SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Mi'kmaw Family and Children's Services of Nova Scotia v. L.M.I., 2013 NSSC 399

Date: 2013-December-12
Docket: SFPA-CFSA-085127
Registry: Port Hawksbury

Between:

Mi'kmaw Family and Children's Services of Nova Scotia

Applicant

v.

L.M.I. and B.L.

Respondents

-AND-

Between:

M.M.I.

Applicant

v.

Mi'kmaw Family and Children's Services of Nova Scotia,
L.M.I. and B.L.

Respondents

Editorial Notice

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

Judge: The Honourable Justice Carole A. Beaton

Heard: November 25-26, 2013 in Port Hawkesbury, Nova Scotia

Written Decision: December 12, 2013

Counsel: Louise Campbell, Q.C. for the Applicant M.M.I.

Lyndsay MacDonald, for the Applicant/Respondent Mi'kmaq Family and Children's Services of Nova Scotia

Sam Moreau for the Respondent, B.L.

Lisa Bevin for the Respondent, L.M.I.

By the Court:

Introduction

[1] This matter came before the Court for a disposition hearing on September 23, 2013 at which time the Applicant, Mi'kmaw Family and Children's Services of Nova Scotia (hereinafter "the Agency") and the Respondents L.M.I. (hereinafter "the Mother") and B.L. (hereinafter "the Father") consented to an Order placing the child E.R.I.M. born June […], 2011 (hereinafter "the Child") in the permanent care and custody of the Agency, pursuant to section 42(1) (f) of the *Children and Family Services Act*, S.NS. 1990, c.5 (hereinafter "the CFSA"). It was agreed the Order for permanent care would come into effect on the adjourned date of November 25, 2013. The purpose in adjourning to the November date to complete the hearing was twofold:

(a) to allow the Mother to present futher evidence on the question of possible access between her and the Child pursuant to s. 47 (2) of the *CFSA*, which the Agency intended to oppose; and

(b) to allow an opportunity for a third party family member (hereinafter "the Family Member") whom the Mother believed wished to come forward, to possibly file an Application for leave and standing to seek custody of the Child, pursuant to section 18 of the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160 (hereinafter "the MCA"). If made the Mother intended to support the Application and the Agency intended to oppose it.

[2] The Family Member did eventually file the MCA Application on October 15, 2013. This decision outlines the Court's determination on items (a) and (b) at conclusion of the matter on November 25-26, 2013.

Background

[3] By way of a brief history, the Child came into the interim care and custody of the Agency under an interim order made July 6, 2011, the Court having been satisfied there were reasonable and probable grounds to believe the child was in need of protective services pursuant to section 39 of the *CFSA*. That order was continued on July 18, 2011 and September 19, 2011. By a Protection Order of October 3, 2011, temporary care and custody with the Agency was continued,

and a further renewal of that Order was made at a disposition hearing on December 8, 2011. At a review hearing on March 12, 2012, the Order was again continued on the same terms. Disposition reviews conducted August 27, 2012 and November 1, 2012 resulted in the same order again being renewed. In late November, 2012, it became necessary for the Justice then having carriage of this file to recuse herself and I assumed carriage of the matter.

[4] On December 10, 2012 at a disposition review hearing, upon consent of all the parties, the Court was persuaded (for reasons that need not be recounted here) that it was appropriate and in the best interests of the Child to terminate the action (previously SFPACFSA-076240) and to permit a "rollover" to commence a new CFSA proceeding (SFPACFSA-085127). On the same day, with consent of all parties, both the protection and first disposition hearings pursuant to the new action were combined. The Child was placed in the temporary care and custody of the Agency, which amounted to a continuation of the child's status quo. At review hearings on March 8, 2013 and June 19, 2013, the temporary care and custody order was continued. To that point, the Child's entire life had been spent in Agency custody.

[5] At the September 23, 2013 hearing this Court was satisfied (for reasons that need not be recounted here) that an Order for Permanent Care and Custody of the Child with the Agency would be necessary, in the best interests of the child, as it was clear neither parent would be able to address the presenting risk factors before the statutory time frame for the action expired in early December, 2013. The permanent care order was to take effect on November 25, 2013 subject to the outcome of the possible events identified in paragraph [1] above.

[6] On October 15, 2013 the Family Member filed a Notice of Application pursuant to section 18 of the *MCA* naming the Agency, the Mother and the Father as Respondents, seeking both leave to apply and custody of the Child.

Issues

[7] The issues before the court for determination are:

(a) Should the Family Member be granted leave pursuant to s. 18 of the *MCA* to apply for custody of the Child, and if the answer to that question is yes, how does the Family Member's Application then inform completion of the final disposition hearing?

(b) If the Court is not persuaded the Family Member should be granted leave and/or custody under the *MCA* what, if any, provision should the court make for access in favor of the Mother under the permanent care order pursuant to section 47(2) of the CFSA?

[8] The Agency opposes the Family Member's MCA Application, which is actively supported by the Mother. On September 23 the Agency advised the Court it would oppose any access between the Mother and the Child under a permanent care order, but subsequently modified that position, as will be discussed later herein. The Father has been a passive participant in the September and November proceedings to the extent that he did not attend Court but had Counsel appear on his behalf on each occasion to maintain a "watching brief" and submit he supports the position of the Mother in relation to all matters. In addition, on November 25, L.L.B. who is not a party to this action, addressed this Court pursuant to section 36(4) of the *Act* to confirm that she and her family have had the care of the Child throughout the Child's life and if and when the *CFSA* court process is complete it would be her intention to seek to adopt the Child.

[9] Section 18 (2) of the MCA governs the Family Member's Application:

> 18(2): The court may, on the application of a parent or guardian or, with leave of the court, a grandparent, other member of the child's family or another person make an order:
>
> (a) that a child shall be in or under the care and custody of the parent, or guardian or authorized person; or
>
> (b) respecting access and visiting privlidges of a parent or guadian or authorized person.

The Applicant Family Member's Evidence

[10] The 21 year old Family Member, a sibling of the Mother, testified to having resided in foster care since age 10 and having recently come out of permanent care in January 2013. The Family Member has resided with an opposite-gender romantic partner in the same location for the past two years. The Family Member has completed one year of university undergraduate studies and intends to return to studies in the future. Since July, 2013 the infant D.M., (hereinafter "the Infant") who is the half-sibling of the Child of these proceedings, has been in the care of the Family Member under the auspices of an Order for temporary care and custody of the Infant secured by the Agency in

July, 2013 in a separate CFSA proceeding. The Infant, born in July 2013, was 4.5 months old at the conclusion of the subject proceeding.

[11] The Family Member has a history of seasonal employment, and presently collects government assistance. The Family Member testified to having confirmed with a local daycare that the Child could attend there if and when residing with the Family Member, should the Family Member return to work and/or studies. A letter put before the court from the Family Member's recently acquired physician confirmed that physician would also be prepared to assume medical care of the Child if necessary.

[12] The Family Member has no criminal record and testified to enjoying a close relationship with both the Family Member's former foster family and birth family. If permitted to care for the Child, the Family Member expressed an intention to use a "time out chair" rather than physical discipline and expressed the view that the two-and-half year old Child would be "easier" to care for, relative to the Infant currently in that person's care, because the Child walks and "is mobile".

[13] The Family Member has cerebral palsy and is confined to a wheelchair. The Family Member described the details of providing day-to-day care to the Infant. If placed with the Family Member, the Child would share the bedroom currently occupied by the Infant. The Family Member did not envision any particular difficulties in caring for the Child in addition to the Infant.

[14] The Family Member's two bedroom apartment has windows which are "…high and cannot be accessed by a small child", and "there is a patio door in my apartment which will be locked at all times," with an intention to "…child proof the door knobs leading out of my apartment."

[15] On cross examination by counsel for the Agency, the Family Member confirmed that without Agency approval the Infant had been transported to a different community on the day immediately prior to continuation of the proceedings in November. The Family Member also acknowledged the Infant had been transported to that same location in October, 2013 without Agency approval. The Family Member also confirmed that on the first day of the adjourned hearing, as the Family Member was giving evidence, the Infant was in the care of an individual not approved in advance by the Agency, although the Family Member was unaware that same person was someone about whom the Agency had previously expressed child welfare concerns. These events were later corroborated in the evidence offered by the Agency.

[16] The Family Member acknowledged only "limited contact" and no prior involvement with the Child except on several previous occasions when the Family Member and others had been present during the Mother's access visits. The Family Member testified to being unaware that it was possible to request visits with the Child through the Agency.

[17] The Family Member testified to being aware of Agency concerns about the Family Member having let the Mother have past unauthorized access to the Infant, which the Mother later confirmed in her evidence. The Family Member maintained the visit would not have occurred if the Family Member had believed it was inappropriate or not in the best interests of the Infant, and if the Mother ever became a threat to the Infant then the Family Member would take action to correct the situation.

[18] The Family Member testified to understanding the responsibility to do whatever might be in the best interests of the Child, even if it meant the Mother might not have access with the Child. The Family Member described feeling sibling love for the Mother, but was confident there would be no difficulty standing up to the Mother in the event they disagreed regarding the Child, stating: "…this is a child we are talking about, not a sibling issue". The Family Member reported a willingness to listen to the Mother's opinion but predicted remaining firm in whatever the Family Member believed to be in the Child's best interests. The Family Member was unwilling to accept the documented history of violence by the Mother, speculating any violence would only have occurred if the Mother had been required to defend herself.

[19] The Family Member described having applied for and received approval to act as a kinship foster parent for another child relative in the spring of 2013, which placement ultimately did not occur. Subsequently, in preparation for caring for the Infant, the Family Member had secured a criminal record check, taken some training, participated in a home assessment and prepared various paperwork. The Family Member took time away from studies to arrange to be able to care for children who might come into her care (i.e. financial, employment, daycare and medical arrangements).

[20] In July, 2013, the Agency agreed to place the Infant with the Family Member on the Family Member's understanding that eventually other family members were going to come forward to propose plans of care for the Infant (which did not happen). The Family Member reported periodic visits by social workers for both the Infant and the Mother.

[21] The Family Member understood the Agency had not approved the Family Member's request to assume foster care of the Child in August, 2013 because the Agency was intending to secure a permanent care order and expecting the current foster parents to seek adoption. The Family Member confirmed that if the other child relative were to be placed in the Family Member's care in the future, that did not diminish the present plan to assume custody of and financial responsibility for the Child.

[22] The Family Member testified without prompting as to an assumption there would be an attachment between the Child and the present foster family that would require giving the Child an opportunity to slowly transition from the foster family placement to the home of the Family Member, and by extension the Child's biological family, so as not to frighten the Child. The Family Member spoke in favor of arranging ongoing contact and visits between the Child and the present foster family, to prevent the Child from feeling lonely.

[23] The Family Member told the Court the current Application was not filed in advance of the September 23, 2013 court hearing because (i) the Family Member believed it would not be possible to have the Child, according to the Agency, and (ii) the Family Member was told there was no need to attend Court on September 23, although the source of that information was not identified. The Family Member was aware another family member had expressed an intention to apply for custody of both the Child and the Infant, and also that on October 16 (the day after the Application was filed) the Mother had told the Agency that the other family member intended to make such application.

[24] The Family Member testified to being aware the Mother might seek to have both the Child and the Infant returned to her care at some future time; the Family Member suggested these were two separate cases and if the Mother was successful in having the Infant returned to her care, then the Family Member *might* contemplate the Child also being returned, if it could be shown to be in the Child's best interests. The Family Member believed that if the instant Application was to be denied, there was the possibility that another family member would apply for custody of both the Child and the Infant.

[25] The Family Member testified to being aware of the Mother's previously expressed concerns about the Family Member needing assistance to care for the Infant. Notably, the evidence of the Agency did not identify concerns about the Family Member's abilities. The Family Member testified to being unaware that the Mother was concerned the Family Member was becoming too attached to the Infant, but noted that such would be "understandable". The Family Member

was also aware the Mother was upset when the Family Member's partner cut the Infant's hair, which was later corroborated in the Mother's evidence.

[26] The Family Member is aware the Child's foster mother teaches the Mi'kmaw language and the Child is learning to speak Mi'kmaw in that home, a practise the Family Member, who also speaks the language, would intend to continue if caring for the Child.

[27] Overall, the Applicant Family Member presented as an articulate, well intentioned and responsible individual, also prepared to be frank about those aspects of the evidence that shed perhaps a more negative cast on the Applicant's position.

The Respondent Mother's Evidence

[28] The Mother confirmed all four of her children are in the custody of the Agency and only the two older children have ever lived with her. She confirmed that her Affidavit sworn October 24, 2013 (Exhibit 4) is the *only* Affidavit she has filed since proceedings concerning the Child began in July, 2011. She confirmed she has never asked for a family case conference concerning the care of the Child. The curious rationale for the same offered by the Mother was that she "didn't have time before [the child] was born", during which period she had been intending "to go to a private court".

[29] The Mother testified in support of the Family Member's Application, clarifying that when she told the Agency on October 16, 2013 that she did not support the Application, she meant she did support the Child being with the Family Member, but had understood at an earlier meeting that the Infant would leave the Family Member's home to move to the community where the Mother resides. The Mother then contradicted that clarification, stating she had not supported the Family Member's Application when speaking to the Agency on October 16 because "… we [the Mother and the Family Member] had misunderstandings on Thanksgiving weekend…".

[30] The Mother corroborated the Agency evidence of social worker, Sean O'Neil (Exhibit B, page 4, paragraph 11) that she had previously reported to him she does not use street drugs and it has been over a year since she consumed alcohol. Contrary to that, the Mother agreed she had recently reported to other Agency workers her recent consumption of alcohol. The Mother then explained that what she had told Mr. O'Neil was incorrect, because she had failed to focus or pay attention to what was being discussed with him

during that conversation and had simply agreed with whatever he stated because she was not paying attention. The Mother then told the Court that in fact she had used "weed" but it was over a year ago, and that she used alcohol during the summer of 2013, during an incident when she was drunk and fell down a set of stairs. Later, during cross-examination, the Mother was confronted with and conceded the accuracy of the statement that she consumed alcohol with the Father as recently as October, 2013, later corroborated by the Agency's witness.

[31] On the issue of drug and alcohol use, the Mother contradicted herself both in her evidence before the Court and in what she chose to reveal to various Agency personnel. In addition, her evidence that she did not pay attention at a meeting that could impact on the future of her children was troublesome. In view of such carelessness, it was ironic to later hear the rather assertive evidence of the Mother in regard to her "right" to dictate to individuals caring for the Child or the Infant her instructions about haircuts for the children.

[32] When queried about her view of the Family Member's evidence that person would do what was in the Child's best interests even if it meant refusing the Mother access or taking a position different from the Mother on a particular subject, the Mother avoided the suggestion by replying only that she had no position on that matter and she supported the Family Member's Application. On cross examination by counsel for the Family Member, the Mother testified she understood the seriousness of the Family Member having to abide by any court order that might dictate conditions regarding the Mother's contact with the Child.

[33] The Mother is currently in her third residence since October 2013, now residing with the Father, with whom she continues a physical relationship. The Mother reported she had recently been told by an unidentified Agency social worker that she was to have a weekend visit with all four of her children, however the visit was cancelled because the family member presently having care of her two oldest children (who are in permanent care) reported to the Agency that the home of the Mother and the Father was "a mess" and smelled of alcohol, which the Mother denied. Inexplicably, she also argued with Agency counsel at some length during cross-examination regarding the discrepancy between the identification of paternity on the Child's birth registration and the results of a paternity test, insisting contrary to documentary evidence before the Court (Exhibit 2, Tab 3) that the paternity test had come before the birth registration.

[34] The Mother confirmed that at the time of the September 23 hearing she was uncertain whether other relatives or the Applicant Family Member might come forward with a plan to care for the Child, but she was prepared to support any one of those individuals. She also confirmed that in the event the Family Member proves unsuccessful in the instant Application then she would expect to support another relative should one apply for custody of the Child. The Mother confirmed her plan is ultimately to have all of her children returned to her care and she wants the decision in this matter to serve to prevent the Child from being adopted.

[35] With respect, the cumulative impact of both the Mother's demeanour and the content of her often contradictory and vague evidence left the impression of one who presented on alarming air of casualness, boredom and nonchalance given the serious subject matter at hand.

The Agency's Evidence

[36] Sean O'Neil, a child protection worker with 29 years' experience, who currently acts as a supervisor with the long term protection team, testified on behalf of the Agency. The Agency's position is that the Application is contrary to the best interests of the Child, who requires permanent placement that the potential for adoption should not be further delayed. The Agency believes the current foster parents will "probably" seek to adopt. Mr. O'Neil stated the Agency is prepared to facilitate continued sibling access and provide some supervised access for the Mother, and if adoption took place access to the Mother would then be in the discretion of the adopting family.

[37] Mr. O'Neil testified that during a home visit with the Mother on October 16, 2013 she told him she would like to have custody of all of her children, that she did not support the placement of the Infant with the Family Member because the Family Member was getting too attached to the Infant, and that another family member was planning to apply for temporary care of both the Child and the Infant.

[38] Mr. O'Neil testified that since October, 2012 each risk conference held by the Agency has reconfirmed the decision made at that time to seek permanent care of the Child. When the Agency became aware in August, 2013 of the Family Member's request to provide a foster home for the Child, two further August risk conferences identified that the Agency's position for permanent for care should continue.

[39] On cross-examination Mr. O'Neil denied the suggestion that the Agency has viewed the child protection proceedings since October, 2012 to be an attempt by the Mother to delay permanent care. He stated the Agency continued with its position developed in October, 2012 but had there been positive developments or changes the Agency would have followed up on them. When challenged that the Agency failed to treat the Family Member's suggestion to be a foster placement as "serious", Mr. O'Neil responded that he had advised the Family Member of the Agency's position regarding permanent care and custody and suggested that person contact legal counsel, following which the Agency did not change its position regarding permanent care and the Family Member did not follow up on their expression of interest. The Agency's position in August was the Child should retain the sibling relationships, stability and sense of security that the only home the Child has known (the foster home) could provide, given the September 23 hearing date was approaching.

[40] Mr. O'Neil then suggested that during July, 2013 the Family Member identified an interest in caring for the Child and he stated, "I guess I could have redirected [the Family Member] to the foster care support program", but confirmed the Agency would not then have supported the Child moving to a different foster care placement at that late point in the proceedings. On re-direct Mr. O'Neil clarified that the proposal received from the Family Member in August, 2013 as discussed in two August risk conferences was not to have the Family Member assume custody of the Child as is now sought, but rather to move the Child from the current foster care placement to a foster care kinship placement with the Family Member.

Issue No. 1 – Should Standing be Granted?

[41] Regardless of the purpose for which standing is sought-here it is placement in a disposition hearing - the paramount focus must always be on the best interests of the child.

[42] In *Nova Scotia (Minister of Community Services) v. S.S.*, 2012 NSSC 293, wherein the Court was asked by maternal grandparents to be added as a party to a child protection proceeding, Jollimore, J. noted "Family court rule 5.09 governs those who seek to become a party in proceedings pursuant to the *Maintenance and Custody Act* and pursuant to the *Children and Family Services Act*" (paragraph 11), and canvassed caselaw regarding the test to grant standing:

14. The *Maintenance and Custody Act* and the *Children and Family Services Act* are very different pieces of legislation: the former governs private disputes while the latter regulates the state's intervention into families' private lives. In various decisions (*Gray*, (1995) 137 N.S.R. (2d) 161 (FC) at paragraph 191 and *B.(R.) v. Children's Aid Society of Halifax*, 2003 NSCA 49 at paragraphs 30 and 44) the existence of different tests for standing has been identified. In *B.(R.) v. Children's Aid Society of Halifax*, 2003 NSCA 49 at paragraph 44, Justice Chipman said that the test of compelling circumstances (which applies when an application is made by a non-party with no prior involvement in the child's protection proceeding, after a permanent care order has been made) "is to be distinguished from that appropriate for granting standing in custody proceedings or child welfare proceedings prior to a final disposition order being made".

15. At the same time, there are some commonalities to be found in the standing test. The factors identified at paragraph 189 by then-Judge Legere in *Gray*, (1995) 137 N.S.R. (2d) 161 (FC) were drawn upon by Justice Bateman at paragraph 51 and52 of her reasons in *C. (I.) and C. (H.R.) v. Children's Aid Society of Shelburne County*, 2001, NSCA 108 in identifying areas which supported the application by foster parents to be joint as parties. It's worth noting that in applications such as that in *B.(R.) v. Children's Aid Society of Halifax*, 2003 NSCA 49, it's recognized that an application for party status can't be considered independent from the application for leave to terminate the permanent care order. Here, of course, there is no permanent care order.

16. In *Children's Aid Society of Halifax v. C. (T.)*(1996), 152 N.S.R. (2d) 277 (FC) Judge Daley added the mother's half sister and her husband (the Ms.), as parties at the disposition stage of a child protection application. His Honour said, at paragraph 7, that the *Children and Family Services Act* intends and requires that all reasonable alternatives for a child's care be exhausted before a child is permanently removed from its parents. This is accomplished by the Minister searching out those who might provide a placement (relatives, neighbours or community members) or by an individual or individuals coming forward. His Honour continued:

> "There needs to be more than just familial connection. There must be sufficient evidence that the person, who is seeking leave, has a reasonable alternative to the permanent removal of the child from his family. In deciding if there is a reasonable alternative, is the question of the welfare of the child: is there a reasonable possibility, when compared to the other alternatives, that the welfare of the child may be enhanced by granting leave and hearing the evidence of the third party"?

17. Like *C. (I.) and C.(H.R.) v. Children's Aid Society of Shelburne County*, 2001 NSCA 108 and *Family and Children's Services of King's County v. K.D.,* 2006 NSFC 8, Judge Daley acknowledged, again at paragraph 7, the assistance of then-

> Judge Legere's decision in *Gray* (1995) 137 N.S.R. (2d) 161 (FC) at paragraphs 189-190 in identifying "some of the questions to be explored".
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> 18. In *B (R.) v. Children's Aid Society of Halifax*, 2003 NSCA 49 at paragraph 39, Justice Chipman said that "Having regard to the Statute and the case law, particularly C. (I.), I am satisfied that the test for permitting standing and leave to one who is not a party and without prior involvement in the proceedings is more stringent than that applied by Dellapinna, J. i.e. the "reasonable alternative" test. His Lordship was clearer at paragraph 44, the compelling circumstances test "is to be distinguished from that appropriate for granting standing in custody proceedings or child welfare proceedings *prior* to a final disposition order being made." (emphasis added)

[43] The Family Member must persuade this Court compelling circumstances exist that present a reasonable possibility that the welfare of the Child might be enhanced by granting leave to consider the possibility of the Family Member assuming care of the Child.

[44] While there was minor confusion on the evidence as to dates, I am satisfied that in the spring of 2013, the Family Member applied to be a placement for another child relative and in July 2013 the Family Member agreed to provide a temporary placement for the Infant. In August 2013 the Family Member expressed a desire to act as the Child's foster parent. No family conference was ever sought, nor potential for family custodial placement of the Child raised until September 23, 2013 when the Family Member's name was raised by the Mother in Court without the Family Member present. By contrast, the Agency's position has been plain to all concerned since October 2012, in anticipation of the December 2012 disposition hearing, (which ultimately did not occur) and then maintained in each subsequent appearance before the court to date. I accept the evidence of the Agency to the effect that this continuation of its position has not been merely rote, but rather was maintained after successive risk conferences identified no reasonable alternative was available.

[45] The Family Member was critical that the Agency's plan for permanent care for the Child has never wavered since October, 2012 despite the fact the Family Member contacted the Agency in August 2013, at a time when it was becoming clear the Mother and Father would be unable to address the Agency's concerns. Counsel for the Family Member likened this to the situation that was before the Court in *Children's Aid Society of Inverness/Richmond v. C.S.L., D.R. and E.R.*, 2009 NSSC 207. In that case, seven months prior to the end of the timeline the Agency identified it would seek permanent care of the child, and while the

maternal grandmother identified her desire to assume case, she failed to file a formal plan.

[46] In her decision, Leger-Sers, J. discussed the difference between an Agency needing to avoid solicitation of family members, and giving full consideration to expressions of interest:

> 299. The message in the legislation is very clear as to the duty to consider family placement before placement with strangers, to respect the child's need to be connected to their community and to address the principles that intervention proceeds in sequence from least intrusive to more intrusive.
>
> 300. The Agency relies on the fact that the grandmother did not produce a written formal plan as a result of the court's direction. The Agency worker indicates that they do not solicit family plans. Family members must come forward themselves. Part of the reason for this is the belief that soliciting family members creates undue stress on family members. This stress might result in creating expectations and pressure on the family members to participate which ultimately break down when they cannot live up to these expectations. This could result in the possibility of another lost to the child.
>
> 301. Failure to give full consideration for family placement contravenes the spirit and the intent of the child protection legislation. It avoids adequate consideration of the cultural linguistic background of the father's family. Failure to investigate possible options does not incorporate an understanding and empathy with respect to the obstacles to presenting a written plan to a Court by a person who is unfamiliar with and unsophisticated regarding court procedures.

[47] In that case the Court was satisfied the paternal grandmother was present and desirous of playing a significant role, and noted the Agency had declined to accept an assessor's recommendations. The court concluded, after hearing the paternal grandmother testify, that she ought to have been considered as a placement option and that the Agency would not do so. The Court noted:

> 332: Decisions relating to custody of children are more than an evaluation of past history and findings of fact relating to the conduct of parents and capacity to parent. They are prospective in nature. They involve an element of uncertainty because the child's future circumstances are unknown. It is a somewhat artificial weighing of the best interests of a child within undefined future possibilities.
>
> 333: Before moving in that direction, the Agency and the court, independent of one another, must with due diligence seriously consider the factors outlined in Section 3(2) within the context of the objects of the *Children and Family Services Act* before handing this child over to the agency for placement in the global community.

[48] In my view, the circumstances in the instant case are very different. The Agency became aware of the Family Member's expression of interest to act as a *temporary* foster placement only, approximately one month prior to the disposition hearing on September 23, 2013. The Family Member waited until October 15, 2013 to file her Application, only five and a half weeks prior to the hearing on November 25-26, 2013 which was identified as necessary on September 23 to allow the parties time to consider further the question of access for the Mother and her assertion that a family member wished to put forward a plan. This timeline is much shorter than the one in *C.S.L., D.R., and E.R.*, and the nature of the Family Member's August 2013 overture or expression of interest was in the context of offering to assume foster care, not custody of the Child, one with whom the Family Member has no past connection. The evidence does not lead me to conclude that in this case the Agency was remiss in its duty or the Agency failed to place the appropriate priority on family placement.

[49] This case is in line with the comments of Saunders, J.A. in *Children's Aid Society of Halifax v. T.B.*, 2001 NSCA 99:

> 53. The Agency is not required to investigate each and every family placement proposal. The burden of persuasion is upon those advocating a competing plan to advance the most compelling and sensible alternative they can muster.

The Agency is not to be faulted for not pursuing a tenuous and last minute "plan" that to all appearances was aimed only at changing the foster care arrangements until this Application was made.

[50] The Mother submitted this Court can be confident that any order made would be respected by the Family Member and would focus on the best interests of the Child. In my view, the evidence also justifies concern as to whether the Family Member would be able to maintain respect for any court order that might impose conditions on the Mother. Although the Family Member's intentions seem sincere, it remains very questionable whether the Family Member could resist pressure from the Mother, especially given the Mother's refusal to take a position regarding the Family Member's expressed intention to overrule the Mother if necessary, as discussed earlier herein. Admitted breaches of Agency instructions also create concern about the Family Member's ability to comply with any conditions in the future. The evidence certainly establishes the Family Member's home as being a culturally appropriate one however the Family Member is virtually a stranger to the Child.

[51] I agree with the Agency submission that while the Family Member has overcome challenges presented by that person's family of origin and physical disability, the generous offer to parent the Child is naïve, as illustrated in the Family Member's unrealistic evidence that it would be easier to care for the Child than the Infant, which underestimates the task that would be presented by simultaneously parenting both, possibly compounded if the prior approval to parent the third child relative comes to pass in the future.

[52] The Mother's evidence persuades me her expression of support for the Family Member is ultimately to serve her own goal, which she made plain, being the eventual return of the Child- indeed all four of her children- to her. The Mother has failed to place the Child's interests ahead of her own.

[53] The Family Member may not intend to thwart the Agency's efforts, but there can be no doubt that allowing the Application for standing will have great potential to interfere with permanency for the Child. While it would be improper to weigh the merits of the potential adoptive parents, currently the foster parents, against those of the Family Member, it cannot be ignored that the Child has had a stable placement with the same foster family since birth and throughout the course of this litigation, which has now run its statutory course for the second time. The Application is, as characterized by counsel for the Agency, "a hurried attempt to prevent the adoption of the Child". With respect, it is too little, too late in the timeline of the protracted litigation over the Child.

[54] The plan put forward by the Family Member is not at all reasonable under all of the circumstances. "By 'reasonable' I mean those proposals that are sound, sensible, workable, and well-conceived and have a basis in fact": per Saunders, J.A. at para 30 of *Children's Aid Society of Halifax v. T.B* (supra). The evidence does not establish, on a balance of probabilities, the presence of any compelling circumstances that could create the possibility that the welfare of the Child might be enhanced if standing were permitted.

[55] Granting the Application could increase the potential for conflict between the Family Member and the Mother, which increases the potential for risk to the Child. The Family Member has a tenuous connection to the proceedings in that her relationship to the Child is only a biological one. This begs the question as to how the Applicant could be well-positioned to address the Child's needs when they are strangers? The Child is entitled to permanency and stability, and while adoption is not guaranteed, granting the Application for standing could indeed potentially serve only to put the Child in a further "holding pattern".

[56] In summary, regardless of the motivations of either the Family Member or the Mother in this Application for standing, to permit it would, in my view, compromise the best interests of the Child. The whole of the evidence does not support a conclusion that it would be appropriate, reasonable or justified to permit the Applicant standing in this proceeding. The ill-considered plan serves only to advance the Mother's goals, not the best interests of the Child. It is in the Child's best interests to deny leave to the Applicant.

[57] The Application is therefore denied, and the permanent care order is confirmed.

Issue No. 2 – Access by the Mother

[58] In the September 23 hearing the Agency objected to any continuation of access between the Mother and the Child beyond the date of the coming into effect of the permanent care order on November 25.

[59] The Mother advised the Court she would argue for access on the November 25 date. Subsequently, the Agency represented to the Court in its Brief (filed November 20) that it had reconsidered, and on the basis of the principles articulated by Farrar, J.A., in *P.H. v. Nova Scotia (Community Services)*, 2013 NSCA 83 as to "special circumstances" referenced in s. 47 (2)(d) of the *CFSA* that might rarely justify access after an order for permanent care, the Agency agreed (page 4-5 of its Brief) that in this case special circumstances are found in:

> 21: "… an expectation and good likelihood that the child's current approved foster parent will adopt the child. The current foster parent knows the identity of the child's natural parents and of the child's siblings in Agency care. The current foster parent may choose to provide or facilitate some post-adoption contact with the siblings and with the natural parent(s).
>
> 22. The Respondent (Mother's) Agency-supervised access with the Child has been rather frequent and regular.
>
> 23. Reduced and reducing supervised access under the permanent care order could be part of a transition for this child…
>
> 24. The Agency's priority is successful adoption placement.
>
> 25. The Agency thereby seeks full discretion with respect to the terms and conditions of supervised access under the permanent care and custody order." (page 4-5)

[60] The Agency reiterated this position during closing submissions. The Mother's Pre-Hearing Brief of November 20 requested "an Order for access" (page 27), but the issue was not raised in final submissions.

[61] As it appears the Agency and the Mother are essentially agreed on the question of post - permanent care access, I see no jeopardy for the Child in permitting access between the Mother and the Child at times and upon terms and conditions as the Agency, in its sole discretion, may determine to be in the best interests of the Child from time to time.

[62] Counsel for the Agency shall prepare the Orders pursuant to the *CFSA* and *MCA* proceedings giving effect to this decision, to be consented to as to form only by counsel for all parties.

Beaton, J.