SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: *Nova Scotia (Community Services) v. P.F.*, 2017 NSSC 43

Date: 20160105
Docket: SFSNCFSA-95073
Registry: Sydney

Between:

Minister of Community Services

Applicant

v.

P.F. and A.J.

Respondents

Judge:	The Honourable Justice Robert M. Gregan
Heard:	September 12, 20, 27, 28 and November 1, 2016
Oral Decision:	January 5, 2016
Written Release:	February 21, 2017
Counsel:	Danielle Morrison, Counsel for the Applicant, MCS Patrick MacMillan, Counsel for the Respondent, P.F. Jill Perry, Counsel for the Respondent, A.J.

Introduction:

[1] B.F. has been described as a wonderful little boy who is very much caught up in his imaginary world. Although being only seven years of age, perhaps being caught up in an imaginary world is a positive thing given the turmoil and chaos that has surrounded him in his young life. This of course, has not come without its difficulties. As was opined by Dr. Reginald Landry, who prepared a Parental Capacity Assessment, it will require significant resources to parent B.F.

[2] When B. F. was taken into care of the Minister in May of 2015, he was five years old and weighed 132lbs.

[3] The Minister has been involved with B.F. and his mother for a considerable amount of time under a voluntary arrangement until April 2015 when the Minister says B.F's mother, P.F. bit him on the arm.

[4] The Minister asks this Court to find on a balance of probabilities that P.F. bit her son on the arm. The Minister also seeks a finding that there was neglect in caring for B.F. which

included life-threatening weight gain, as well as other issues. The Minister also relies upon the Parental Capacity Assessment of Dr. Reginald Landry that concluded P.F. does not have the capacity to parent B.F.

[5] The Minister also asks that because of these issues, that I place B.F. in permanent care.

[6] Finally, the Minister also seeks a provision that there be no access by either parent P.F. or A.J.

[7] P.F. the mother of B.F. denies biting her son and asks that I find the Minister has not proven these allegations. P.F. denies being neglectful in the caring for B.F. and asks that this claim be dismissed.

[8] She says as well that she has insight to properly care for her son B.F. and asks that her son be returned to her care with the support of her grandmother, A.F.

[9] A.J., B.F's biological father, supports the Minister's position and consents to permanent care and custody ordered without access.

Issues:

[10] The issues I must consider are:

1) **Has the Minister, on a balance of probabilities provided, clear, convincing and cogent evidence that P.F. physically assaulted her son, B.F. by biting him on the arm.**
2) **Has the Minister proven that B.F. has suffered neglect while in his mother's care by failing to address the issues of:**

    I. **Weight gain and health issues;**
    II. **Inadequate living conditions; and**
    III. **Lack of insight and parental capacity**

3) **If I am satisfied that the above substantial risks have been proven, should B.F. be returned to his mother, or be placed in the permanent care of the Minister without access.**

I will now canvass the History of the Proceedings.

History of the Proceedings:

[11] I do not intend to review all of the proceedings in this matter, but will highlight certain portions.

[12] There was a Notice of Child Protection Application filed February 24, 2015. It sought findings under Section 22 (b) and

(g) of the *Children and Family Services Act*. There was a Notice of Motion filed May 5, 2015, seeking an amendment of the Protection Application to include the finding pursuant to section 22 (2) (a).

[13] At the initial court appearance of March 2, P.F. appeared with counsel, Ms. Morrow and consented that there were reasonable and probable grounds to believe B.F. was in need of protective services and an order was granted.

[14] On March 25, at the 30-day hearing, again, there was consent to finding reasonable and probable grounds and Ms. Morrow, on behalf of P.F., took issue with the content of the Affidavit of the Minister but there was consent and an order was issued.

[15] At the May 6, 2015, court appearance, the Minister was seeking to amend the proceedings and seeking a finding pursuant to section 22 (2) (a). The court made a finding of reasonable and probable grounds and an order issued placing B.F. into temporary care and custody of the Minister. B.F. has been in the temporary care and custody of the Minister since that time.

[16] At the time of being taken into care, B.F., then age 5, weighed 132 pounds. On May 20, 2015, there was a consent finding pursuant to section 22 (2) (b) and (g) and there was no consent to section 22 (2) (a) finding. A court date of August 17, 2015, was set for disposition and protection hearing on the section 22(2)(a) allegation.

[17] On August 17, the parties appeared and the matter was adjourned until August 21, 2015. On August 21, there was a consent to disposition wherein all parties consented to an adjournment of the section 22 (2) (a) finding. The court agreed to this approach but made it clear to the parties, the preference would have been to have had a hearing to deal with the 22 (2) (a) prior to disposition. There were then a number of subsequent adjournments while awaiting a Parental Capacity Assessment.

[18] On March 11, 2016, the matter was adjourned from March 7 to allow the parties to review the Parental Capacity Assessment. The Minister advised it was seeking permanent care and custody but no Plan of Care was on file. P.F. was not present but her counsel, Ms. Morrow was.

[19] On April 1, 2016, Ms. Morrow advised there was a break down in the solicitor-client relationship and requested to withdraw as counsel. The court confirmed the deadline for the hearing in this matter was August 21, 2016. On May 10, 2016, Ms. Morrow was permitted to withdraw as counsel for P.F. and the matter was adjourned to May 30.

[20] On May 30, 2016, P.F. was not able to obtain counsel. Ms. Perry for A.J. confirmed consent to permanent care and custody and was taking no position on the section 22 (2) (a). Hearing dates were set for August 23 to 29, 2016 with a pre-trial for July 19 for the purpose of determining the status of counsel for P.F.

[21] On July 19, P.F. was still unable to obtain counsel. On August 22, the Court received a request for an adjournment by Mr. McMillan, new counsel for P.F. who had just been retained. All parties consented to the adjournment request and the Court recognized the importance of P.F. having counsel given the gravity of the proceedings and noting the consent of counsel to the adjournment. The court provided the earliest possible dates available from September 12 to October 4, 2016.

[22] Hearing dates were set for September 12, 20, 27 and 28. There was a request for amended dates due to the Minister's witnesses, Dr. Reginald Landry and Mr. Mugford no longer being available. October 3 and 4 dates were released and additional dates of November 1 and 2 were set. The court heard evidence over those dates and the hearing concluded on November 2.

[23] Given the number of days of evidence and that they were spread out; given not only that there was issue with permanent care and custody but also that the court had to consider the section 22 (2) (a), the court requested written submissions to be filed in November and December and a decision date of today's date.

[24] The court heard from a number of witnesses and a number of exhibits were entered. I have listened to the witnesses and reviewed the exhibits. I will not be referring to all the evidence in my decision, and will highlight the evidence required to give effect to my decision. I will now go through the evidence as it

pertains to each of the issues. I will also where appropriate set out the relevant legislation and case authorities.

Issue # 1: Did the Minister prove that B.F. bit her son?

Position of the Minister:

[25] The Minister seeks a finding under Section 22(2)(a) based upon a single incident which the Minister says occurred during the week of April 26, 2015. In support of this position, the Minister relies upon the hearsay statements of the child to his teacher, Kara Doyle, and others, as well as an observation of "bite marks" by worker Renee Wilson.

Position of the Mother:

[26] P.F. has consistently during interviews with the workers and in her evidence in these proceedings steadfastly denied biting her son. She acknowledged a mark on her son's arm but denied that it was a bite mark. She said that it was likely from playing a game called microwave, or giving B.F. "raspberries". P.F. also said that her son sometimes hit himself or ran into doors. She

also suggested that if there was a bite mark, it could have been caused by other students.

Position of the Biological Father:

[27] B.F.'s biological father, A.J. takes no position on the Section 22(2)(a) allegation.

[28] Because we are dealing with out of court statements of a child, a *Voir Dire* was held regarding statements made by B.F. to a number of individuals. At the conclusion of the *Voir Dire*, I found the statements made by B.F. to his teacher, Kara Doyle, were admissible. Following that ruling, the Respondent, P.F., through her counsel, Mr. MacMillan, did not object to other statements made by the child to others being tendered as evidence, and counsel agreed that evidence from the *Voir Dire* could be tendered into the trial proper.

[29] At the *Voir Dire*, Ms. Doyle testified as follows:

- There were approximately 20 children in her class as well as an adult teacher's assistant.
- During the week of April 26th, 2015, she had a conversation with student, B.F.
- The conversation took place in the classroom.

- Ms. Doyle noted a mark on B.F.'s arm and asked what happened.
- B.F. said his mother did it because he didn't do his homework.
- Ms. Doyle said visually it looked consistent with what B.F. had reported when describing the mark.

[30] Ms. Doyle told the principal who advised Ms. Doyle she had a duty to report the incident and she reported it to Family & Children's Services the next day. Ms. Doyle said she did not make notes because she wanted it to remain an anonymous referral and avoid conflict because she had to continue to work with the parents. Asked about B.F.'s demeanour when describing the event, Ms. Doyle said that B.F. sounded "matter of fact".

[31] Ms. Doyle couldn't recall if B.F. was in class or was pulled aside for the conversation. It was also Ms. Doyle's understanding that the mark on B.F.'s arm had been noticed by a T.A. the day before it was reported to Ms. Doyle and that B.F. had given the same explanation to the T.A. She noted that B.F. was wearing a t-shirt and the mark was visible.

[32] Nancy MacIsaac, a social worker with the Cape Breton Victoria Regional School Board, tasked with being a liaison between the school and P.F., did not testify directly on the biting incident and her evidence was more relevant to other issues. Ms. MacIsaac did confirm; however, in both direct and during cross-exam that B.F. had ongoing difficulties with other children both in the classroom and on the playground.

[33] Worker Renee Wilson testified about the apprehension of B.F. She and worker, Amy Donovan, went to B.F's home on April 29th, 2015. Ms. Wilson stated as follows:

- P.F. would not allow us to talk to B.F. alone.
- Ms. Wilson, Amy Donovan, P.F. and P.F.'s grandmother were present.
- Ms. Wilson observed what she thought looked like a bite mark on B.F.'s arm.
- Ms. Wilson could not remember whether it was on the left or right arm.
- Ms. Wilson described the mark as a circle like bruise with red marks and little red dots.
- In Ms. Wilson's opinion, the mark was an adult bite mark.

[34] Ms. Wilson noted that the interview was not ideal given the number of people present , and the interruptions and comments of

the mother. During the interview, the mother stated the mark was caused by “raspberries”. The mom also reported the B.F. bites himself and hits his arm on the door. Also during the interview, B.F.’s great grandmother, asked B.F. what happened and B.F. responded that he hit his arm on the door and that he bit himself and that he cried.

[35] On cross examination, Ms. Wilson was asked whether or not the mark was recorded or photographed. Ms. Wilson responded she did not recall taking photos and that it was her understanding that there was to be a joint investigation with police and typically, police would photograph the bruise. Ms. Wilson was also asked if she measured the bruise or could comment on the diameter or the size of the bruise. Ms. Wilson stated she could not. She further conceded that she was not a doctor but nonetheless, offered her opinion, that the mark was consistent with an adult bite mark.

[36] Ms. Wilson also testified that on April 29, after Ms. Wilson questioned B.F. on the mark on his arm, and B.F.’s response, B.F.’s great grandmother confronted P.F. in Ms. Wilson’s

presence immediately and P.F. denied biting B.F. and swore “on her dead nephew” that she did not do that. P.F. throughout the agency’s involvement denied biting B.F.

[37] P.F. denied the allegation again in giving her testimony in these proceedings. She did acknowledge on the stand giving B.F. what she called raspberries and playing the game, microwave with him.

[38] Section 96(3)(b) states of the *Children’s and Family Services Act* as follows:

> **Section 96(3)(b) of the *Children and Family Services Act* – Evidence**
>
> 96 (1) At a proceeding pursuant to this Act other than Sections 68 to 87, the court may, subject to subsection (2) of Section 40, admit as evidence
>
> (3) Upon consent of the parties or upon application by a party, the court may, having regard to the best interests of the child and the reliability of the statements of the child, make such order concerning the receipt of the child's evidence as the court considers appropriate and just, including
>
> (b) the admission into evidence of out-of-court statements made by the child. *1990, c. 5, s. 96.*

[39] Following the *Voir Dire*, I ruled B.F.'s statements admissible. While admissible, I still must weigh the evidence and examine the nature and quality of the evidence and apply the appropriate tests. The appropriate test has been referred to in a number of the case authorities.

[40] Section 22(2)(a) of the *Children and Family Services Act* sets out as follows:

> **Child is in need of protective services**
>
> 22 (1) In this Section, "substantial risk" means a real chance of danger that is apparent on the evidence.
>
> (2) A child is in need of protective services where
>
> (a) the child has suffered physical harm, inflicted by a parent or guardian of the child or caused by the failure of a parent or guardian to supervise and protect the child adequately;

[41] The Minister says they have met the burden, based upon the evidence outlined as well as the observations of Ms. Doyle and Ms. Wilson on the bite marks on B.F., as well as the timing of the mark, appearance and the connection to homework assignments.

[42] P.F. says the court should believe her denial as well as the lack of other evidence such as photos, a recording of the injury or medical evidence, as confirmed by Ms. Wilson during cross-examination.

[43] In my view, there were a number of areas of the Minister's evidence that were problematic:

- Lack of complete record;
- Conduct of the interview;
- Opinion Evidence; and
- Statements of the child, B.F.

Lack of Complete Record:

[44] From the evidence, B.F's initial disclosure of the "bite mark" was made to a teacher's assistant during the week of April 26th. The Minister did not call the T.A. as a witness. We therefore, do not know what was observed by the teacher's assistant or what was said either by B.F. to the teacher's assistant, or what inquiries the teacher's assistant made either by inquiry or response.

Conduct of the Interview:

[45] Also problematic was the manner in which the interview was conducted b the Minister. It was conceded by Ms. Wilson it was far from ideal; there were a number of interruptions with P.F. and A.F. present. This tainted in my view, the entire process which allowed suggestions by mother and great grandmother and as well, put pressure on B.F in answering questions asked during the interview.

***Lay Opinion Evidence of Renee Wilson*:**

[46] There was no impartial evidence; no photos, nor medical evidence provided. In the end, I am left with the opinion evidence of Ms. Wilson that the mark was "consistent with an adult bite mark", in other words, a layperson's opinion.

[47] The evidence of Ms. Wilson was that the mark on B.F's arm was not only a bite mark but an adult bite mark. Such evidence in my view, would require specific or technical knowledge before rendering such an opinion. Ms. Wilson was not qualified to do

so [see *R. v. Mohan, 1994]* 2 SCR 9, *(*at paragraphs 22, 25 and 37).]

[48] Layperson opinion without expert qualification is only permitted in limited circumstances. See *Graat v. Queen*, [1982] SCR 819.

[49] *Graat* in the family context was recently commented upon in *Children's Aid Society of Toronto v. M.R.*[2016] O.J. No. 1984, where the court stated as follows as paragraphs 106 and 107:

> "106 Under the modern view as set out in Graat, non-experts are permitted to give their opinion on an issue of a witness:
>
> * Has personal knowledge of the observed facts;
> * Is in a better position than the trier of fact to draw the inference;
> * Has the necessary experiential capacity to draw the inference; and
> * Expresses an opinion that it is a "compendious statement of facts that are too subtle and too complicated to be narrated separately and distinctly".
>
> 107 Courts following Graat have allowed opinion evidence from social workers not qualified as experts to be admitted in protection cases and criminal cases involving childhood sexual abuse". Courts have, however, followed the caution in R. v. Mohan that "the

> closer a witness comes to expressing an opinion on the ultimate issues, the closer scrutiny should be of the admissibility the evidence". [Emphasis Added]

[50] It bears repeating, the ultimate question for this Court to decide was whether or not the mark on B.F.'s arm was caused by his mother. To decide this, I must determine if:

a) The mark is a bite mark;
b) If it was a bite mark, if it was caused by an adult or a child, bearing in mind, the bite mark was disclosed in a school setting.

[51] The Minister asks that I come to the conclusion that it was P.F., based upon the opinion of Ms. Wilson and what she observed and the inference she drew without other empirical evidence. For the reasons outlined, I decline to do so.

Statements of the Child:

[52] I am being asked to assess B.F.'s credibility through hearsay, what he told others. While I permitted it into evidence as meeting threshold reliability, I must weigh it with respect to its ultimate reliability. I must do so without having heard from B.F. himself. The Minister had an opportunity to remedy this; there

was a joint investigation as I understand it and a video taped statement which was conducted jointly between the police and community services.

[53] The Minister chose not to put the video into evidence and the court has therefore, no ability to hear from B.F. directly. As referenced, the court, in the absence of this evidence, must rely upon what others say B.F. told them. As the Court of Appeal reminded us in *R. v. D.M.*, 2007 NSCA 80, it is important that the trier fact have as complete a picture as possible in making determinations.

[54] In *D.M,*, the accused was charged with sexual touching and inciting sexual touching. The day after the event, the child gave a video taped statement in the presence of a social worker and an R.C.M.P. officer. The crown did not attempt to admit the video into evidence. The crown's only evidence was the hearsay of the child's parents who testified that their daughter had reported the event to them. The accused appealed whether or not the Judge erred by holding the child's video interview was inadmissible.

[55] In holding, there was an error in ordering a new trial, the court stated as follows, at paragraphs 31 and 33:

> "[31] To assess necessity and reliability fairly, it is sometimes essential that the trial judge have a full record of the declarant's available out-of-court statements. This is particularly so where those statements were contemporaneous with the event, or where a series of statements might show changes to the related narrative. It is for the trial judge on the *voir dire* to determine whether the record of hearsay statements should include MM's video recording. She should determine the matter unencumbered by the mistaken view that the Crown is legally disabled from tendering the video outside s. 715.1…

[56] The court continued at paragraph 33:

> "[33] MM made her video recording the day after the event. A contemporaneous video recording of the complainant has been described as "probably the best recollection of the event that will be of inestimable assistance in ascertaining the truth" …Even if it is inadmissible under s. 715.1(1), the video recording may be admitted at common law through the testimony of the witnessing social worker or RCMP officer, if the trial judge concludes it is necessary and reliable. If admitted, the video may be of significant assistance to the trial judge's search for the truth. The video is the only potentially observable statement by a witness with personal knowledge, MM. The parents' evidence, on the other hand, was second hand from the child, their testimony was long after the event, and in some respects their separate testimony inconsistently related what MM had said in their joint presence…"

[57] I am cognizant that counsel for P.F. in this case, was not insisting the video evidence of B.F. be played in this instance. I am also cognizant this is not a criminal proceeding and a different test applies; however, the fact remains that:

* In deciding that P.F. did what she is alleged to have done, I am left with hearsay as opposed to hearing from B.F. or to use the phrase in *D.M,* "a full record of the declarant's available out-of-court statements…

* Applying *D.M*. given:

    - the flawed nature of the interview on April 29 in the presence of the Mother and Great Grandmother;
    - the fact that disclosure to the teacher's assistant and the uncertainties as to what was said during that interview with B.F. were not provided, and may have been useful; and
    - It would also have provided as referenced in *D.M.* assistance by providing a situation where "…a series of statements might show changes to the related narrative…"

[58] I must now consider this problematic evidence by applying the appropriate standard in child welfare cases.

[59] In *MCS v. KD and JT,* 2016 NSSC 276, at paragraph 29, Forgeron, J. set out the principals which had been enunciated in the

Supreme Court of Canada in *R. v. McDougall*, 2008 SCC 53,

wherein at Paragraph 29, Justice Forgeron says as follows:

> **" [29]** Issues related to burden of proof, credibility and reliability lie at the heart of this determination. In **C. (R.) v. McDougall**, 2008 SCC 53 (S.C.C.), a civil sexual abuse case, Rothstein, J. confirmed the following applicable points of law:
>
> * There is only one standard of proof in civil cases - proof on a balance of probabilities. A heightened standard of proof, where criminal or morally blameworthy conduct is alleged, is rejected: paras 39, 40, and 49.
>
> * Where appropriate, a judge must be mindful of inherent probabilities or improbabilities, or the seriousness of the allegations and consequences -- all within the context of the one standard of proof: para 40.
>
> * In all cases, the court must scrutinize the evidence when deciding whether it is more likely than not that an alleged event occurred: para 45.
>
> * Evidence must be <u>sufficiently clear, convincing, and cogent to satisfy the balance of probabilities test, although there is no objective standard to measure sufficiency</u>: para 46. [Emphasis Added]
>
> * There is no rule as to when inconsistencies in a plaintiff's evidence will cause a judge to conclude that the evidence is not credible or reliable. A witness' testimony must not be considered in isolation, but rather examined

based upon the totality of the evidence to assess the impact of inconsistencies on questions of credibility and reliability relating to core issues: para 58.

* Corroborative evidence, although helpful, is not a legal requirement in sexual abuse cases, and indeed this requirement has been removed in the criminal law context: paras 80 and 81..."

[60] At paragraph 30, Justice Forgeron continued to cite the following from *Novak Estate,* re, 2008 NSSC 283 (N.S.S.C.):

* "…There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety: **Novak Estate, Re**, 2008 NSSC 283 (N.S.S.C.). On the contrary, a trier may believe none, part or all of a witness's evidence..." [Emphasis Added]

[61] Applying the appropriate standard, I find that the evidence of the Minister was not sufficiently clear, convincing or cogent on a balance of probabilities.

[62] Also, while I do not accept all of the evidence of P.F. as it relates to all the issues, I do accept her evidence of denial of the bite mark which I am entitled to do (per *Novak Estate)*.

[63] To summarize, having considered the evidence I find:

1. the record of the Minister was incomplete, as set out previously;
2. the hearsay evidence of B.F. was ultimately, unreliable, and
3. The evidence of the mother of B.F. that she did not bite her son was accepted.

[64] Considering these findings, I am of the view that the evidence falls short of satisfying me on a balance of probabilities that B.F. is at risk pursuant to Section 22(2)(a) of the *Children's and Family Services Act* and I dismiss that claim.

Issue 2: Has the Minister proven that B.F. has suffered neglect while in care of P.F. by failing to address issues of weight gain and health issues, inadequate living conditions and lack of insight and parental capacity:

[65] I now turn to whether or not the Minister has established that there is substantial risk to B.F. under Section 22(2)(b) (f) (g), (k) .

[66] The relevant sections read as follows:

Child is in need of protective services

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

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

(b) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (a);

> (f) the child has suffered emotional harm, demonstrated by severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour and the child's parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;
>
> (g) there is a substantial risk that the child will suffer emotional harm of the kind described in clause (f), and the parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;
>
> (k) the child has been abandoned, the child's only parent or guardian has died or is unavailable to exercise custodial rights over the child and has not made adequate provisions for the child's care and custody, or the child is in the care of an agency or another person and the parent or guardian of the child refuses or is unable or unwilling to resume the child's care and custody;

[67] The Minister asserts a number of substantial risks, most significant:

1. B.F's weight gain and health issues;
2. Living conditions; and
3. Lack of insight in parental capacity and also domestic violence. (P.F. acknowledges these protection concerns but says they have been alleviated to the point where B.F. can now be returned to her care).

Weight gain and Health Issues

[68] There had been a prior history with the Agency's involvement with P.F. When the agency was re-engaged in September of 2014, a

photo was taken of B.F. and it was marked as Exhibit #13 in these proceedings. It is extremely troubling. It was noted that October 2014 to December 2014, while working with P.F., B.F's weight continued to increase from 114 to 120lbs. We are talking about a boy who turned 5 in October of 2014 and weighed 114lbs. It was not just a bit of excess weight or a cosmetic issue. As Dr. Sasani; B. F's pediatrician identified, which was not challenged during the hearing, B.F. was at risk of serious harm to his liver and other organs causing physical harm to the child. This was a serious health issue.

[69] Not to mention the emotional damage of B.F. trying to fit in with his peers and the resulting behavior B.F. demonstrated in school as set out in the evidence of Ms. MacIsaac.

[70] During the meetings in January 2015, B.F. gained another 5 lbs. P.F., in my view, was in total denial of the seriousness of this issue. She stated the only reason she was seeing a pediatrician because Child Welfare was making her do so. She was going to stop taking B.F. to see Dr. Sasani because she was not accepting the medical evidence she was hearing. I also find, and accept the evidence of Mr. Mugford, where it differed from that of P.F. and I find that she did mislead the

agency as to what she was feeding B.F. and how much exercise he was getting. She also had no insight into the seriousness of B.F.'s condition. As already discussed, B.F. weighed 132 lbs when taken into care.

[71] Similarly, with respect to B.F.'s ADHD condition, I find that P.F. was not properly administering B.F's medication and that at times, P.F. would over medicate B.F. if she felt he was out of control.

Living Conditions:

[72] There were a number of concerns which occurred with respect to the living conditions when B.F. was living with his mother. There were a number of mice infestations including a sofa which was a nest of mice. P.F. acknowledged the issue of mice, she acknowledged it was not just isolated to that once incident, but acknowledged it was an issue in almost every apartment she had said she lived in. She described one apartment as "walking with mice". In addition, even after B.F. was taken into care, and up until August 2016, when Mr. Mugford and other workers continued to check on the state of the home, P.F's home , and her home continued to be an issue. Once B.F.

was placed in Yarmouth, there was greater emphasis placement on other issues and there were less visits to P.F's home. There continued, however, to be a concern regarding her home up until August 2016 and the issue remained on the Minister's radar.

Lack of Insight and Parental Capacity

[73] The Minister's prior case plan requested P.F. to participate in a Parental Capacity Assessment. That parental capacity assessment was marked as Exhibit #3 in these proceedings. I also make reference to Exhibit #13, which was a picture of B.F. prior to his being taken into care in 2014 and it is quite remarkable the transformation for B.F. that occurred in Exhibits #14 and Exhibit #15 and his physical appearance since he was in care and the photos that were taken in those Exhibits.

[74] Returning to the issue of the Parental Capacity Assessment, Exhibit #3 in these proceedings. I will go through portions of the report. The general observation by Dr. Landry are contained at page 7 of the report are apt given the difficulties that B.F. faces, wherein Dr. Landry states as follows:

> "…A parents individual issues such as major mental illness and an important consideration in a parental capacity assessment as are other features of a person's presentation such as the relationship style or problematic behavior such as impulsivity. These are important considerations because of a parent's individual issues can affect the quality of the relationship of their child or it can affect the environment in which a child lives. These in turn can have a profound development effect on the child..."

[75] Those comments are particularly appropriate in this case given the number of difficulties and challenges that B.F. faces. Again, at page 10, Dr. Landry said as follows:

> "…P.F. evidenced a low score in the Neuroticism factor suggesting a relatively low experience of anxiety. This may result in a lack of appropriate concern for potential problems in health or social adjustment. She also obtained a low score in one of the facets of Neuroticism, Vulnerability suggesting an unrealistic sense of invulnerability and appropriate precautions or obtain necessary support or assistance..."

[76] That is particularly so with respect and evidenced by P.F.'s approach towards B.F's weight gain and also her inability to accept or to take precautions or to accept the advice of Dr. Sasani.

[77] At page 13 of the Parental Capacity Assessment, Dr. Landry said as follows:

> "…Ms. F presented with significant cognitive difficulties that manifested no unusual ideation. Her intellectual abilities were significantly below average (0.4th percentile) when compared to same aged peers. These abilities were in mild range of intellectual disability. This suggested that P.F. would have more difficulty with comprehension and novel problem solving. She would likely have great difficulty understanding more abstract ideas. This would indicate that it would take P.F. much longer to learn new skills. In addition, individuals with intellectual challenges often have difficulties with higher-level attention abilities called executive functions…"

[78] At page 18, under Summary and Conclusions, Dr. Landry stated as follows:

> "…As noted above, previously, P.F. has had significant difficulties managing her daily living needs and meeting B'F's needs. She has evidenced some difficulties with decision-making. Ms. F has significant learning issues that may be contributing to these difficulties. P.F. presents with significant cognitive limitations. Ms. F's cognitive abilities were estimated to be in the mild range of intellectual disability..."

[79] At page 20:

> "…P.F. has significant intellectual limitations that will make meeting his needs very difficult. Given the significate challenges of raising a child who may have intellectual and medical difficulties, it is unlikely that she would have the requisite parental capacity to deal with the needs of B.F. independently, on her own. The crucial issue is the commitment and consistency of support that she is able to get from sources such as her

> family. Ms. F will likely require on-going emotional and practical support. With that support in place, P.F. will likely have little difficulty maintaining an attachment with B.F."

[80] It was obvious to the court and I believe acknowledged by all of the participants that there is a strong attachment between B.F. and his mother. The issue is the ability to parent. Dr. Landry opined:

> "…The more specific of B. F's optimal development, particularly in the social domain will require more than simply 'adequate' parenting, B.F. will likely benefit from care-giving situations that will support his social development and ensure that he is developing appropriate peer relationships with other children…"

[81] This was again, highlighted in Dr. Landry's evidence wherein he described B.F. as a wonderful little boy but very much caught up in his imaginary world and requiring additional social development and also the recommendation of possible tests with respect to autism.

[82] I note as well that a number of these same issues with parental capacity were outlined at pages 30 and 31 of the Minister's submissions to the Court. There at page 31, the Minister indicated:

> "B.F's own challenges included ADHD and being on the autism spectrum as well as food issues, wanting to eat too much, eating too fast are likely to require involvement of

> a number of professionals and will be up to B.F's parents to maintain contact, comprehend advice and put that advice into practice. The parent will also have to access whether treatment planned is working and report accurately back to expert how affectively the treatment plan is working. The Applicant would submit the evidence does not support that P.F. has the capacity to do this."

[83] With respect to this observation by the Minister, the Court agrees. As noted as well, the inability to comprehend and to have capacity is in and of itself grounds under section 22(2)(k) for the reasons set out in *Minister of Community Services v. C.K.Z*, 2016 NSCA 61.

Domestic Violence

[84] I will briefly address that issue as well. There was evidence that the Applicant, P.F. had also continued to be involved in relationships including a domestic violence incident which occurred on a New Year's Eve. When questioned, P.F. admitted that in addition to the domestic violence, the person whom she had met and perpetrated the domestic violence while B.F. was present was someone who also was given access to information about her son B.F., posted on the internet. In my view, this

shows extremely poor judgement by P.F. This was not contradicted by P.F.

[85] Finally, I note that B.F. missed a significant number of school days from September 2014 to January 2015, 60% of the classes.

[86] I am therefore, after reviewing all of the evidence, certainly satisfied that the Applicant has proven to the requisite standard that B.F. remains in need of protective services pursuant to Section 22(2)(b) with the future risk of physical harm under Section 22(2)(g) as a risk of emotional harm and under Section 22(2)(J)(a) of neglect and also under Section 22(2)(k) for the reasons I've set out in the *Minister of Community Services v. C.K.Z.* 2016 NSCA 61.

Issue 3: If I am satisfied the above substantial risks have been proven, should B.F. be returned to his mother or placed in the permanent care of the Minister without access?

[87] That does not end the inquiry. Having found that B.F. is in need of protective services, I must now must now consider the best interests of B.F. I must also adhere to the time limitations

prescribed in the *Children and Family Services* Act. Finally, I am to review the possibility of family placements for B.F.

[88] As was set out by the Minister in its factum, at page 16, section 41 of the *Child and Family Services Act* provides as follows:

> "at the conclusion of a disposition hearing, the court shall make one of the following orders in the child's best interests".

[89] Also under section 3(2) of the *Children and Family Services Act*, sets out the factors, that I must consider when determining the best interest of the child. I will not list the factors, but I have considered them.

[90] The *Children and Family Services* Act also requires that I weight the plan which is being put forward by P.F. and the plan put forward by the Minister.

[91] Ryan Ellis, a Child and Care Worker for the Department of Community Services, Child Welfare Division, testified that although B.F. initially struggled in his placements, he is now thriving and that he is under 80 lbs. I have already referenced the

photos which show the remarkable transformation of B.F. Mr. Ellis's evidence, which I accept, is that B.F. is socializing and that he is active. In contrast, the placements suggested by P.F. through her evidence and also through the submissions of her counsel, suggest to the fact that P.F. has a great deal of family support. I simply find that is not the case. The plan, as the court understands it of P.F. is that she would continue to have B.F. remain in her care and would have her great grandmother available for assistance with respect to some executive decisions.

[92] There is no doubt, and I think the Minister has acknowledged the fact that in addition to P.F. loving B.F, there is no question that A.F, the great-grandmother also loves B.F. Given however, A.F's own medical shortcomings and her health difficulties she discussed, when testifying on the stand and given the lack of capacity with which P.F. has and her openness to having support and change, the court simply does not accept that plan is appropriate in this particular case are in B.F's best interest. The court is also mindful of time constraints and time limitations that are placed in the *Act*, under Section 43(4). As pointed out, the

deadline for this matter was August 21, 2016 and Section 43(4) sets out the timelines that a supervision order cannot be extended beyond the 12 consecutive months. As reference in the case authorities cited by the Minister in their factum, in the end, the court is left with very little in the way of choices. The choices are to terminate the proceedings and have the child returned to P.F. or to order permanent care. There is no mechanism whereby the court could extend any of the supports previously put in place by the Minister for P.F. I therefore, will order that the child, B.F. be placed in permanent care and custody of the Minister of Community services.

Should there be access?

[93] Having done so, the next question I must consider is whether or not there should be access. For the reasons as set out by the Minister in their factum, it is not, in my view, an appropriate case for access. It is not in B.F's best interest for several reasons. First off, it could severely limit the ability for B.F. to be adopted or to be put in another placement. Mr. J, in his submissions through his counsel had discussed other family members possibly

coming forward, while nothing is guaranteed, any access would result in there having to be consultation or interaction with P.F. and given the difficulties that have occurred to date, it would in the Court's view, hold B.F. back in the ability for placement and would also hold him back physically and emotionally. Certainly, we have heard the evidence from Mr. Ellis, who indicated there were initial difficulties in B.F's placement but he has since settled in and seems to be overcoming those difficulties. A provision for access would be a setback for B.F. and a potential for difficulties re-occurring.

[94] Lastly, I note there were some concerns during the access visits about some false hopes being put to B.F. about possibly returning home. Any access, given the order of permanent care would not be appropriate for that reason as well. For all of the above reasons, I decline to order access.

Gregan, J.