

IN THE SUPREME COURT OF NOVA SCOTIA  
(FAMILY DIVISION)

**Citation: D.M. v. S.M., 2005 NSSC 330**

**Date: 20050829**

**Docket: 30741**

**Registry: Sydney**

**Between:**

D. M.

Applicant

v.

S. M.

Respondent

**Editorial Notice**

Identifying information has been removed from this electronic version of the judgment.

**Judge:** The Honourable Justice M. Clare MacLellan

**Oral Decision:** August 29, 2005

**Written Decision:** November 10, 2005

**Counsel:** Jill Perry for Applicant  
Alan Stanwick for Respondent

**By the Court:**

[1] The matter before the court is M. and M.. Originally both parties had wanted sole custody of both boys, A. (date of birth November [...], 2002) and B. (date of birth August [...], 1996). However, as the case progressed, the issue became a matter where both parties wanted to have joint custody but with each of them as the principle care giver.

[2] The law in this particular situation is dealt with in the **Maintenance and Custody Act**, which deals with the best interest of the children, as well there is the decision of the Supreme Court of Canada in King and Low, which requires the court to make decisions that are in the children's best interest so that the child can develop to the child's full potential, spiritually, academically, and in every other way. To achieve that desired development, if it is necessary to set aside parental rights, while it should be done only under the greatest scrutiny, if it is in the child's best interest, those rights must be put aside.

[3] Section 18(5) of the **Maintenance and Custody Act** provides:

(5) In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child, the court shall apply

the principle that the welfare of the child is the paramount consideration. R.S., c. 160, s. 18; 1990, c. 5, s. 107.

[4] King v. Low, [1985] 1 S.C.R. 87 para 27:

I would therefore hold that in the case at bar the dominant consideration to which all other considerations must remain subordinate must be the welfare of the child. This is not to say that the question of custody will be determined by weighing the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. The welfare of the child must be decided on a consideration of these and all other relevant factors, including the general psychological, spiritual and emotional welfare of the child. It must be the aim of the Court, when resolving disputes between rival claimants for the custody of a child, to choose the course which will best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult. Parental claims must not be lightly set aside, and they are entitled to serious consideration in reaching any conclusion. Where it is clear that the welfare of the child requires it, however, they must be set aside.

[5] As well, the law is found in the decision of Justice Goodfellow in Foley v. Foley (1993), 124 N.S.R (2<sup>nd</sup>) 198, where he outlines sixteen (16) points which are very helpful as this checklist makes the application of King v. Low easier to analyse. Not all the factors are important in every case. It depends on the age of the children, the needs of the children and parenting styles, etc.

[6] The factors set out in Foley v. Foley (1993), 124 N.S.R. (2<sup>nd</sup>) 198 are, para 16:

Nevertheless, there has emerged a number of areas of parenting that bear consideration in most cases including in no particular order the following:

1. Statutory direction Divorce Act 16(8) and 16(9), 17(5) and 17(6);
2. Physical environment:
3. Discipline;
4. Role model;
5. Wishes of the children - if, at the time of the hearing such are ascertainable and, to the extent they are ascertainable, such wishes are but one factor which may carry a great deal of weight in some cases and little, if any, in others. The weight to be attached is to be determined in the context of answering the question with whom would the best interests and welfare of the child be most likely achieved. That question requires the weighing of all the relevant factors and an analysis of the circumstances in which there may have been some indication or, expression by the child of a preference;
6. Religious and spiritual guidance;
7. Assistance of experts, such as social workers, psychologists- psychiatrists- etcetera;
8. Time availability of a parent for a child;
9. The cultural development of a child:
10. The physical and character development of the child by such things as participation in sports:
11. The emotional support to assist in a child developing self esteem and confidence;

12. The financial contribution to the welfare of a child.
13. The support of an extended family, uncles, aunts, grandparents, etcetera;
14. The willingness of a parent to facilitate contact with the other parent. This is a recognition of the child's entitlement to access to parents and each parent's obligation to promote and encourage access to the other parent. The Divorce Act s. 16(10) and s. 17(9);
15. The interim and long range plan for the welfare of the children.
16. The financial consequences of custody. Frequently the financial reality is the child must remain in the home or, perhaps alternate accommodations provided by a member of the extended family. Any other alternative requiring two residence expenses will often adversely and severely impact on the ability to adequately meet the child's reasonable needs; and
17. Any other relevant factors.

[7] The two children involved are A., born in November 2002, and B., born in August 1996. The case began on March 9, 2004 on an ex-parte basis. The father alleged that Mrs. M. failed to supervise A. (then 18 months old) for a quarter of an hour to half hour at a time, on more than one occasion, while she left the house to do wash or for some other reason. The parties were separated at the time of Mr. M.'s complaint.

[8] During the March 2004 hearing, the father complained that leaving A. unsupervised was a frequent occurrence, and that, although he had discussed the problem with his wife, she continued in the practice. He also complained that the mother did not bath the boys, and that the house was dirty. He indicated that B. slept in urine stained sheets.

[9] During the March 2004 hearing, Mr. M., Senior, gave evidence to support the lack of supervision of A. by Mrs. M.. He provided a video to support this allegation. He advised that he had corrected her for failing to supervise A. on an earlier occasion, yet she continued to leave A. alone for twenty-five minutes on March 9, when Mr. M., Senior, had she and her house under surveillance with a video camera.

[10] An Ex-parte Order was granted for three days, giving custody of A. to Mr. M.. Mrs. M. was served and three days later an Inter Partes Order was issued granting the father interim custody of A. and the mother interim custody of B..

[11] A parental capacity assessment was ordered and the matter was set over for hearing on an interim basis on May 11 and May 13, 2004. On this date, an interim

hearing was held by cross examination on affidavits, and twelve witnesses presented at that time.

[12] The decision was granted wherein I held.

When I review the evidence, there is fault on both sides. The absence of a washing machine; it seems to be pretty pivotal. Why don't we have a wash machine? That is pretty inexcusable why there is not a second hand washing machine. I accept that there was laundry not done on a sufficient basis to meet the needs of the kiddies, and there should not be computers bought, or nights at the Steele City, or anything else until the washing machine is provided. Failing which, it would not be the first time somebody washed something out in a bathtub. Mr. M. is to be faulted for keeping a score card on this. Granted he worked during the day, but you still do not let your little fellow sleep in urine sheets, regardless if you are holding two jobs. So it is not a score card to look at what she did not do while I was at work and look at this let's keep track of it. This is an example of naivety. I think his naivety is effectively camouflaged by his father's input because his father seems to be quite aware of proper child care, to a degree in any event.

Mrs. M., J. M., as well, has a naivety in her child rearing. I find as a fact and accept that these children were left, on more than one occasion, unattended. I did not hear any great contrition today. I did not hear any great awareness. I did not hear any enlightenment. She is glib in her presentation, and I think that might be more of a reflection of naivety than her intention to be flippant. But she does not seem to be aware of the demoralizing effect on a child to wake up in bed with wet sheets night after night. She does not seem to be aware that, by her own evidence, she could not have this child in clean sheets every night. She only had two sets of sheets and she only did two loads of laundry a week. Up until last month he was wetting the bed every night. Put her own evidence together, it does not line up, it is not possible.

I accept, as a matter of fact for this hearing, that B. was left in less than an appropriate situation with the sheets in relation to when mom was there alone, and when dad was there with mom, and that is really the problem because he was not doing enough, and she was not doing enough. The bottom line was it was not getting done.

So if you do not like your spouse, fair enough, but take a broom and sweep the stairs, and clean the pantry, and clean the bedroom. The kiddies come first. If you do not like your spouse, you can deal with that through the court, through conciliation, through separation, whatever, but you do not leave the status quo, which I accept, on the evidence that this situation existed when the father was living in the home. So this is the parental problem that I see permeating both parents.

I am concerned that Mrs. M. has a computer in lieu of buying a washing machine. It is a lot more important that her son have a clean sheet, than he have games to play. I am concerned that she spent money on obtaining the internet, and then did not connect to the internet.

I am concerned with the last day, how A. appeared in Court before me on March 9th. He did not have any pants on, but he had a blanket. He went from his home on March 9th, which was a very cold day, to Children's Aid and back to me, and he still did not have any pants on during the whole trip, even though his dad told me, and I marked it in my transcript of the last day, that the dad had clothes at home that he could have put on between the time his father took the child, and the time they came to court. Lots of time to go down the [...], and properly clothe the child. Why was it not done? Was it naivety? I am going to say so at least in part, but it was also the grandfather's overwhelming rush to get evidence. I did not find it as difficult to accept on March 9th as I do upon reflection.

Another fact I find difficult is not that the grandfather took the child, but that he did not leave the note to tell the mom, and when he was in Court in front of me on March 9th, the mother still had not been contacted to say, 'Oh, by the way, it is four or five hours since we removed this 15-month-old baby from your house and we have not told you.' Now why was that? Maybe winning the case was more important. I am not



condemning the grandfather for taking the child. I think something had to be done, some intervention. I do not understand why the child was not properly clothed and then taken outside. I do not understand why there wasn't a car seat. When the grandfather went there with his movie camera, he was on a mission, and I do not understand why there wasn't the courtesy of leaving the mother a note to say, "There is a real problem here J., and I took A. until we can straighten it out." It would have taken a minute. But you saw the video, the urgency was there to get the evidence. So that is a complicating factor, which will probably have to be addressed more. But something had to happen or A. was going to be hurt.

Mr. Y. says, nothing happened, nobody ate bugs in the pantry, nothing happened. We do not wait for damage to happen. You do not wait for that to happen. How many times did we read in the past year about child abductions and these people who abduct children are generally someone who knows the family and knows the system of leaving the door opened, leaving the baby in bed, and leaving the baby unsupervised. No one has to be taught that, it's just poor parenting. You do not leave your children unsupervised. You do not leave a 15 or 17-month-old where he can get out of the crib and get into mischief.

Anyway, I conclude that both the parties, their conduct both together and separate, leads to a great naivety. I think that we might have been here on a more tragic hearing if it were not for the grandfather's intervention.

I find that both of the parents exhibit an alarming unawareness of what is involved in parenting and Mrs. M. to date, I think, still has an unawareness of what she has to fix up. To tell the Court you have a baby monitor, but then you did not have it with you, and it probably would not work at that distance anyway... I do not know. And then to indicate that most of the problems were because you would not get a washing machine. It is like she has not still grasped the problem that we could be dealing with a fatality as opposed to a custody application. She also does not accept that, of course, B. at his age would find it an absence of self esteem, I do not need a report to tell me, to wake up wet day after day or every second day. There is no reason he should not

have had pull ups. That is a lot more important way to spend money than on a computer.

These are parenting deficits that are, I think, hopefully correctable, but they are here today, and they are here right now, and they have to be dealt with by both parties.

I should comment on the Children's Aid examination. It might have been sufficient for their purposes, their onus is risk, risk assessment. My onus is best interest. I would like to think that they line up, maybe they do not. I do not understand why, with the referral information, with urine on the sheets and urine smells in B.'s room. Why the sleeping quarters were not examined. I do not understand why the pantry was not examined. I do not understand why Mrs. M. can say to me, I let it (housework) slide, but there is no real reason. Anyone can leave a load of laundry for a day, if it's not dirty laundry, they can leave it before you fold it, or maybe the floor should be scrubbed today and you do it tomorrow, that's a temporary thing, but to let the housekeeping slide so that so many witnesses' evidence is unrefuted that the house was simply inappropriate for children.

I accept V. M.'s evidence, that while the parties were living together, she could not give her nephew a kiss because as cute as he was he was so dirty it was repugnant to give him a kiss, and that was when the parties were together. So this has to be examined.

In any event, it is very rare for me to separate siblings, but at this point in time, at this interim hearing, I do not believe either one of these parents can parent two children. I think they are going to be really challenged to parent one until we can obtain a parental capacity assessment, and some parental counselling as to fundamental parenting techniques. I really want to have an assessment on both parties, to find out their ability to parent. I'm going to make a bench referral to Children's Aid Society. I'll put it on the record because I sent the transcript of March 9 to the Children's Aid Society. There was voluntary involvement by the Children's Aid Society until this court became involved.

I believe Mr. M. Senior did make a trip to Children's Aid at the same time he was in court, but the investigation was not self referral by Mr. M., Junior, or Mrs. M.. So, as I have indicated, I think we would be in a much worse position if it was not for the granddad, the parental grandfather. But we have to see if these people, who now have two children, can they parent two? Can they parent one? Right now I do not think either of them can parent more than one and that's with help. So I want a parental capacity assessment. I want them to take parenting courses. I want Mrs. M. and Mr. M. to take some fundamental nourishment courses on what is a proper balanced menu, and I want the matter to go back to conciliation and parent education. I want both of them to take the parent education course over again. I recognize that Mr. M. already did, I do not know if Mrs. M. did, but she is going to, and I think both of them should avail themselves to the voluntary assistance of Children's Aid for parenting courses, but I'm not prepared to entertain a permanent order for custody to either of these parents without the recourse to a parental capacity assessment because I do not feel that I have a total grasp on whether or not they have the ability to parent two children.

[13] An interim order followed. It indicated that the parents must co-operate in a parental capacity assessment, that the parents should take parenting courses, including courses in fundamental nourishment, menu planning; and that they should seek voluntary assistance from Children's Aid. No permanent order was made at that time. Custody was divided between the parents and access was set up for the non-custodial parent.

[14] On June 21, 2004, the court reviewed the overnight issue, which was left unchanged. The parental capacity assessment report prepared by Dr. Landry, was

received on December 3, 2004. A pretrial was held on March 22, 2005. Both parties clarified their request as joint custody of both boys, with each as principle care giver.

[15] The trial was held on May 26, six witnesses were presented including Dr. Landry, the psychologist who preformed the parental capacity assessment. The trial was held on May 26, 2005, and the decision adjourned to June 13, 2005. The decision was further adjourned to August 29; as I needed more time to consider what was these two boys best interests, given the family problems found in the May 2004 hearing remained after the full hearing on May 26, 2005. By then there had been 14 months (March 04 - May 05) of Court involvement and many recommendations for parenting improvements.

[16] During the May 2005 hearing, Dr. Reginald Landry gave evidence. His qualifications were admitted and the parental capacity assessment tendered. He indicated he interviewed both parties four times. Dr. Landry made recommendations regarding their strengths and parenting challenges. He indicated that neither one had a propensity for substance abuse, neither of them had a propensity towards child abuse. He indicated that both loved their children. He indicated that B., Junior, needs more academic support because of his learning challenges. He indicated that

Mrs. M. has cognitive challenges herself, while Mr. M. does not. He indicated that Mrs. M. exhibits avoidance coping style, in that she does not confront problems. He indicated that Mr. M.'s house was neat, but Mrs. M. home was not. Her home emitted a smell of urine, and clothes were everywhere, even though Mrs. M. knew that Dr. Landry would be attending at that day and time for the assessment. Dr. Landry indicated that B. was not there at the time of his home visit, and that Mrs. M. was unaware of B.'s whereabouts at the time. B. was nine-years-old at this time.

[17] Dr. Landry indicated that Mrs. M. did not read to B. as the resource teacher had instructed. Dr. Landry indicated at the time of his assessment that Mr. M. did not read to B., Junior, either. He indicated that both parents have strengths, and both parents love their children.

[18] On cross examination he indicated that as B. goes through his academic climb, Mrs. M. will have greater problems helping him with school work. Mr. M.'s academic ability is within the normal range. He concluded Mrs. M. was capable to take care of the children during the day, while Mr. M. worked. Dr. Landry believed that parenting courses would help Mrs. M., and stress reduction courses would help Mr. M.. He indicated that Mr. M. is very well organized in his approach to child

rearing, and he felt that while Mrs. M. was not organized, she did not pose a risk to the children. He indicated that if she was left as a full time parent it would be challenging to her, but he took some support in the fact that the parents were cooperative to each other.

[19] Dr. Landry's report pages 8, 9 and 10 outline as follows:

Mr. M. has moved to a home in [...] of Sydney, however, he notes that he intends to move closer to Ms. M.'s home to ensure that each has convenient access to the children. A home visit was conducted. Mr. M.'s apartment was clean and well organized. There was no obvious safety hazards. Mr. M.'s home contained appropriate toys for the children. In addition, Mr. M. appeared to be aware of B.'s learning difficulties, and was informed about the ways in which to help. However, he noted that he had relatively little time with B. to help with his reading difficulties. Mr. M. appeared to enjoy a well-developed social network in Sydney, and is aware of the children's needs to develop peer relationships.

Ms. M. lives in a two-bedroom home in Sydney. The home appears to be relatively safe for children, however, there was broken glass strewn around the back door. Ms. M.'s house was less tidy than might be expected during a home visit. The drawers in B.'s dresser were open and clothing spilled out of the drawers on to the floor. There was noticeable smell in the room.

There were a few books, and Ms. M. noted that she did not read regularly with B., despite his resource teacher's request to practice during the summer to maintain the gains he made. During the home visit, A. was playing on the floor clad only in a diaper.

[20] Under emotional environment and disposition towards children he writes:

Mr. M. was observed on one occasion with the boys. He appeared to be very attentive when the examiner was present and appeared to be at ease with the children. While the examiner was present, he appeared to attend regularly to the boys and initiate interaction with them. There was a great deal of warmth in their interaction. Mr. M. supervised the boys closely during the home visit.

Ms. M. was observed on one occasion with the children in her home. While the examiner was present, Ms. M. directed relatively little attention towards A. while he played on the floor. B. was out of the house for the duration of the home visit, and Ms. M. was not sure where he was when the examiner arrived. She noted he was out with friends, but was unclear about his location. Ms. M. reports a positive disposition towards the boys and reports that she is attempting to deal with some of her issues to improve the quality of her parenting.

[21] Under child management.

Mr. M. reports a basic knowledge of child management techniques. Although both parents report the boys behaviour is certainly within manageable limits. Mr. M. was noted to supervise the boys closely during the home visit. Ms. M. reported some difficulty in the past, leaving the children unattended. Ms. M. reports a basic knowledge of child management techniques, although, she noted there is little need to set limits. However, as noted above, Ms. M. was not aware of B.'s location during the home visit, and notes that he frequently goes out for extended periods.

[22] Under recommendations and conclusions:

1. It is recommended that the children be in the joint custody of Mr. and Ms. M., however, given Ms. M. present difficulties, the children should spend the majority of their time with Mr. M.. It suggests that Mr. M. can care for the children, while Ms. M. would have overnight access every second weekend, and one day during the week. However, given Mr. M.'s work schedule, Ms. M. could look after the children while Mr.

M. is at work. This would reduce some of the stress on Ms. M. and she would be able to spend more quality time with the children, and play an active role in their lives. If this arrangement was successful, then the over-night access with Ms. M. could be extended to four-day weekends, so that she would be able to play a bit more of a role in their school work.

2. Ms. M. would continue to access some parenting support. The modality for this support would be most effective if it uses visual strategies and modelling of the procedures in order to more effectively ensure that Ms. M. comprehend the instructions. In particular, an emphasis should be put on actively planning to create an environment where the children are not in an unsupervised setting.

[23] Next recommendation:

3. Mr. M. would benefit from some stress management to help him cope more effectively with his anxiety.

4. Both parents would also benefit from some opportunity to work on their communications skills. They appear to have a relatively decent working relationship and it is an opportunity for them to work more closely to improve their rapport. A more co-operative relationship will ensure that both parents are able to spend more time with the kids and concentrate on their needs.

[24] The findings of Dr. Landry were not modified or changed substantially from the report and his *viva voce* evidence.



[25] The court next heard from D. M., the father, and he indicated that after the Landry report, he asked Mrs. M. to babysit A. while he was at work. He has taken three parenting courses and he described the courses.

[26] He complained about Ms. M., that her house still has a smell of urine, and that B.'s sheets are still stained even though Mrs. M. now has a washer, which she did not have when the ex-parte Order was made on March 9, 2004.

[27] Mr. M. asked Mrs. M. to take B. to a doctor for bed wetting, but when she refused; either Mr. M. or his father took B. to the doctor. He complained that A.'s teeth are neglected and decaying.

[28] He advised that, on occasion, when he goes to pick up B. for access, B. is not at home and Mrs. M. does not know where he is. Also, he says that Mrs. M. does not do B.'s homework with him. Mrs. M. does not attend parent-teacher.

[29] If granted custody, he will do B.'s homework and supervise him. Now he takes B. to swimming class and Mr. M., Senior, the grandfather, takes B. to baseball.

[30] If he were to have custody of both boys, he would move to a larger apartment or house as now he has a one bedroom home. He would plan to move to a larger home near B.'s school, and closer to Mrs. M.'s home.

[31] After B.'s poor report card he, Mr. M. went to parent teacher night. He now reads to B., Junior, on a regular basis.

[32] He alleged that he had to pay Mrs. M. to babysit A. which is a direct opposite of her comments that she did not ask for money but that he volunteered a small amount.

[33] He admitted that on one occasion he returned B. to his mother with soiled sheets for her to clean as she had a washing machine. He indicates he washes the sheets in the bath tub.

[34] Socially, he indicates he now has a girlfriend who overnights, most nights, in his one bedroom house.

[35] The Court heard from C. X., who gave evidence that she has been his girlfriend for five months, and spends most nights with him. She indicated that on occasion, she has also been to Mrs. M.'s house, at least on one occasion, which she found to be dirty and there was a smell of urine. She asked to go the washroom. When she went upstairs, she looked in B.'s room and looked around, she indicated that the house was in bad shape, and that there was food on the walls on the lower level. She indicates that she helps D., the father of the children, by taking his laundry to her parents' home to wash. She believes that Mr. M. interacts well with his boys, and she indicates that A. is with his father most nights except Saturday. Ms. X. has seen Mr. M. read to B., Junior.

[36] The court heard from Mrs. M., the Respondent. She gave evidence which is the opposite of Mr. M.'s on most material points.

[37] She indicated she did not ask for money to babysit from the father, but that he volunteered it, but the amount he paid was little, and she made and paid for most of the meals for the boys. She believes A. stayed with her two to five nights a week until just before the Court hearing. She indicates that she has done B.'s soiled

laundry when he returns from access with Mr. M. on numerous occasions, and she views herself as, in the past and present, as principle caregiver to both boys.

[38] Mrs. M. believes that she knew where to find B. when he wandered. She states she knows where B. Junior is when he is outside. She believes B., Junior, has the same reading problem that she has. She maintains she wants to help B. with his homework. She attended one parent teacher meeting. Mrs. M. indicates that B. will have an educational assessment in the fall, and she agrees that B. Junior will be very sad if he fails this year. She admits that she told B., Junior, that if he did not do his homework that she would make sure that he did not pass the year. Mrs. M. said she only said that once and it was certainly a mistake to say to a nine year old child who is having learning problems.

[39] She accepts that B. must be read to at least fifteen (15) minutes a night, but she does not do this every night because to quote her, “B. is too busy doing other stuff,” but she will start to read to him soon. She did not call the school regarding B.’s progress in the pass six months, (December to May). She maintained that the school had her phone number available if the staff wished to contact her.

[40] Since May 2004, Mrs. M. has taken five courses to improve her parenting, and she tendered these certificates. She indicates a willingness and an interest in continuing to take parenting courses.

[41] She admits that she did lose her electrical power for three weeks, during the past year, for nonpayment of her account. She maintains she only spent part of that three (3) weeks in Mr. M.'s house. Now social assistance pays her power bill, and deducts it from her cheque. Social assistance is her sole source of income, (along with, I would assume, child tax credit although I did not hear any evidence on that point).

[42] Mrs. M. did allow D., Senior, to take her son for blood work as she was busy with A. and she did not have a ride to the hospital. She indicated she did not think to ask Community Services for a taxi because that involved a 24-hour wait before she would be able to secure transportation from that office.

[43] Mrs. M. indicates that now she is able to keep up to the clean sheet problem as she now has a sufficient number of sheets. She believes that her house is much cleaner than it was last year.

[44] She indicates she views B.'s bed-wetting problem as hereditary and does not believe that pull-ups are the answer, although she understands that Mr. M. does use pull-ups when B. is with him over night.

[45] Mrs. M. maintains that she and Mr. M. are both flexible and they can work out their problems. However, she did admitted that she would not allow Mr. M. more than a few minutes with the boys on Fathers' Day. She believes it was her time according to the schedule.

[46] She admits that she did not tell Mr. M. about A.'s dentist appointment in Halifax because she did not want Mr. M. to go to the appointment. She indicated at the conclusion of the hearing, that it was a mistake not to notify Mr. M. of the appointment, but she was unable to explain why it was a mistake to withhold medical information from the father.

[47] Mrs. M. indicates she never leaves her children unsupervised, but that her two-year-old can be upstairs when she is downstairs. She indicated that somehow, despite a locked door to the basement, A. got into the basement and got into paint cans that were left in the basement. The basement is also where the cat's litter is located.

[48] Mrs. M. does agree that she had broken glass outside her door for approximately eight months. She was waiting to secure a rake to clean it up. She did agree that she had one week prior notice of Dr. Landry's intended visit to perform the assessment on parental capacity.

[49] She indicated on the employment aspect, that she had once asked Community Services to help her get a job, but did not hear back from them, but that she herself did look for jobs in the local malls without success.

[50] B.L. gave evidence in support of Mrs. M.'s application and her strengths as a mother, and she maintains that she has seen Mrs. M. with A. in her care often.

[51] B. M. gave evidence that she is Mrs. M.'s neighbour, she has four children herself, and that according to her recollection, Mrs. M.'s house never smelled of urine. She sees Mrs. M. play and walk with her two children.

[52] During submissions both of the lawyers viewed their evidence differently, which is to be expected; however, both agreed that the boys ought not to be separated.

[53] The evidence shows clearly that Mrs. M. has cognitive challenges and Mr. M. does not, while that of itself is not relevant, it is relevant in so far as B., Junior, has learning problems now, and as indicated by Dr. Landry, as B.'s academic career advances, Mrs. M. will continue to be more challenged when required to help him with his school work.

### DECISION

[54] Mr. M. is able to supervise the children while in his care. Mrs. M. cannot or does not, it was unclear from the evidence whether she is unwilling or unable to supervise. To have B., Junior, wander the neighbourhood on his own is unacceptable. The risk is alarming for abduction, abuse or car accident. The baby, A., in the basement among the paint tins and cat litter is also unacceptable. The glass left for eight months outside the door is of concern. Failing to recognize these risks is what began the courts involvement in March 2004. Mrs. M. has all day to clean her house. She did not work outside the home up to the date of the May 2005 hearing. Granted working inside the home maybe to many and to myself viewed as a difficult job. Mrs. M. is simply not performing the tasks of a 'stay at home' parent. She does not clean the house, keep the children safe, supervise help with school work, keep their teeth clean or keep B.'s sheets clean.



[55] Mr. M. cleans his home, which is agreed by all to be too small, being a one bedroom apartment or house. Mr. M. now reads to B. since his attendance at parent teacher. He indicated to Dr. Landry he did not read to him often before because he did not have an opportunity as B. was not in his custody. He indicated that he does read to B. now as a result of the parent teacher meeting. However, Mrs. M. indicated that she is only starting to read to her son. For whatever reason neither parent read to B. at the time of the parental capacity assessment.

[56] Mrs. M. has not addressed the bed-wetting problem until recently. She is not actively in touch with B.'s school, even though she knew he may fail this year, and in her words, "If he failed, he would be sad." Failing in school and sleeping in dirty sheets is demeaning. She does not see that the broken glass outside her door is a risk to both boys. She leaves broken glass there for eight months without any reason for not putting on gloves and simply getting down on the ground and picking up the glass.

[57] Mrs. M. has failed to learn to supervise her children, clean her house to an acceptable level, show sufficient interest in her son's schooling, even though according to her they may have the same cognitive challenges. Of concern is that

Mrs. M. is unaware of her parenting challenges despite the court's involvement, the parental capacity assessment, and the parenting courses that she has taken. I do accept she genuinely loves her sons, but her parenting is inadequate to protect them. Her parenting skills do not permit the nurturing these boys' needs as they deserve.

[58] I grant joint custody because that is what the parties want, and because the parties are able to work together and show flexibility. Given that joint custody may promote harmony, I find it to be in the children's best interests, however, Mr. M. is better able, in all relevant areas, to take care of these two boys. It is in their best interest that he become the principle care giver. It is in their best interest that the father will be primary care giver for the majority of the time.

[59] I adopt the Landry recommendations. However, I do not accept that Mrs. M. at this time can babysit full-time while Mr. M. is at work. She needs hands on training with visual aids from a family skills worker to improve her parenting, she needs to clean her house to an acceptable level, and clean up the broken glass, and keep her children away from paint tins. She needs to be aware of these potential risks. She needs to be aware that nine (9) year old B. wandering the neighbourhood poses an incredible risk to him.

[60] Dr. Landry feels that she does not pose a risk over the short term ie. the work shift while her husband, Mr. M., is at work. I do not share his view on risk assessment for an eight-hour period, five days a week. This period of forty (40) hours per week with her current parenting deficits is not in the boys' best interest.

[61] Her access will be twelve (12) hours a week, which will be spread over three different days, which will be four (4) hours on days that the parties select until her parenting improves.

[62] I hope Mrs. M. can work on her problem areas in the future. She now exhibits very close to the same naivety that was seen in May 2004. I make this ruling knowing that it will be difficult for Mrs. M. and that she will be quite upset, and there will be an adjustment for her boys, particularly B.. However, it is in the boys' best interests to be together, and it is in their best interest to be with their father as principle care giver, where they will have a clean environment, they will be supervised, progress in school will be monitored and health issues addressed in an appropriate manner.

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M. CLARE MACLELLAN, J.