SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Nova Scotia (Community Services) v. K.B.*, 2021 NSSC 372

Date: 20211209
Docket: SFSBCFSA-123635
Registry: Shelburne

Between:

Nova Scotia (Community Services)

Applicant

v.

K.B.

Respondent

Restriction on Publication:

Section 94(1) of the *Children and Family Services Act* applies to this decision and provides as follows:

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.

Judge:	The Honourable Justice Michelle K. Christenson
Heard:	November 22, 2021 and November 25, 2021, in Yarmouth, Nova Scotia
Oral Decision:	December 9, 2021
Written Release:	May 12, 2022
Counsel:	Cynthia Scott for the Applicant Seamus Murphy for the Respondent

By the Court:

[1] This is my decision in the matter of **Nova Scotia (Community Services) v K.B.**

Background:

[2] As a result of a series of incidents, K.B., ended up at a women's shelter in New Brunswick. Her daughter, N., who is under the age of three, ended up at a friend's house in Shelburne, Nova Scotia. Her ex-boyfriend was incarcerated and charged with attempted murder in relation to a third party.

[3] Child and Family Services became involved. By the time the matter was brought to Court, K.B., acting on the recommendations from the local R.C.M.P., had fled the jurisdiction due to safety concerns. Her daughter, N., according to the Minister, was in the care of a friend under the guise of a voluntary placement. K.B. contacted her friend directing the child to be brought to her in New Brunswick. That did not happen. The Minister filed a Child Protection Application.

[4] In Court, K.B., appeared by phone, had no disclosure, was not represented. She took no position on any issue before the Court. Based on the evidence before me, I determined there were reasonable and probable grounds to believe the child needed protective services.

[5] The interim hearing was adjourned to allow K.B. the opportunity to obtain and instruct counsel. When the matter reappeared, I learned K.B. was contesting the Courts' jurisdiction based on what she alleged was a "shadow apprehension."

[6] K.B. argued, the matter had not been brought before the Court in the requisite five-day time period. She argued I lost jurisdiction to make the finding on the grounds of protection. N., needed to be returned.

[7] The Minister asserted there was no taking into care. She argued the matter was brought to Court pursuant to an application.

[8] To the extend, that I may have had jurisdiction, which is the very issue of this decision, I did extend in the best interests, the date for completion of the interim hearing. I did so because the Minister needed time to respond to the novel argument being advanced by K.B.

[9] Dates were set for completion of the interim hearing. They were adjourned due to late filing of subsequent affidavits by the Minister. Eventually the interim hearing was completed.

[10] I had the benefit of receiving evidence from the respondent mother, and two social workers on behalf of the Minister. All parties filed affidavits and were cross-examined.

[11] It is not my intention to recite the evidence, it is a matter of record.

[12] Briefs were filed, and extensive closing arguments were advanced.

Issues:

[13] I must decide the following issues:

1. Can the issue of jurisdiction be raised at the completion of the interim hearing?
2. What constitutes a taking into care?
3. Was there a taking into care in this case?
4. Given the finding made, which are the implications?
5. In the event it is necessary to do so, what should be done about placement?

Position of the Parties:

Applicant:

[14] The Minister argues, that if K.B. wanted to argue jurisdiction, she needed to do so at her first appearance, or alternatively appeal the order granted.

[15] The Minister maintains the mother voluntarily placed her child in the care of a friend. A safety plan was developed. It was implemented. At no time did a representative of the Minister take physical care and control of the child. An application was made pursuant to Section 32 of the *Children and Family Services Act*, S.N.S. 1990, c. 5 (the "*Act*"), and within five clear days the matter was in Court. She argues I have jurisdiction to decide the remaining issue of placement.

[16] The Minister seeks a third-party placement for the child. She argues there are reasonable and probable grounds to believe there is a substantial risk to the child's health or safety, if placed with the mother.

Respondent:

[17] It is K.B.'s position, there is but one hearing: started within five clear days from a triggering event, completed within thirty. She argues, I can still decide the issue of jurisdiction because the hearing was not completed at first appearance but adjourned over for completion of interim.

[18] K.B. argues the Minister's application for protection should be dismissed for lack of jurisdiction. She argues there was a shadow apprehension. The Minister was obligated to start the proceeding within five days from the child's apprehension under the guise of a so-called "safety plan" on September 24, 2021. That meant, the interim hearing needed to occur on or before October 1, 2021. It did not. Therefore, jurisdiction is lost.

[19] In the event I find otherwise, the mother argues the child should be returned to her care in New Brunswick, under a supervision order.

Law and Analysis:

Issue one: jurisdiction

[20] I must first determine if I have jurisdiction to decide the jurisdictional issue.

[21] The Minister argues I do not. K.B. is precluded from advancing her novel argument because it was not raised at first appearance. The Minister asserts her arguments on jurisdiction must be raised on appeal.

[22] I disagree with that argument for the following reasons:

1. There is but one hearing: it is called the interim hearing, which starts on the first appearance, and is concluded usually at the next. Five days is the timeframe in which the matter must be brought to court from the triggering event. Although routinely called a five-day hearing, it is in fact, the start of the interim hearing which is adjourned over for completion when necessary.
2. The evidence needed to decide the issue is rarely available to the court at first appearance. Forcing an appeal before the completion of the

evidence on the issue makes little sense. For example, in this case, K.B., would not have had meaningful opportunity to be able to even advance the argument about jurisdiction given her circumstances:

(a) K.B. was out of province when the Minister brought her application. Persons served out of province are often given more time to respond then persons in province.

(b) K.B. was served with notice of the proceeding in New Brunswick on the Saturday of the Thanksgiving weekend. Monday was a holiday, not a clear working day. The evidence the Minister was to rely upon in relation to the proceeding, came to K.B. in the form of an unsworn affidavit received on Tuesday. She had less than one clear day to review and respond to the Minister's application.

(c) K.B. on her first appearance, advised the Court she wanted the benefit of counsel before taking any position on the issues before the Court. The matter was adjourned for completion of interim hearing after the Court made a finding there were reasonable and probable grounds to believe the child was in need of protectives services.

3. Jurisdiction is an issue that precedes and goes outside the confines of statue.

Issue two: What constitutes a taking into care?

[23] The deep issue before the Court, is what constitutes a taking into care?

[24] The term "taking into care" is itself not defined in the *Act*.

[25] The Minister argues, that given the principles of statutory interpretation, the term taking into care, means: "an agency through its appointed representative has taken physical care and control of a child." ***Only*** that constitutes a taking into care.

[26] K.B. argues, a taking into care is that and much more. A taking into care is essentially "an interference of parental autonomy such that the Minister and not the parent controls the care and the residence of the child, or the care and control of the child."

[27] Counsels agreed on the applicable principles of statutory interpretation. They disagreed however, on the results flowing from that application.

[28] The Legislator chose not to define the term.

[29] Neither Counsel located any reported cases on this issue. I have written on the topic, in unpublished oral decisions. Here is what I previously wrote:

> There is little written that I am aware of, which speaks to the issue of what constitutes a taking into care. Clearly it is a fact specific event which will depend on the circumstances at play. I do not assume that simply because a notice of taking into care was served that it means in fact the child was taken into care. Likewise, simply because a notice was not served does not mean in fact, that it did not happen either.
>
> This is important because it is the triggering event, which starts the clock ticking as to when the Minister is obligated to ensure the matter is before the court. Whether a court makes a finding that the child was taken into care will depend on the facts presented. If not brought to court within the statutory timeframe from this event, there is no jurisdiction to proceed. (**Family and Children Services of Kings County v. E.D.,** 86 NSR (2d) 205)
>
> It is not my intention to suggest that in every instance the Minister needs to apply to court for a determination as to whether their actions constitute a taking into care. That would be ridiculous in most of the cases. It will be clear based on the facts presented whether it happened or not. If they are unsure, prudence would dictate they err on the side of caution.
>
> Recently in an unpublished, oral decision of mine, a request was made by the Minister for a locate and detain order for a child who had fled the home when the Minister showed up to 'take him into care." I needed to determine first who had custody of the child, to determine who needed to make the application. I needed to determine, if the taking into care had been affected by the Minister or averted by the child fleeing. Ultimately, based on the facts as presented, I decided the taking into care had occurred.
>
> While making that decision I had cause to consider the factors, which in my view may be important in making that determination. In hindsight, I regret that I did not reduce my words to writing. This appears to be a good opportunity to revisit this issue.
>
> In my view, the following are some of the relevant factors a court would want to consider in determining this issue:
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> 1. Did the Minister express an intent to take the child into care, either to the child, a parent, or third-party who had the child?
>
> 2. Was this intent reduced to writing in the form of a notice?
>
> 3. Did the Minister reference to a parent, guardian, or third-party having control of the child, they had a notice?
>
> 4. Was the notice served on anyone?

> 5. Who was present at the time? Did the Minister request assistance from the police or the R.C.M.P. to attend with them? Did they attend? Was the parent aware of the police presence?
>
> 6. Was the child taken into possession? This aspect is in my view, important because I do not believe intent alone is enough to take a child into care. Possession, in my view, perfects that intention and is the moment when it is a fait accompli. There must be possession, either actual, or constructive. For example, if the Minister showed up with police in tow, and serviced a notice on a parent to take a child who was physically located out of province into care, in my view, the taking into care has not taken place because possession is not possible in these circumstances. There must be some action associated with the taking of possession of the child. What that action must be and whether it is enough will depend on the circumstances.
>
> 7. The most complicated factor in my view, relates to the parents' and their intention. Routinely, the Minister opts not to take a child into care because the parent "voluntarily" placed the child elsewhere. One must question whether this is truly voluntary. When the Minister shows up with a notice of taking into care, serves that notice, in the presence of the police, can one truly say the parents', in such a circumstance, have acted voluntarily? Have they freely given up the placement of their child, or opted under duress? In my view, it is akin to the circumstances related to the detention of a person in the presence of the RCMP. Such a situation at times can trigger the giving of the charter of rights. Psychologically, the person feeling like they have no choice but to remain, despite the polices assurance otherwise, may result in the court determining the person was detained and rights should have been given. If a parent is left feeling, like they have no choice but to allow their child to go elsewhere when they would rather the child stay with them, I am uncertain if it is proper to classify such a situation as a "voluntary placement." From the parents' perspective, quite likely they are feeling like their child has been taken. Quite likely they have acted in duress. This alone should not determine the issue. But in consideration of all other factors presented at the time, it should be considered.

[30] My above comments were rendered without the benefit of the very comprehensive arguments and briefs submitted in the case. Further, no one argued the issue of agency as a mechanism for a taking into care. I must now assess, considering the arguments advanced, if my position remains unchanged.

[31] Both Counsel in their very thorough and comprehensive submission have alluded to the principles of statutory interpretation. They essentially agree on the principles to be applied but conclude that those principles lead them to different

results. Those principles are well known, and duly cited in their briefs, I do not intend to restate them in this oral decision.

[32] The guiding principle as noted by Driedger, on the Construction of Statutes, in his often-quoted passage at page 87 does merit however restating:

> …there is only one principle or approach, namely the words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act* and the intention of Parliament.

[33] In attempting to determine the proper context for understanding the term "taken into care," I am alive to those principles as outlined in Section 9(5) of the *Interpretation Act*, RS 198, c. 23.

[34] I have considered the matters noted therein.

[35] Both Counsel agree the preamble sets the stage by providing broad direction regarding the principles that govern the interpretation and the application of the *Act*.

[36] The Minister focuses on children being entitled to protection from abuse and neglect.

[37] K.B. focuses on parents' having the responsibility for the care and supervision of their children with removal only when other measures are inappropriate.

[38] Further, K.B. notes the importance for the rule of law as stated in the concluding paragraphs of the preamble which merit restating here:

> And whereas the rights of children, families and individuals are guaranteed by the rule of law and intervention into the affairs of individuals and families so as to protect and affirm these rights **must** be governed by the rule of law.

[39] Both counsels acknowledge any interpretation of the *Act*, must recognize the primacy of the child's best interests as stated in **Nova Scotia (Community Services) v. C.K.Z.**, 2016 NSCA 61, at paragraph 33:

> [33] Integrity of a family unit is important. However, the predominant factor must be the welfare of the child. Following the seminal decision of the Supreme Court of Canada in **New Brunswick (Minister of Health and Community Services) v. C.(G.C.)**, [1988] 1 S.C.R. 1073, courts have clearly placed the welfare and best interests of the child in priority to considerations of parental rights and family integrity. In **K.L.M. v. Nova Scotia (Community Services)**, 2007 NSCA 100, Justice Bateman said:

> [30] Throughout these proceedings the parents' approach had been one of "parental rights" rather than child protection. They say it is their right to raise their children as they see fit, unimpeded by society's oversight, regardless of the impact on the children. However, the Supreme Court of Canada has clearly rejected a parental rights approach to child welfare. In **Syl Apps Secure Treatment Centre v. B.D.**, [2007] S.C.J. No. 38, Abella, J. wrote for the Court:
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> 44 The primacy of the best interests of the child over parental rights in the child protection context is an axiomatic proposition in the jurisprudence. As Daley J.F.C. observed in **Children's Aid Society of Halifax v. S.F.** (1992), 110 N.S.R. (2d) 159 (Fam. Ct.):
>
> [Child welfare statutes] promot[e] the integrity of the family, but only in circumstances which will protect the child. When the child cannot be protected as outlined in the [*Act*] within the family, no matter how well meaning the family is, then, if its welfare requires it, the child is to be protected outside the family. [para. 5]
>
> . . .
>
> 45 This Court has confirmed that pursuing and protecting the best interests of the child must take precedence over the wishes of a parent (**King v. Low**, [1985] 1 S.C.R. 87; **Young v. Young**, [1993] 4 S.C.R. 3, **New Brunswick (Minister of Health and Community Services) v. L. (M.)**, [1998] 2 S.C.R. 534). It also directed in **Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)**, [1994] 2 S.C.R. 165, that in child welfare legislation the "integrity of the family unit" should be interpreted not as strengthening parental rights, but as "fostering the best interests of children" (p. 191). L'Heureux-Dubé J. cautioned at p. 191 that "the value of maintaining a family unit intact [must be] evaluated in contemplation of what is best for the child, rather than for the parent".
>
> 46 It is true that ss. 1 and 37(3) of the *Act* make reference to the family, but nothing in them detracts from the *Act*'s overall and determinative emphasis on the protection and promotion of the child's best interests, not those of the family. The statutory references to parents and family in the *Act*, which the family seeks to rely on to ground proximity, are not stand-alone principles, but fall instead under the overarching umbrella of the best interests of the child. Those provisions are there to protect and further the interests of the child, not of the parents...
>
> [31] The paramount consideration is the best interests of the children.

[40] It is to be noted however, that K.B. is not arguing that parental rights supersede the primacy of best interests. Instead, she is arguing that the legislature created a scheme that protects those principles as noted in the preamble, and how the *Act* is to be administered.

[41] The issue is at what point is a child removed from his or her parents?

[42] This case involves the placement of the child with a third-party under the guise of a safety plan.

[43] The Minister views this circumstance as a consented to voluntary placement.

[44] K.B. claims, it was a shadow apprehension.

[45] It is necessary in my view, to look more closely at the *Act*:

[46] The purpose of the *Act* is set out in Section 2 as follows:

> **Purpose and paramount consideration**
>
> 2 (1) The purpose of this *Act* is to protect children from harm, promote the integrity of the family and assure the best interests of children.
>
> (2) In all proceedings and matters pursuant to this *Act*, the paramount consideration is the best interests of the child. 1990, c. 5, s. 2

[47] Section 3(1)(c) of the *Act* defines care as "physical care and control" as follows:

> **Interpretation**
>
> 3 (1) In this *Act*,
>
> (c) "care" means the physical care and control of a child;

[48] Section 3(1)(u) defines representative:

> **Interpretation**
>
> 3 (1) In this *Act*,
>
> (u) "representative" means a person appointed as a representative of an agency pursuant to this *Act*;

[49] Section 8(4) outlines actions an agency may do:

> **Agencies**
>
> 8 (4) An agency may
>
> (a) with the approval of the Minister, change its name or amend its constitution and by-laws;
>
> (b) engage such persons as may be necessary for carrying on its affairs;

(c) do such acts and things as may be convenient or necessary for the attainment of its objects, the carrying out of its functions and the exercise of its powers.

[50] Section 9 outlines the functions of the agency:

Functions of agency

9 The functions of an agency are to

(a) protect children from harm;

(b) work with other community and social services to prevent, alleviate and remedy the personal, social and economic conditions that might place children and families at risk;

(c) provide guidance, counselling and other services to families for the prevention of circumstances that might require intervention by an agency;

(d) investigate allegations or evidence that children may be in need of protective services;

(e) develop and provide services to families to promote the integrity of families, before and after intervention pursuant to this *Act*;

(f) supervise children assigned to its supervision pursuant to this *Act*;

(g) provide care for children in its care or care and custody pursuant to this *Act*;

(h) provide adoption services and place children for adoption pursuant to this *Act*;

(i) provide services that respect and preserve the cultural, racial and linguistic heritage of children and their families;

(j) take reasonable measures to make known in the community the services the agency provides; and

(k) perform any other duties given to the agency by this *Act* or the regulations. 1990, c. 5, s. 9.

[51] Section 12 provides authority for the Minister and agencies to appoint "representatives in accordance with the regulations:"

Representatives

12 The Minister or an agency with the approval of the Minister may appoint representatives in accordance with the regulations to exercise the powers, duties and functions of representatives pursuant to this *Act* and may prescribe the territorial jurisdiction of the representatives to be the whole of the Province or a part thereof. 1990, c. 5, s. 12; 2015, c. 37, s. 74

[52] Section 12A of the *Act*, sets out the powers of a social worker:

Social worker's investigation powers

12A (1) When conducting an investigation in respect of a child, a social worker employed by an agency may

(a) attend at the residence of the child and any other place frequented by the child;

(b) interview and examine the child;

(c) interview any parent or guardian of the child;

(d) interview any person who cares for or has an opportunity to observe the child;

(e) interview any person who provides health, social, educational or other services to the child or to any parent or guardian of the child;

(f) interview other persons about past parenting; and

(g) interview other persons and gather any evidence that the social worker considers necessary or advisable to complete the investigation.

(2) A social worker employed by an agency may exercise any of the powers enumerated in subsection (1) regardless of whether the social worker has the consent of a parent or guardian of the child. 2015, c. 37, s. 4.

[53] Nowhere therein does it provide for safety planning per se, nor do the regulations. The social workers confirmed, the policy manual is also silent on this issue.

[54] Section 17 deals with temporary care agreements where a parent is temporarily unable to care adequately for a child in that person's custody. These agreements have time limits and must be in writing:

Temporary-care agreement

17 (1) A parent or guardian who is temporarily unable to care adequately for a child in that person's custody and an agency may enter into a written agreement for the agency's temporary care and custody of the child.

(2) An agency shall not enter into a temporary-care agreement unless the agency

(a) has determined that an appropriate placement that is likely to benefit the child is available; and

(b) is satisfied that no less restrictive course of action, such as care in the child's own home, is appropriate for the child in the circumstances.

(3) No temporary-care agreement shall be made for a period exceeding six months, but the parties to a temporary-care agreement may extend it for further periods if the total term of the temporary-care agreement, including its extensions, does not exceed an aggregate of twelve months.

(4) A temporary-care agreement may empower the agency to consent to medical treatment for the child where a parent's consent would otherwise be necessary.

(5) A temporary-care agreement shall be in the form prescribed by the regulations. 1990, c. 5, s. 17

[55] Section 30 of the *Act* allows a judge of the Supreme Court the authority to make a protective intervention order. These orders may prohibit a person from residing with or having contact with a child. Such orders require court applications:

Protective-intervention order

30 (1) Upon the application of an agency, a judge of the Supreme Court may make a protective-intervention order pursuant to this Section directed to any person where the judge is satisfied that the person's contact with a child is causing, or is likely to cause, the child to be a child in need of protective services.

(2) The judge may make a protective-intervention order in the child's best interests, ordering that the person named in the order

(a) cease to reside with the child;

(b) not contact the child or associate in any way with the child,

and imposing such terms and conditions as the judge considers appropriate for implementing the order and protecting the child.

(3) A protective-intervention order made pursuant to this Section is in force for such period, not exceeding six months, as the order specifies.

[56] Section 32 of the *Act* outlines when applications are made. They "may" be made in circumstances wherein the Minister files an application, but they must be made, "shall" be made when there is a taking into care:

Court application by agency

32 An agency may make application to the court to determine whether a child under sixteen years of age is in need of protective services or, where a representative has taken a child into care pursuant to Section 33 without an application having been made pursuant to this Section, the agency shall make such application. 1990, c. 5, s. 32; 2015, c. 37, ss. 22, 74.

[57] Section 33 deals specifically with a taking into care. It permits a representative, without warrant or court order to take a child into care, where the agent believes there are reasonable and probable grounds to believe the child is in need of protectives services and the child's health or safety can not be protected adequately otherwise then by being taking into care:

Taking into care

33 (1) ~~An agent~~ [A representative] may,

(a) at any time before or after an application to determine whether a child is in need of protective services has been commenced, if the child is under sixteen years of age; or

(b) at any time after an application to determine whether a child is in need of protective services has been commenced, if the child is sixteen years of age or more but under nineteen years of age, without warrant or court order take a child into care where the representative has reasonable and probable grounds to believe that the child is in need of protective services and the child's health or safety cannot be protected adequately otherwise than by taking the child into care.

(2) On taking a child into care, a representative shall forthwith serve a notice of taking a child into care upon the parent or guardian if known and available to be served.

(3) ~~An agent~~ [A representative] taking a child into care may enlist the assistance of a peace officer.

(4) Where a child has been taken into care pursuant to this Section, an agency has the temporary care and custody of the child until a court orders otherwise or the child is returned to the parent or guardian. 1990, c. 5, s. 33; 2015, c. 37, ss. 23, 74

[58] Section 39 of the *Act* deals with the interim hearing. It sets out the trigger event for the start of the clock, five days from the day of the application for Section 32 matters, or five days from a taking into care as contemplated by Section 33 of the *Act*.

Interim hearing

39 (1) As soon as practicable, but in any event no later than five working days after an application is made to determine whether a child is in need of protective services or a child has been taken into care, whichever is earlier, the agency shall bring the matter before the court for an interim hearing, on two days' notice to the parties, but the notice may be waived by the parties or by the court.

(2) Where at an interim hearing pursuant to subsection (1) the court finds that there are no reasonable and probable grounds to believe that the child is in need of protective services, the court shall dismiss the application and the child, if in the care and custody of the agency, shall be returned forthwith to the parent or guardian.

(3) Where the parties cannot agree upon, or the court is unable to complete an interim hearing respecting, interim orders pursuant to subsection (4), the court may adjourn the interim hearing and make such interim orders pursuant to subsection (4) as may be necessary pending completion of the hearing and subsection (7) does not apply to the making of an interim order pursuant to this subsection, but the court shall not adjourn the matter until it has determined whether there are reasonable and probable grounds to believe that the child is in need of protective services.

(4) Within thirty days after the child has been taken into care or an application is made, whichever is earlier, the court shall complete the interim hearing and make one or more of the following interim orders:

(a) repealed 2015, c. 37, s. 28.

(b) the child shall remain in, be returned to or be placed in the care and custody of a parent or guardian or third party, subject to the supervision of the agency and on such reasonable terms and conditions as the court considers appropriate, including the future taking into care of the child by the agency in the event of non-compliance by the parent or guardian with any specific terms or conditions;

(c) a parent or guardian or other person shall not reside with or contact or associate in any way with the child;

(d) the child shall be placed in the care and custody of a person other than a parent or guardian or third party, with the consent of that other person, subject to the supervision of the agency and on such reasonable terms and conditions as the court considers appropriate;

(da) where the child is or is entitled to be an aboriginal child, the child shall be placed in the customary care and custody of a person, with the consent of that person, subject to the supervision of the agency and on such reasonable terms and conditions as the court considers appropriate;

(e) the child shall remain or be placed in the care and custody of the agency;

(f) a parent or guardian or third party shall have access to the child on such reasonable terms and conditions as the court considers appropriate and, where an order is made pursuant to clause (d) or (e), access shall be granted to a parent or guardian unless the court is satisfied that continued contact with the parent or guardian would not be in the child's best interests;

(g) referral of the child or a parent or guardian or third party for assessment, treatment or services;

(h) referral of the child or a parent or guardian or third party for a family group conference.

(4A) Where the court makes an order pursuant to clause (b) or (d) of subsection (4), any representative of the supervising agency has the right to enter the residence of the child to provide guidance and assistance and to ascertain whether the child is being properly cared for.

(5) Where, subsequent to an interim order being made pursuant to subsection (4), the agency takes a child into care pursuant to Section 33 or clause (b) of subsection (4), the agency shall, as soon as practicable but in any event within five working days after the child is taken into care, bring the matter before the court and the court may pursuant to subsection (9) vary the interim order.

(6) In subsection (7), "substantial risk" means a real chance of danger that is apparent on the evidence.

(7) The court shall not make an order pursuant to clause (d) or (e) of subsection (4) unless the court is satisfied that there are reasonable and probable grounds to believe that there is a substantial risk to the child's health or safety and that the child cannot be protected adequately by an order pursuant to clause (a), (b) or (c).

(8) Where the agency places a child who is the subject of an order pursuant to clause (e) of subsection (4), the agency shall, where practicable, in order to ensure the best interests of the child are served, take into account

(a) the desirability of keeping brothers and sisters in the same family unit;

(b) the need to maintain contact with the child's relatives and friends;

(c) the preservation of the child's cultural, racial and linguistic heritage; and

(d) the continuity of the child's education and religion.

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

(10) Sections 32 to 49 apply notwithstanding that the child

> becomes sixteen years of age after the child is taken into care or after the making of the application to determine whether the child is in need of protective services.
>
> (11) For the purpose of this Section, the court may admit and act on evidence that the court considers credible and trustworthy in the circumstances. 1990, c. 5, s. 39; 2015, c. 37, s. 28.

[59] Taking into care however, is not specifically defined in the statute.

[60] Safety planning, according to the social workers takes place daily.

[61] The question becomes, at what stage does a safety plan interfere with the parental autonomy of a child to the point, in which judicial oversight is required? Further, is it truly a plan of the parent, and have they provided consent?

[62] *Informed* consent in circumstances wherein the Minister is directing the child to reside with persons other than those with the lawful custody, or imposing restrictions such as supervision, is critical in my view. It is not that a parent can not consent to directives given to the Minister, because quite clearly, a parent can. The question is, do they voluntarily?

[63] In circumstances where directives have been given and not consented to, it may be a finding would be made there was a taking into care. It will be fact driven. It will depend on the circumstances of each case.

[64] In my view, it is imperative to ensure that consent given, is free and voluntary. It may be necessary to consider objective and subjective considerations.

[65] No doubt the agency workers believed K.B. was consenting to the safety plan. But can I say with the same certainty that K.B. was voluntarily consenting?

[66] The power imbalance between the parties is a reality. It is akin to the power imbalance between police and civilians.

[67] In **R. v. Grant**, 2009 SCC 32, [2009] 2 S.C.R. 353, McLachlin C. J., as he then was, at paragraph 32, made the following helpful comments:

> [32] However, the subjective intentions of the police are not determinative. ….While the test is objective, the individual's particular circumstances and perceptions at the time may be relevant in assessing the reasonableness of any perceived power imbalance between the individual and the police, and thus the reasonableness of any perception that he or she had no choice but to comply with the police directive. To answer the question whether there is a detention involves a realistic appraisal of the entire interaction as it developed, not a minute parsing of

> words and movements. In those situations where the police may be uncertain whether their conduct is having a coercive effect on the individual, it is open to them to inform the subject in unambiguous terms that he or she is under no obligation to answer questions and is free to go. It is for the trial judge, applying the proper legal principles to the particular facts of the case, to determine whether the line has been crossed between police conduct that respects liberty and the individual's right to choose, and conduct that does not.

[68] It is necessary to look at the entire situation to determine, if in fact, a taking into care has occurred.

[69] Court orders set out the parenting arrangements between parties. Directions by the Minister which are contrary to orders grounded in evidence and deemed to be in the best interest of the child, may require some form of judicial oversight.

[70] It makes sense to me, that in the context of child protection work removing a child from a parents' care requires judicial oversight. Oversight to ensure the requisite grounds to warrant such action exist and to ensure that due process and respect for the rule of law has occurred.

[71] Safety planning takes place daily, yes. The statute however, contains no provisions which speak directly to this issue; nor do the regulations. Nor is it covered in the 1500-page policy which provides child protection workers direction as to how to implement their *Act* and preform their duties.

[72] The *Act* provides for temporary placement of children outside the care of their parents. These arrangements are set out in Section 17 of the *Act*. In circumstances wherein a parent is not able to adequately care for a child, an agency may enter into a written agreement for the temporary care and custody of the child.

[73] Theses agreements have timelines and must be in writing. So quite clearly, the legislator has contemplated arrangements which allow for children to be placed in the custody of persons other than their parents, when the adequacy of the child's care is called into question.

[74] However, nowhere in the *Act*, does it contemplate or give authority for the use of safety planning per say as a mechanism to alter fundamentally, the custodial arrangement of the child.

[75] In my view, not all safety planning requires judicial oversight. But safety planning which has the de facto affect of removing a child from a parent's care, without their voluntary consent, should. It is in keeping with the principles of the

Act, and intent of the legislator to balance safety of the child with respect for the rule of law. It is not about giving parental rights precedent; it is about ensuring that the actions taken by the Minister are in keeping with the *Act*.

[76] K.B.'s brief rightly notes, "court supervision of the Minister's apprehensions is not some superfluous formality. It is baked into the legislative scheme and is necessary for the state action to be constitutional." I agree.

[77] The term "less intrusive measures" have been thrown around a lot in the context of this proceeding. Parents' want and should be able to consent to less intrusive measures which allow them to avoid court. True. However, in the context of those cases where the circumstances are so serious that the Minister had determined it is necessary through a safety plan, to give directions for that child to reside with persons other than a parent, who do the less intrusive measures truly serve: the Minister or the parent?

[78] It is not lost on me, that in circumstances wherein there is no court application, there is also:

1. No Disclosure;
2. No hearing by a judge to determine if **the Minister** has established based on credible and trustworthy evidence that reasonable and probable grounds exist for the finding of protection;
3. No opportunity for the parent to challenge the conclusions drawn by the Minister and to present his / her side of the story to a judge who will determine the issue;
4. No opportunity to request for services sought and obligated to be provided by the Minister and perhaps most importantly; and
5. Likely, no counsel because no court proceeding is taking place.

[79] I would argue, that as between the Minister and the parent, the less intrusive measures serve the Minister, not the parent.

[80] What parent would not consent to a third-party placement in the face of a statement that the Minister may have to take their child?

[81] That may not be the language used by the Minister, but certainly it is the intent of what they mean when they say, more intrusive measure may be needed.

[82] In the face of such a statement, is a parents' consent truly voluntary, is it duress, or perhaps capitulation as suggested by K.B.?

[83] I concur with the following comments made by Justice Baker in **Children's Aid Society of Brant v. C.H.**, [2017] OJ No 2209 (QL), which dealt with an agency who directed the father to disobey the parenting order that existed and said the mother was not to have access with the child. The Court dismissed the proceeding for lack of jurisdiction because the agency failed to bring the matter to Court within five days of their direction.

[84] Justice Baker wrote at paragraph 21:

> At the outset I would say that I am troubled by the Society's minimization of the significance of the right it was asking the mother to forego. The Society characterized that right as "Access" It seems to me that imposing a supervised access regime on a parent who shares custody on an equal timesharing goes far beyond giving up an access right. This was significant state intrusion into parental autonomy and independence by way of state action. It is by now, trite law that the parental right to be free from state intervention triggers the right to fundamental justice pursuant to the Canadian Charter of Rights and Freedoms. To put it in plain language, state intervention by a child protection agency is a big deal….

[85] The Minister, in giving directions to parents and third-parties, do not make orders because quite clearly she lacks this authority. But, the Minister gives "directions" and "recommendations" to follow, often in the face of a valid court order made under the *Parenting and Support Act*, or the *Divorce Act*.

[86] What does the reasonable person in the shoes of the third-party placement understand from the directives given? What does the reasonable person perceive from the circumstances of the safety plan? Objective and subjective factors need to be considered. Who does the third-party perceive to be running the show, the parent, or the Minister?

[87] After a consideration of the various sections of the *Act*, and the principles of statutory interpretation as noted by Counsel, I am of the view that the Ministers definition of a taking into care, will **always** constitute a taking into care.

[88] Further, that K.B.'s definition of a taking into care, **may** constitute a taking into care, but it will depend on: 1) the circumstances of each case, 2) the level of interference by the Minister into the care and control of the child and the child's residence, and 3) it will depend on the thorny issue of consent considered objectively and subjectively.

[89] In my unreported decision referenced earlier, I listed factors relevant in my view to such a determination. I wish now to update that list, after having had the benefit of the very thorough and comprehensive arguments advanced by Counsel.

[90] In my view, these factors assist me in determining if in fact, a taking into care has occurred:

1. Did the Minister express an intent to take the child into care, either to the child, a parent, or third-party who had the child?
2. Was this intent reduced to writing in the form of a Notice?
3. Was there reference to the need of a safety plan to avert more intrusive measures? What were the circumstances of this conversation and the specific details of the plan?
4. Was a plan developed? By whom?
5. Did that plan place restrictions on the parents' care and control of the child, and if so, how much?
6. Did the Minister reference to a parent, guardian or third-party having control of the child, they had a notice of taking into care?
7. Was this notice served on anyone?
8. Who was present at the time the safety plan was developed?
9. Did the Minister request assistance from the Police or the R.C.M.P. to attend with them? Did they attend? Was the parent aware of the police presence?
10. Was the child taken into possession; actual or constructive?
11. What was the intention of the parent? Did they provide valid consent? Did they understand the consequences of what they were being asked to consent to? Did the parent have the benefit of independent legal advice or a written document to outline the specifics of what they were being asked to agree to?
12. Did the safety plan as developed disrupt the parents' physical care and control of the child and would a reasonable person in the parents' position have believed they truly had options?

[91] Turning now to determine if in fact, a taking into care occurred in this case.

Issue three: Was there a taking into care in this case?

Background:

[92] K.B., is the mother of the N., born on February 12, 2019. The child had previously been taken into care shortly after her birth. After the expiration of the timeline, by consent the matter was terminated, with a roll over into another proceeding, by a different judge. That proceeding was terminated three weeks thereafter.

[93] In the previous protection proceeding, extensive services were provided. A parental assessment capacity was completed which identified K.B. as having an intellectual disability. The social workers who engaged with K.B. were aware of her disability.

[94] K.B., is also the mother of another child, who was the subject of a separate child protection proceeding. Upon termination of that matter, custody was granted to the maternal grandmother.

[95] In this proceeding, the Minister's affidavit contained several unidentified sources. I do not rely on, or find those unidentified sources to be credible or trustworthy evidence upon which I can rely for the purpose of making any finding. They do help however to provide context for actions taken by agency workers.

[96] On September 22, 2021, the Minister received three referrals related to K.B.: one from an anonymous source, one from the child's daycare, and the third from the R.C.M.P. The report from the police related to J.G. potentially staying at K.B.'s residence. Concerning observations were made. Concerning sounds were heard from her apartment.

[97] Social Workers, Emma Couillard and Patti Penney went to K.B.'s house on September 22, 2021. They encountered a man, later identified as J.G. leaving on a bike. They spoke with K.B. who denied J.G. had been present. They challenged her on that point. Ultimately, she conceded he'd been there for "five seconds" but left. He was her ex–boyfriend. He came for a cigarette and left.

[98] K.B. denied he had been there for weeks. She denied an incident related to him wielding a knife.

[99] The social workers told K.B. a second time, J.G. could not be around the child. They left, only to return to confront K.B. with information that J.G. had been identified and seen in her window.

[100] K.B. continued to deny that J.G. had been present. They emphasized again that J.G. could not be around the child.

[101] On September 23, 2021, the Minister received a new referral from the R.C.M.P. It related to the previous night. It involved, J.G., K.B., and her child, N.

[102] An incident took place at or near Tim Hortons.

[103] Allegedly, J.G. attempted to stab a man with a knife. He threatened a Tim Horton's employee. He claimed to be possessed by the devil. He heard voices. He believed the police drones followed him. Ultimately, J.G. was arrested. He was charged with numerous offenses, one of which was attempted murder.

[104] Social Workers believed K.B. and her child were present with J.G., during the incident.

[105] On September 24, 2021, Social workers Sarah Harvey and Emma Couillard returned to K.B.'s home.

[106] From K.B., they learned:

- J.G. took her phone for a few days. He'd been hiding around her house. He watched her the day the agency worker visited.
- J.G. threatened her. He followed her around.
- She couldn't call for help without her phone.
- She gave details about the violence she witnessed.
- She confirmed they were dating again. She confirmed he had been at her house for five days prior. They fought.
- She reported he tied the baby monitor out the window. He was afraid they were being spied on.

[107] A safety plan was implemented for N. to stay with L.B., a family friend. K.B. proposed L.B., after some other proposals were not considered reasonable options by the agency.

[108] K.B. was advised by the social worker, "this is a safety plan until the agency can complete the investigation and the agency make further decisions around the child's care." That statement would seem to suggest the decision making was being done by the Minister, not the mother.

[109] The agency decided K.B. was not to have unsupervised contact with her child. This was clearly communicated to L.B., but not necessarily to the mother.

[110] K.B. went to a transition house. She then left the province. She did so because of concerns for her personal safety. She acted on police advice.

[111] On October 5, 2021, K.B. contacted L.B. She reported her agency file was closed. She wanted the child brought to her in New Brunswick.

[112] L.B. contacted the agency to advise of these developments. Ultimately, L.B. chose not to follow the mother's directives.

[113] The agency directed L.B. to immediately notify them if anyone came or spoke about bringing the child to K.B.

[114] On October 7, 2021, the agency told K.B., her file had been reviewed: a court application was being made. The Minister wanted an interim order placing the child with L.B. The child would not be taken into care.

[115] K.B. was served in New Brunswick, with Notice of the proceeding on Saturday October 9, 2021. Monday was the holiday (thanksgiving). Tuesday, she received an unsworn affidavit. Wednesday, she appeared by phone at the first appearance.

[116] After a consideration of the evidence, I make the following findings:

- On September 22, 2021, K.B. was directed not to allow J.G. around her child. K.B. failed to follow that direction. This was a less intrusive safety plan which did not interfere significantly with K.B.'s care and control of the child.
- Agency workers engaged in safety plan discussions with K.B. These discussions took place both before and after the events of September 23, 2021.
- K.B. was told safety planning was an alternative to more intrusive measures. Intrusive measures meant an apprehension or a court proceeding.
- A notice of taking into care was never served on K.B.
- A notice of taking into care was never prepared for K.B.
- The Minister's perception is that a taking into care has not occurred.
- R.C.M.P. were not present when the safety plan was developed.
- K.B., told agency workers she planned to go to Juniper House.

- K.B. told agency workers she planned to take her child N. with her.
- The agency workers were not supportive of that plan.
- K.B. was asked by caseworkers to identify other placements for the child. Certain proposed placements were not consider as reasonable options by the Minister.
- Sarah Harvey and Emma Couillard imposed directions that K.B. could not take her child to Juniper House.
- The safety plan developed which placed the child with L.B., was made in co-operation with the mother, but was directed by the Minister.
- The plan put restrictions on K.B.'s care and control of the child.
- K.B. was the one to suggest L.B.
- K.B. was advised the agency would complete the investigation and "make further decisions around the child's care."
- Ms. Harvey told L.B. what the expectations were for K.B.'s access. She was told it had to be supervised. It is unclear if this was communicated directly by the agency to the mother.
- The child was in the physical care of L.B., who hence forth followed the directions of the agency workers.
- Neither social worker directed K.B. not to see or spend time with her child.
- K.B. advised social workers she did not want to "lose" the child, nor did she want to fight "18 months in court."
- It is the practice and training of the agency workers to direct third-parties to alert the agency if there is any departure from the safety plan.
- The decision about supervision was made by the social workers Ms. Harvey and Ms. Penny in consultation with their supervisor. The mother was not part of the call wherein the decision about supervision was made.
- Ms. Penny called the daycare to direct the daycare to let the agency know if someone came to retrieve the child.
- An agency social worker told the daycare, L.B. would pick up the child, not K.B.

- L.B. and the daycare provider were both advised to contact the agency in the event K.B., or someone on her behalf, attended to retrieve the child. Neither were advised the mother had lawful custody and the right to pick up the child if she chose.

- L.B. was directed to alert social workers, if K.B. planned any unsupervised time with her daughter.

- The Minister through its agency representatives, Ms. Harvey and Ms. Penney, were the ones directing the physical care of the child.

- L.B. was an agent of the Minister, not the mother. Here are examples which illustrate this relationship: L.B. was directed to take the child to the doctor by agency workers, which she did; L.B. was directed to take pictures of the inside of K.B.'s house by agency workers, which she did. The one clear direction given by the mother to L.B. was "bring the child to me in New Brunswick." This direction was not followed by L.B., suggesting that the person who had physical care and control of the child was acting as an agent of the Minister, not the Mother.

- L.B. ignored the direction of the parent who had lawful authority of the child after speaking with the Ministers representatives.

- The Ministers representatives did not tell L.B. to withhold the child,

- such action is too risky. But, neither did they tell her she had no legal right to withhold the child from her mother.

- K.B. was not in control of where N. lived. She capitulated to the directions of the Minister.

- K.B. has an intellectual disability. The Minister representatives were aware she was delayed.

- There were signs that K.B. did not understand the imposition of the safety plan or that it was voluntary. On September 29, 2021, K.B. advised she had not yet received her papers, and it had been five days. She was under the impression the Minister had "messed up." This was a clear sign that K.B. did not understand that the safety plan was something she created and controlled.

- The safety plan developed disrupted the mother's physical care and control of the child.

- No reasonable person in K.B.'s position would have believed she truly had options.

[117] After a consideration of the relevant factors, I am prepared to find as a fact, that the child was taken into care on September 24, 2021. The day the child went to live with L.B. under the guise of the safety plan. I make that finding of fact for the following reasons:

1. The safety plan developed, belonged to the Minister, not the mother. K.B.'s plan was to take the child to Juniper House which was rejected by the Minister. Alternative placements put forth, were again rejected by the Minister. So although L.B. was ultimately suggested by K.B., it is clear that the person who was directing where the child would live was the Minister, not the mother.
2. K.B. was afraid of losing her child. She was confused about the process. She did not have the benefit of legal counsel to ensure she understood and appreciated the consequences of what she was being asked to do or to consent to, in developing a safety plan which placed her child outside her care.
3. K.B. received no paperwork to assist her in understanding the terms of what the plan would be, how long it would last, and how she could opt out of it.
4. K.B. has an intellectual disability, which was known to the workers. They took no steps to ensure she understood what was transpiring. Clearly, she was confused about what was taking place.
5. K.B. acted under duress. I am unable to find that her placement of the child in the care of L.B. was truly voluntary. It is the Minister obligation to prove it was, not K.B.'s obligation to prove it was not.
6. In my view, a reasonable person engaging with the Minister's representatives would believe the Minister was directing custodial issues related to the child, not the mother.
7. An objective reasonable person being told by government authorities responsible for protecting children, that a parent can not be left alone with a child, would think the directions given by that social worker, are mandatory, not optional. An objective reasonable person would assume the social worker had lawful authorization to give mandatory directions. In my view, a reasonable person looking at this situation

would conclude that the Minister was the person in control of the care and custody of the child, through her agent.

8. L.B. had the physical care of the child. She took directions, however, from the agency, not the mother. L.B. was agent of the Minister, she followed their directions, did with the child what they directed, and even entered the residence of K.B. to take pictures which the social workers could not lawfully do without consent of the mother. The one clear direction given by the mother who had lawful custody was not followed: bring N. to me in New Brunswick. This supports in my view, the perception that a reasonable person looking at this situation would conclude the Minister had care and control of this child, not the mother.

9. On October 5, 2021, Ms. Penney advised K.B. the safety plan was still in place. This begs the question, if it were truly a plan imposed voluntary by K.B., how is it up to the Minister to determine if it is still in place? More importantly, how does one withdraw their consent?

10. I accept that Minister representatives did not have the physical care and control of the child. They clearly, however, gave directions to the person who did have it, as to how to interact with the parent, and in so doing, exercised care and control through agency.

[118] Not all safety planning will mean a taking into care has occurred. In the circumstances of this case, however, I have found that it did.

[119] I find as a fact, that a taking into care occurred on September 24, 2021.

Issue four: What implications flow from the finding made?

[120] As a result of the finding made, the Minister was obligated to bring her application within five working days in accordance with Section 39.

[121] She failed to do that, and in my view, I do not have jurisdiction. The Ministers application is dismissed for lack of jurisdiction.

[122] Orders issued at any previous appearances in this matter are set aside.

[123] The child is to be immediately returned to the mother.

Issue five: Placement of the child

[124] Given my finding on the previous issue, I need not address placement of the child.

MICHELLE K. CHRISTENSON, J