has not made herself available to child protection workers in a manner that would allow workers to properly assess risk. The Minister

noted a marked difference in engagement with MT during prior child protection proceedings versus the current proceeding. The Minister is asking the Court to draw a negative inference in relation to substance abuse given MT's refusal to engage in addictions counselling and her lack of engagement with the Minister on the issue.

[35] The Minister did not arrange drug testing for MT. The Minister argues that drug testing is only one component of assessing risk and that MT has not engaged with the Minister in a manner sufficient to permit a holistic assessment of the protection concerns. The Minister further notes that drug testing would have been of limited value in this case, at any rate, given the concern that MT might be misusing drugs for which she had a medical prescription.

[36] The Minister is concerned that MT has connected with another violent individual. The Minister notes that there was a violent incident between MT and her current fiancée, JV, that generated concern such that neighbours called the police to intervene. The Minister did not present details on what, if any, criminal charges were laid as a result of this episode but Child Protection Worker Lovett testified that she was aware there was a no-contact order put in place between MT and JV as a result of the dispute. The Minister claims MT was in violation of the no-contact order through her continued involvement with JV after the incident. The Minister acknowledges that the order was at some point varied to allow contact between MT and JV but claims this is demonstrative of the fact that MT has minimized the seriousness of the situation thereby demonstrating a lack of insight about the protection concern of violence.

[37] MT's parenting time with the children has been supervised during the course of the current child protection proceeding. The Minister claims that MT's parenting time with the children has not always been a positive experience for the children because of MT's actions and inactions. The Minister characterizes MT's parenting time with the children as sporadic, noting many of the supervised visits were cancelled by MT at the last minute, causing a great deal of upset for the children.

[38] During one such visit, MT left to collect food for the children and did not return. She was eventually discovered in the back of a police car. The event was witnessed by the children. The Minister points out that the experience of discovering their mother in a police car was particularly traumatic for the children who were already presenting with significant anxiety issues.

[39] Inconsistency in exercising parenting time resulted in MT's visits with the children being reduced in frequency. The Minister acknowledges that Covid-19 may have, at times, disrupted MT's parenting time but notes that the children eventually refused to engage in any access visits with MT as a result of the inconsistency. CT began to re-engage with parenting time with MT relatively recently.

[40] The Minister has little information about MT's current living arrangements. The Minister did note that in September 2021, MT had acknowledged she had been living without power for approximately two months. The Minister characterized housing for MT as being unstable.

[41] The Minister claims the children have made significant advancements under the care of the Minister. The Minister argues that being in care has provided much needed stability and routine for both children. The Minister argues that it is in the children's best interests to remain in the permanent care and custody of the agency.

Position of MT

[42] MT acknowledges a relapse when she misused valium for a period of approximately 6 weeks in the fall of 2019 but denies any subsequent substance abuse. MT says that drugs are no longer an issue for her as evidenced by her enrolment in the New Horizons Program and by clean drug tests she routinely produced as an active participant of that program. MT acknowledges that she did not engage in counselling through Addiction Services as requested by the Minister but she says that her past participation in addictions counselling, in conjunction with her current participation in the New Horizons Program, negates her need to do so.

[43] MT reports that she is living with her fiancée, JV. She acknowledges there was an incident in February 2021 which resulted in the police being called to attend at their residence and a no-contact order being issued. MT argues, however, that the Minister's concerns about violence are inflated and the no-contact order has been varied to allow contact between herself and JV.

[44] MT notes that she was required to complete Covid-19 screening testing the day before any visit with the children and rigorous screening often resulted in last minute cancellation of visits through no fault of her own. She denies that she ever missed a visit without notice or explanation. MT claims that her requests for increased parenting time were denied by the Minister.

[45] MT acknowledges that NT is very happy in her current foster placement. MT agrees that NT has flourished in foster care and admits that it will be traumatic for NT if she is forced to leave her current foster placement. MT is of the opinion, however, that all protection concerns have been addressed and both children must therefore be returned to her care.

Position of CG

[46] NT's father, CG, participated in the initial stages of the child protection proceeding and indicated an intention to put forward a plan in relation to NT's care. Ultimately, however, a plan was not forthcoming. CG did not participate in the permanent care hearing and did not put forward a position.

Position of the Guardian Ad Litem

[47] Litigation Guardians have the dual role of (1) exploring the wishes and needs of the children and informing the Court and parties of those findings; and (2) conveying to the Court and the parties what, in the Guardian's opinion, is in the best interests of the children, notwithstanding the children's wishes.

[48] Mr. Brown was appointed guardian of CT and NT later in the proceeding, but I am satisfied, based upon Mr. Brown's testimony, that he took appropriate care and caution to fully appreciate and faithfully articulate the voices of CT and NT. Mr. Brown also spoke to what disposition order, in his view, was best for CT and NT going forward.

CT

[49] CT has suffered in the past from extreme anxiety. Protection workers Ellis and Lovett described CT's anxiety as being severe and evidenced by shortness of breath, crying, intense fear and insecurity and inability to communicate. At one point, CT's anxiety was so intense that all of his food needed to be pureed before consumption. In addition to his medical needs, CT requires educational adaptations.

[50] Protection workers Ellis and Lovett both testified that CT has made significant advancements since the fall of 2019. CT has improved his physical health. His self confidence has increased substantially, and his anxiety has decreased significantly. CT is now able to carry on detailed conversations on any topic. Protection workers testified CT has demonstrated remarkable progress on many developmental levels.

[51] CT has autism. He is described as being high functioning. Mr. Brown testified that CT was quite capable of understanding his situation and clearly communicating his feelings and wishes. Mr. Brown explained that CT wanted to ensure his voice would be heard and taken seriously notwithstanding the fact that he is autistic. No party challenged CT's ability to clearly articulate his views and wishes.

[52] Mr. Brown met with CT on two separate occasions, each time engaging in lengthy conversations about the role of the Guardian and the nature of the child protection proceeding. Mr. Brown testified that CT was quite aware of the reasons why he was in care and had a good appreciation of the impact being in care has had upon his life.

[53] After their initial conversation, CT asked Mr. Brown for additional time to weigh the pros and cons of being the subject of a permanent care and custody order.

[54] Mr. Brown's second conversation with CT lasted two hours. Mr. Brown testified that he explored, in detail, how CT had weighed the benefits of being in the care of the Minister versus being returned to the care of his mother, MT.

[55] Mr. Brown testified that CT understands that MT has issues, but CT believes that MT has made progress and has maintained gains in addressing those issues. CT believes that he will be able to recognize any potential protection risk in the future and can safety-plan and self-protect accordingly.

[56] CT's views and wishes changed throughout the course of the child protection proceeding. Initially, CT was concerned that MT would be unable to maintain a home free from protection concerns and CT did not want to return to MT, if there was chance he could be taken into care once again. Mr. Brown testified that CT appreciates he may be forgoing certain supports, including medical and education supports, if he is returned to the care of MT but, in CT's analysis of the pros and cons, CT has prioritized the importance of being returned to his family in assessing his own well-being.

[57] Having confidently conveyed the views and wishes of CT, Mr. Brown testified that it is his opinion that CT's interests are best met if CT is returned to the care of MT. Mr. Brown acknowledged there are risks associated with CT being returned to MT's care. Mr. Brown also testified that there are also risks associated with a permanent care placement citing, as example, the difficulties associated with a foster placement break down.

[58] Ultimately, it was Mr. Brown's testimony that he is supportive of the views and wishes expressed by CT. Mr. Brown is of the opinion that CT has a good appreciation of his situation and that ultimately it is CT himself who will experience the benefit and/or loss associated with any placement. Mr. Brown respects the right of CT to put forth his views and wishes. Mr. Brown feels they are well-reasoned and well-understood by CT, who is now sixteen years of age.

NT

[59] NT also suffers from anxiety and ADHD. NT's anxiety presents as difficulty sleeping, nail biting and behavioural difficulties, including obsessive compulsive behaviours. NT also needs assistance in school.

[60] Mr. Brown testified that, notwithstanding her anxiety, NT was very clear in conveying her views and wishes. NT does not want to return to MT's care. NT has developed a very close and loving bond with her foster mother which NT does not want to have severed. NT's foster parents reside in a rural setting where NT does well in school, has made friends and is surrounded by animals for which NT provides care. Mr. Brown testified that the prospect of being removed from her current foster placement generated a great deal of anxiety for NT.

[61] Mr. Brown testified that he is satisfied NT had a good appreciation of her situation and she was unwavering in her view and wishes.

[62] Having confidently conveyed the views and wishes of NT, Mr. Brown testified that it is his opinion that NT's interests are best met if NT is placed in the permanent care and custody of the Minister. Mr. Brown expressed fear for the well-being of NT if NT is required to vacate her current foster home placement.

Applicable Law

[63] The Minister seeks a permanent care and custody order pursuant to Section 42 of the *Act*.

[64] The Minister is assigned the burden of proof and it is the civil burden of proof. The Minister must prove its case on a balance of probabilities by providing the Court with "clear, convincing and cogent evidence." **Nova Scotia (Community Services) v. C.K.Z.**, 2016 NSCA 61. The agency must prove, on a balance of probabilities that protection concerns remain and that it is in the best interests of the children to be placed in the permanent care and custody of the Minister.

[65] Decisions about permanent care must be made keeping in mind the Legislative purpose stated in s. 2(1) of the *Act*:

- to promote the integrity of the family
- to protect children from harm
- to ensure the best interests of the children

[66] In making a decision about the future care of a child, the best interests of the child must be the Court's paramount consideration as per ss. 2(2) and 42(1) of the *Act*. Section of s. 3(2) of the *Act* directs the Court to consider those of the following circumstances that are relevant when determining what is in a child's best interest:

- a) the importance for the child's development of a positive relationship with a parent or guardian and a secure place as a member of a family
- (b) the child's relationships with relatives
- (c) the importance of continuity in the child's care and the possible effect on the child of the disruption of that continuity
- (d) the bonding that exists between the child and the child's parent or guardian
- (e) the child's physical, mental, and emotional needs, and the appropriate care or treatment to meet those needs
- (f) the child's physical, mental, and emotional level of development
- (g) the child's cultural, racial, and linguistic heritage; (ga) the child's sexual orientation, gender identity and gender expression
- (h) the religious faith, if any, in which the child is being raised
- (i) the merits of a plan for the child's care proposed by an agency, including a proposal that the child be placed for adoption, compared with the merits of the child remaining with or returning to a parent or guardian
- (j) the child's views and wishes, if they can be reasonably ascertained
- (k) the effect on the child of delay in the disposition of the case
- (l) the risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent or guardian (m) the degree of risk, if any, that justified the finding that the child is in need of protective services
- (n) any other relevant circumstances.

[67] The *Act* must be interpreted according to a child-centered approach. Factors to be considered when making a decision in a child's best interests are non-

exhaustive and the definition of best interests is multi-faceted. The Court must consider various factors unique to each child including those needs associated with the child's emotional, physical, cultural, social, and developmental needs and those needs associated with risk of harm: **Nova Scotia (Community Services) v. R.M.N. and M.C.**, 2017 NSSC 270.

[68] The permanent care hearing is the last of the disposition reviews. In conducting a disposition review, the Court assumes that the orders previously made were correct, based upon the circumstances existing at the time. It is not the Court's function to retry the original protection finding, but rather, the Court must determine whether the circumstances which resulted in the original order still exist or whether there have been changes or new factual circumstances such that the children are no longer children in need of protective services: **Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)**, [1994] 2 S.C.R 165, and **Children's Aid Society of Halifax v. V.(C.)**, 2005 NSCAS 87.

[69] In **Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)**, the Supreme Court of Canada outlined a two-fold examination that must be conducted on status review hearings at paragraph 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.

[70] The statutory deadline has been exceeded in this case and therefore the Court is left with only two options: dismiss the matter pursuant to s. 42(1)(a) and return the children to the care of MT or place the children in the permanent care and custody of the Minister pursuant to s. 42(1)(f).

[71] The Minister is arguing that CT and NT remain at substantial risk of harm. "Substantial risk" is defined in s.22(1) of the *Act*. It means a real chance of danger that is apparent on the evidence. When deciding whether there is a "substantial risk," I must only be satisfied that the "chance of danger" is real, rather than speculative or illusionary, and "substantial" in that there is a "risk of serious harm or serious risk of harm" (**Winnipeg Child and Family Service v. K LW**, 2000 SCC 48, paragraphs 104, 106, and 117). It must be more likely than not that this "risk" or "chance of

danger” exists on the evidence presented. **CR v. Nova Scotia (Community Services)**, 2019 NSCA 89.

[72] **In Nova Scotia (Community Services) v. KM**, 2019 NSSC 312, Forgeron J. at paragraphs 27 and 28 stated the following with respect to a finding of substantial risk of emotional abuse:

[27] A finding of a substantial risk of emotional abuse, like any other protection finding, is not one that will be entered lightly. Evidence must support such a finding in keeping with the civil burden of proof. Such a finding involves both objective and subjective elements. The parental conduct must be viewed objectively to prove actions that seriously interfere with a child. The parental conduct must also be viewed subjectively based on the impact that the conduct has or will likely have on the specific child.

[28] In the end, the Minister must prove that there is a substantial risk that the father will seriously interfere with three aspects of the children’s lives – that involving their healthy development, emotional functioning and attachment to others. In addition, for a finding of substantial risk, the Minister must also prove that the father does not participate in services to remedy or alleviate the abuse.

[73] The Minister in this case is relying on past history. In relation to past parenting history, Justice Forgeron states at para 38 of **Nova Scotia (Community Services) v. LD and DD**, 2021 NSSC 99:

... Although “[t]here is no legal principle that history is destiny”, past parenting is relevant as it may signal “the expectation of risk”: **D.(S.A.) v. Nova Scotia (Community Services)**, 2014 NSCA 77, para. 82. The court is concerned with probabilities, not possibilities. Therefore, where past parenting history aids in the determination of future probabilities, it is admissible, germane, and relevant: **Nova Scotia (Community Services) v. L.M.**, 2016 NSSC 80.

[74] Prior to the Court granting an Order for permanent care and custody, the requirements of s. 42(2), (3) and (4) must be met. Section 42(2) of the *Act* states that the Court must not remove children from the care of their parents, unless less intrusive alternatives, including services to promote the integrity of the family, have been attempted and have failed, or have been refused by the parent, or would be inadequate to protect the children. The obligation to provide services is not without limit; the *Act* obligates the Minister to take “reasonable measures” in this regard: **Children’s Aid Society of Shelburne County v. S.L.S.**, 2001 NSCA 62 .

Findings and Decision

[75] In making my decision I have considered the burden of proof as well as the provisions of the *Children' and Family Services Act*. I have considered the applicable case law, including that relating to credibility (**Baker-Warren v. Denault**, 2009 NSSC 59) and drawing inferences (**Jacques Hometown Dry Cleaners v. Nova Scotia (Attorney General)**, 2013 NSCA 4). I have analyzed the evidence, in consideration of the law, and I have reflected upon the submissions of counsel.

The Children

[76] With the hope of adopting a child-centric perspective, I make the following findings:

- I find that both CT and NT have experienced significant anxiety-related issues that have been negatively compounded by an inability of the adults in their lives to protect them from harm and to meet their physical, emotional and mental needs, over the course of many years. Not all of the trauma stems directly from MT. The reality is, however, that when MT suffered an admitted relapse in November 2019 the resulting impact on NT and CT was profoundly harmful.
- I find that the parental attachment between the children and MT deteriorated after the children were taken into care, in large part due to the fact that MT was inconsistent in exercising parenting time. Covid-19 restrictions did create some challenges. The Minister did not prove that there was ever a time that MT failed to provide notice that parenting time could not be exercised. I am satisfied, however, that cancellation was often at the last minute and the children were consequently upset. The net effect for NT and CT was insecurity about their parental relationship with MT. This is evidenced by the fact that the children, to different degrees, refused to attend visits with MT. CT was eventually able to overcome this issue and re-engage with MT. NT wanted to reserve the right to choose to see her mother at some point in the future but expressed no interest in reconnecting with MT at the time of the hearing.
- I find that both CT and NT have a lived experience that significantly informs their respective views and wishes. I am satisfied that those views and preferences were properly ascertained and shared. I do not defer to those views and wishes, as to do so would be to abdicate decision-making

responsibility, but I acknowledge and respect CT and NT's communicated preferences.

- I find that both CT and NT, each in their own way, have demonstrated a remarkable resilience. NT was able to forge a loving and secure bond with her foster family, particularly her foster mother. NT has blossomed in her new environment. CT, while content in his foster placements, has not demonstrated a similar attachment. Nevertheless, CT has also flourished while in the care of the Minister. There is no contest that CT has developed into an insightful and articulate adolescent with a good handle on his mental health issues. The Minister attributes the gains achieved by NT and CT entirely to the structure and routine they have received while in care. I find it more likely that the accomplishments of CT and NT are reflective of both their improved environment and their respective strengths of character.

Protection Concerns and MT

[77] The Minister is asking the Court to draw a negative inference in terms of MT's sobriety as a result of MT's failure to participate in addiction counselling and to make herself available to protection workers. "An inference is a conclusion reached when the probability of its likelihood is confirmed by surrounding, established facts" and "reasonableness is the gauge by which we evaluate the strength of the conclusion reached through our reasoning." **Jacques Hometown Dry Cleaners v. Nova Scotia (Attorney General)**, *supra*.

[78] MT argues that her sobriety is demonstrated through ongoing participation in the New Horizons Program (ORP) and the series of clean drug tests she has produced as a result of her enrollment in that program. The Minister argues that the drug tests referenced by MT would not detect any misuse by MT of a prescribed drug.

[79] When making a disposition order, I must consider whether any protection ground as outlined in the *Act* exists, regardless of whether those grounds have been specifically pleaded. In this case, protection concerns raised relate to risk of physical harm, risk of emotional harm, risk of neglect (failure to ensure the children continue to receive medical, behavioural and education interventions to treat their respective conditions), and exposure to violence where the parent has failed to obtain services, treatment or other measures to remedy or alleviate the violence (MT's relationship with JV).

[80] I make the following findings in relation to MT:

- I find there is a risk that MT may again relapse because I am not satisfied that she has fully addressed her addiction issues. I make this finding for several reasons:
 - MT had been an active participant in the New Horizons Program when she relapsed in November 2019.
 - After MT relapsed, she refused to participate in addictions counselling as requested by the Minister.
 - MT acknowledged, on cross-examination, that New Horizons programming offers very little in terms of addictions counselling.
 - MT's assertion that she did not need addictions counselling because she had completed such counselling in the past rings hollow, given her relapse post-counselling.
 - When asked about her relapse, MT could offer no explanation and displayed no insight into the nature of her addiction and the related relapse.
 - MT acknowledged that she had maintained longer periods of sobriety in the past before relapse. This current period of sobriety is not MT's longest period of sobriety.
- I do believe MT is to be commended for her continued participation in the New Horizons Program. I draw no inference that MT has failed to maintain her sobriety. I am simply not satisfied that MT has fully addressed her addiction issues and I believe that risk of MT relapsing remains.
- There was no direct evidence led in relation to police involvement as a result of MT's involvement with her new partner, JV, other than through the testimony of Child Protection Worker Lovett. Protection Worker Lovett did not provide specifics in relation to the incident between MT and JV other than she understood there were charges laid, a no-contact provision was in place and that she believed MT and JV were in breach of the no-contact provision at some point. Worker Lovett acknowledged the prohibition was later amended to permit contact. I can not consider details about police involvement with MT and JV contained in the Minister's post-hearing submissions that were not offered as evidence at the hearing. I do not find that the Minister has met its burden of proving risk of significant harm related to violence in relation to MT's involvement with JV.

- There was insufficient evidence before me to determine that housing instability was a protection concern for MT. There was an acknowledgment by the Minister that MT's home was equipped with power at the time of the hearing. There were no other housing concerns raised by the Minister.

Protection Concerns and Best Interests Test

[81] The Minister argues that if I find that protection concerns remain, the Court has only one option: permanent care. MT argues that if I find that protection concerns have been sufficiently addressed, the Court has only one option: return both MT and CT to her care. These statements suggest a binary analysis. The *Act* is clear however: the Court can only make a disposition order that is in the best interests of a child (s. 42(1)). Careful consideration must also be given to what is in the best interests of a child and I must also compare and balance the relevant factors outlined in s. 3(2) of the *Act*. An analysis of what is in the best interests of the children is paramount to the Court's ultimate determination.

Issue One: Does NT remain in need of protective services? If so, is it in NT's best interests that a Permanent Care and Custody Order be issued?

[82] NT's medical records were tendered as evidence by consent. I have reviewed them in detail.

[83] I am satisfied that NT remains in need of protective services because the risk that she will suffer harm if she is returned to MT's care is substantial and because it is in NT's best interests to remain in the care of the Minister.

[84] Objectively, MT suffered a relapse and subsequently failed to engage in services and programs to guard against a further relapse. This conduct must be analyzed subjectively from NT's perspective. There is no doubt NT suffered emotional harm as a result of MT's 2019 relapse. Given NT's current mental and physical condition, should MT relapse again, there is a substantial risk that NT would suffer emotional harm which would likely exhibit in terms of physical harm for NT by way of sleep deprivation and OCD behaviours, for example.

[85] Having found that there is a substantial risk of harm to NT if she is returned to MT's care, I must also determine whether it is in NT's best interests to remain in the permanent care and custody of the Minister.

[86] NT's current relationship with MT is neither positive nor secure as evidenced by NT's ongoing refusal to visit with MT. Furthermore, I find that NT's continuity of care with her foster mother is a critical component to NT's well-being and that NT may suffer harm if removed from her current foster placement. The following is a passage from NT's medical records dated March 27, 2021:

N* has done amazing progress in her latest foster home in terms of management of her ADHD and anxiety, of her social interactions and in her school development. She recently received news that her situation was to change, and she suddenly became very disruptive with unforeseen behavioural issues which are deteriorating quite rapidly.

[87] This assessment aligns with the evidence of child protection workers and the litigation guardian David Brown. MT herself, on cross-examination, admitted it would be traumatizing for NT to be removed from her foster mother and returned to MT's care

[88] NT's views and wishes were appropriately ascertained and conveyed, and I have considered NT's preferences, as supported by her Guardian, along with the other relevant best interest factors.

[89] Having been satisfied that NT remains in need of protective services, s. 42(2), (3) and (4) of the *Act* must be addressed prior to an order for Permanent Care and Custody being granted. No family placements were put forward by the parents pursuant to s. 42(3). Less intrusive measures have been refused by the parents — s. 42(2). Statutory deadlines have expired in this case, so it is unnecessary for me to consider whether circumstances are likely to change in a reasonably foreseeable time as per s. 42(4).

[90] Given the circumstances of MT and NT as presented at the disposition hearing, the substantial risk of harm should NT be returned to MT's care, and the weighing of the best interest factors outlined in the Act, I have determined that it is in NT's best interests that a permanent care and custody order be granted to the Minister.

Issue Two: Does CT remain in need of protective services? If so, is it in CT's best interests that a Permanent Care and Custody Order be issued?

[91] CT's medical records were tendered as evidence by consent. I have reviewed them in detail.

[92] I am satisfied that CT no longer remains in need of protective services because the risk of harm, should he be returned to MT's care, is not substantial enough to warrant a permanent care and custody order. Furthermore, I do not find it to be in CT's best interests to remain in the care of the Minister.

[93] Objectively, MT suffered a relapse and subsequently failed to engage in services and programs to guard against a further relapse. This conduct must be analyzed subjectively from CT's perspective. There is no doubt CT suffered emotional harm as a result of MT's 2019 relapse. However, given CT's current condition, should MT relapse again, I am satisfied that CT's mental well-being and associated coping skills are sufficient to protect him against further emotional and physical harm.

[94] Most recent medical reports in relation to CT describe a young person who has a fair degree of insight into his anxiety triggers and the trauma he has experienced as well as a good understanding of distraction/calming strategies and mindful self-compassion strategies. It is clear that CT has a good appreciation of the impact, both positive and negative, that his relationships with his family and friends, including his relationship with his mother, has upon his well-being.

[95] Dr. Kerri Gibson-Grant, Registered Clinical Psychologist, wrote CT a letter on August 12, 2020 in support of CT's request to the Minister for a fish tank to help with self-soothing and relaxing when stressed/anxious. Dr. Gibson-Grant writes:

I would like to acknowledge how important and impressive it is that you are self-advocating and requesting what you feel would be helpful for your mental health, as you are working hard on taking good care of yourself and you know yourself well.

[96] I do appreciate that providing support for an aquarium does not equate to providing support for a return to MT's care. However, the commentary in CT's more recent medical reports aligns with the evidence of child protection workers and the litigation guardian, David Brown. CT has done remarkably well in improving and maintaining good mental health through solid coping techniques.

[97] I am satisfied, based on the testimony of Mr. Brown, that CT has a deep appreciation of risks associated with returning to the care of MT. From a lived experience perspective, through his guardian, CT expressed confidence in his ability to recognize protection concerns associated with his mother and to safety plan and to self-protect accordingly. I have no reason to doubt CT in this regard. I believe

CT will be able to self-advocate for any continued need of health or education interventions, negating the risk of neglect. In CT's particular case, given his unique circumstances, that risk of harm is not substantial.

[98] I am also satisfied that it is in CT's best interests to be returned to MT's care. CT's relationship with MT is positive and secure, from CT's perspective, and it is important to CT that he be returned to MT's care. A return to MT's care for CT also signals a return to his extended family, particularly his great-grandparents to whom he is especially close, and a return to his community, his friends and his school. The degree of risk to CT being kept from those connections to family and community outweighs the risk of impact upon CT should MT relapse again.

[99] I find that respecting the wishes and views of CT is a critical component to CT's well-being. The law requires me to take CT views and wishes into consideration, where those views and wishes can be reasonably ascertained. I am completely satisfied, and there was no evidence to the contrary, that CT gave serious thought to his situation and that his views and wishes were accurately conveyed.

[100] Given the circumstances of MT and CT as presented at this disposition hearing, I am satisfied that it is in CT's best interests that he be returned to MT's care. I believe any protection concerns as they may exist between MT and CT are manageable and not substantive enough to outweigh the best interests of CT in returning to his mother's care. CT's interests are best met by respecting his lived experience and autonomy as clearly expressed through his views and wishes.

[101] The Motion for permanent care and custody for CT is dismissed. The Motion for permanent care and custody for NT is granted.

Marche, J. Pamela A.