CANADA
PROVINCE OF NOVA SCOTIA
2010

IN THE SUPREME COURT OF NOVA SCOTIA (FAMILY DIVISION)

Citation: Nova Scotia (Community Services) v. R.M.S., 2010 NSSC 177

Date: 20100429
Docket:060762
Registry: Sydney

Between:

Minister of Community Services

Applicant

v.

R.M.S. and J.B.

Respondent

ORAL DECISION

Editorial Notice

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

Judge: The Honourable Justice Kenneth C. Haley

Heard: February 26, March 4, March 30, April 12, 2010, in Sydney, Nova Scotia

Oral Decision: April 29, 2010

Written Decision: April 29, 2010

Counsel: Mr. David Raniseth, for the Applicant
Mr.Luke Wintermans, for the Respondent, R.M.S.
Mr. Vince Gillis, for the Respondent, J.B.
Ms. Lisa Fraser Hill, for the child, R.S.

By the Court:

INTRODUCTION

[1] This is the Final Disposition Review in this matter where the Applicant seeks permanent care, without access, of the children, S. S. born December *, 1998 and J. M. S. born April *, 2008 on the grounds that the said children are in need of protective services pursuant to s. 22 (2)(b) of the *Children and Family Services Act.*

[2] The Respondents oppose the application and seek return of their children. Evidence was heard on February 26, March 4, March 30 and concluding on April 12, 2010. Decision was reserved to April 29, 2010 with counsel consenting to and the Court finding that it was in the best interests of the children to exceed the statutory time lines to permit time to properly hear all the relevent evidence and permit the Court to fairly adjudicate upon the matter. In the case **D.C. v Family & Children Services of Lunenburg County and T.M.C. and C.L.G.**, (2006) 249 N.S.R.(2d) 116 (NSCA) Justice Oland stated at paragraph 17 as follows:

> "[17] However, the law is clear that exceeding that time limit does not always constitute an error of law. In *Children's Aid Society of Cape Breton-Victoria v A.M.*

> 2005 NSCA 58 (CanLII), [2005] N.S.J. No. 132, 2005 NSCA 58, in seeking to overturn an order placing her children in permanent care, the appellant parent argued first, that the judge had no jurisdiction to make a permanent care order once the s. 45 (1)(a) time limits had been reached, and second, if the judge had discretion to extend the time, he erred in doing so because he failed to consider whether the extension was in the best interests of the children. Cromwell, J.A. for this Court stated:
>
> > [28] Turning to the first submission, there was no loss of jurisdiction here. The Court made this clear in **Nova Scotia (Minister of Community Services) v. B.F.** 2003 NSCA 119 (CanLII), (2003), 219 N.S.R. (2d) 4l (C.A.); [2003] N.S.J. No 405 (Q.L.) (C.A.) At paras. 57 and 58 and **The Children's Aid Society and Family Services of Colchester County v. H.M.** reflex, (1996),155 N.S. R. (2d) 334 (C.A.). The Act contemplates that there will be a judicial determination of the child's best interests. If a time limit, which is a milestone toward that determination, caused the Court to lose jurisdiction to determine the child's best interests it would contradict the purpose of the **Act**. Therefore, the Court did not lose jurisdiction by reserving its decision as to disposition for longer than the time limits for temporary care orders under s. 45."

BACKGROUND

[3] This matter originally came before the Court on September 26, 2008 and an Interim Order was issued ordering that the children S.S. and J.M.S. remain in the temporary care and custody of the Applicant pursuant to s. 39 (4) (e) of the *Children's Family Services Act*. The matter was adjourned to October 9, 2008.

[4] The Applicant alleged, in part, in the Protection Affidavit dated September 23, 2008 as follows:

> On September 19, 2008, Agency Worker Doug Thorn received a report from the Cape Breton Regional Police which stated as follows:
>
> a) The police had been in pursuit of R. M. S. and J.B. after receiving reports that the car in which they were driving was swerving in traffic;
>
> b) After pursuing the vehicle, it was stopped on Grand Lake Road;
>
> c) Both R. M. S. and J. B. appeared to be under the influence of a substance or substances and that they seemed "high";
>
> d) A five month old child (J. M. S.) was in the vehicle with R. M. S. and J. B.;
>
> e) At the time that these two Workers arrived at the police station, R. M. S. and J. B. had been arrested and placed in jail; a decision was made to take the five month old child, J. M. S.;
>
> f) Workers, Doug Thorn and Sandi Virick served R.M.S. with a copy of the Notice of Taking while she was in police custody; workers observed that R.M.S.appeared to be very groggy with dark circles under eyes;
>
> g) The Workers explained to R.M.S. that they were taking this action because she had been driving under the influence with her daughter in the care which placed her daughter at risk of harm; R.M.S.stated that she was a good mother and that she was only on her prescribed medication of Percocets; she then threatened to kill herself and workers advised the police of R.M.S.'s threat;

h) Workers, Doug Thorn and Sandi Virick then served J.B. with a copy of the Notice of Taking Into Care while he was also in police custody; Workers noted that J.B. also appeared groggy and tired looking; once J.B. was told about the notice, he became upset and began to curse and scream but Workers were unable to determine what he was trying to say;

i) On the basis of my involvement with the Respondents and the children, S.S. and J.M.S., and the information available to me I believe that it is in the best interests of the Children, S.S. and J.M.S. that they remain in the temporary care and custody of the Applicant, the Children's Aid Society of Cape Breton-Victoria.

[5] At the conclusion of the October 9, 2008 contested hearing the Court ordered that there were reasonable and probable grounds to find that the children were in need of protective services and ordered the return of the children to the supervised care of the Respondents pursuant to s. 39 (4) (b) of the *Children & Family Services Act.*

[6] The following conditions were included in the October 9, 2008 order, namely:

a) The Respondents shall absolutely refrain from the consumption of alcohol and /or illegal drugs;

b) The Respondents shall consume medication only as is prescribed by a doctor;

> c) The Respondents are to comply with random drug testing as ordered by the Applicant Agency;
>
> d) That the Respondents shall cooperate and comply with all reasonable requests, inquires, directions and recommendations of any representative of the supervising agency (the Children's Aid Society of Cape Breton -Victoria);
>
> e) That any representative of the supervising agency (the Children's Aid Society of Cape Breton-Victoria) shall have the right to enter the residence of the children to provide guidance and assistance and to ascertain that the children are being properly cared for.

[7] The Protection Hearing was scheduled for December 1, 2008. The Respondents consented to the finding that the children were in need of protective services pursuant to s. 22 (2) (b) with the terms of the previous order being confirmed.

[8] The first Disposition Review Hearing was held February 23, 2009 and the parties consented to a continuation of the order pursuant to s. 42 (1) (b) until the next review date of May 11, 2009 which resulted in a further extension of the order to July 16, 2009.

[9] On July 6, 2009 the Applicant made an application under s. 43 (3) of the *Children & Family Services Act* seeking an order that the children S.S. and J.M.S. be returned to the care and custody of the Applicant Agency.

[10] The Applicant alleged concern about the Respondents non-compliance with random drug testing and there were further concerns about the need for R.M.S.to attend Addiction Services to determine what, if any, programs should be put in place for her. Paragraph 25 of the Applicant's Affidavit dated July 6, 2009 states as follows:

> 25. This worker again reminded the Respondents that they both must be home between 9:00 and 11:00 a.m. and that the Agency was not going to tolerate the missed drug tests.

[11] An order was issued pursuant to s. 42 (1) (d) of the *Children & Family Services Act* placing the children back in the temporary care and custody of the Applicant and the matter was adjourned to July 16, 2009 at which time a contested Disposition Review Hearing was scheduled for September 3, 2009.

[12] After having heard the evidence this Court stated in it's Decision as follows:

1. Regarding the issue of the Respondent's non - compliance the Court is faced with the task of determining what is in the best interest of the two children, namely S. and J. M., under these circumstances, which are serious and concerning to the Court.

2. There was an initial apprehension in September of 2008, there was a hearing in October of 2008 and the Court granted an order of supervised care for the Respondents, conditional upon them following certain specified requirements and conditions outlined by the Agency. It might sound trite but these things are done with due care and diligence to insure that it is in the best interest of the children. It is not always what's best for the parents. The parents lose some of their parental authority and rights in this regard because the state has officially become involved and the Court has become involved to insure what appears to be a potential risk for the child to remain in that environment is reduced or eliminated, and if it cannot be then the children can not be returned to ensure their best interests.

3. So the parents have a positive obligation to work with the Agency involved and the Court, to attempt to address any identified deficiencies in their parenting ability. That's what this is all about. This is not about taking children from their parents and walking away and being indifferent to the family unit and the integrity of a particular family. What this is about is insuring that families can live safely and productively and that the children in our community are going to be safe in the care of any specified parent. Now if they need help, they will get help. If they accept the help then there shouldn't be any problem in that family going off and doing what all families do and living in a nice, safe, family environment. If the parents cannot meet those expectations, then in those difficult cases, and they do happen, the children have to be removed and placed in a safe environment if the parents cannot or will not meet their parental obligations.

4. So it is about the kids, it's all about the kids and when parents come into this courtroom and are given the opportunity to participate and work with trained professionals, social workers, psychiatrists, addiction personnel to work through their difficulties, they should embrace that opportunity and not reject it or dismiss it as being intrusive upon their lifestyle. Is it intrusive, yes it is. But to dismiss it as being irrelevant to the long term objective, to have those children returned to a safe and happy environment, it strikes the Court as being an amazing position to take by any parent, an absurd one to be exact.

5. So in this particular instance J.B. and R.M.S. have agreed to do certain things confirmed by court order. That has significance, if not to them, certainly to the court. When a commitment is made to this Court, the Court expects the Respondents to meet that commitment and not to trivialize it because it doesn't suit their daily perspective or it might interfere with their weekends. The very thought that you would have the ability to believe or think that random drug testing could be in someway be controlled by your personal wants for the weekend is just amazing to the Court. I think J.B. to your credit you acknowledged that you made a mistake in that regard. R.M.S. I think you need an attitude adjustment in terms of how you view the seriousness of the situation and what a court order means. Start taking some responsibility and do some soul searching about what you can do to be a better parent and better cooperate with the services that are being afforded to you to assist in getting you out of this situation. Defiance and fighting is going to do nothing but result in the very situation you want to avoid, and that's what you're in now. You don't have your children do you. So I hope you've learned a lesson here since June 30th. It is important for you to participate and be compliant but do it in a productive way, don't do it in an aggressive or indignant way which may result in mixed messages being received by the people involved, including the Agency.

[13] The Court ultimately ordered the return of the children to supervised care of R.M.S. as follows:

> I am going to order the return of the children to your supervised care. J.B. will have to vacate the premises, because quite frankly J.B. your history of avoiding drug samples has been horrendous and not acceptable and the Court has no confidence in your evidence saying that you aren't doing drugs when in fact we don't have any empirical scientific data to establish that. Until such time as that is provided to this Court you will have to remain away from R.M.S. while she has care of those children.

[14] The following conditions were included in the September 3, 2009 order:

> (a) The Respondents, R.M.S. and J.B. shall participate in hair sample drug testing and/or random urinalysis drug testing and/or any other type of accepted drug testing as required by the Agency;
>
> (b) That the Respondents, R.M.S. and J.B., shall make referrals to the Addiction Services and follow any recommended treatment that results from these referrals;
>
> (c) That the Respondents, R.M.S. and J.B. both refrain from the consumption of alcohol and the consumption of illegal or prescriptive drugs unless the prescriptive drugs are used as directed by a physician.
>
> (d) That the Respondents, R.M.S. and J.B. comply with all reasonable requests, inquires, directions or recommendations of the Agency, including making the children available to the Agency representatives.
>
> (e) The Respondents, R.M.S. and J.B. are to work with the child, R., on continuing her education;

> (f) The Respondents, are to inform the Agency of any criminal charges or undertakings in relation to either or both of them within a reasonable time;
>
> (g) The Respondents are to inform the Agency of any changes in their address prior to the change and to provide the Agency with all updated contact information;
>
> (h) The Respondent, J.B. is not to have any contact, direct or indirect, in person, by phone, or by any other means with the children, S.S. and J.M.S. except as arranged through the Children's Aid Society of Cape Breton -Victoria;
>
> (i) The Respondent, R.M.S., will notify the Children's Aid Socity of Cape Breton-Victoria immediately of any contact or attempted contact by J.B. with either S.S. or J.M.S.;
>
> (j) In the event of non-compliance by the Respondents, R.M.S. and J.B. with any of the terms and conditions of this Order the Applicant, the Children's Aid Society of Cape Breton - Victoria shall be entitled to take the children, S.S. and J.M.S. into care and bring the matter before this Honourable Court pursuant to s. 43 (3) of the *Children's and Family Services Act.*

[15] The matter next returned to the Court for review of disposition on November 24, 2009 which was ultimately rescheduled to December 2, 2009.

[16] At that time the Court was advised that the Agency was still having difficulty in contacting R.M.S. and gaining access to her apartment building. The

Agency went on record indicating they would like to have more drug testing completed.

[17] The Court was also advised the Respondent, J.B. was “out of the picture” and had no further contact with Ms. R.M.S.

[18] Applicant’s counsel advised that if drug testing went okay, the Agency would seek a dismissal. The matter was thus adjourned for further review with the supervision order continued until February 1, 2010.

[19] On January 6, 2010 the Court was presented with a new application submitted on behalf of the Agency seeking an order to once again return the care and custody of the children to the Applicant pursuant to s. 43 (3) of the *Children & Family Services Act.*

[20] The companion affidavit filed by the Protection Worker and dated January 4, 2010 stated as follows:

> 1. On December 18, 2009, myself and Co-worker, Doug Thorn as well as Officers from the Cape Breton Regional Police Services

attended at the home of R.M.S. and she was cooperative and allowed myself, Mr. Thorn and the police to enter the residence;

2. It was noted that R.M.S. and all the other parties who were present in the apartment were sober;

3. After going through the apartment, it was noted that the bedrooms were cluttered but there were no signs of drugs and there was an appropriate amount of food on the premises to provide for all the children;

4. I checked the children, J.M.S. and S.S. for bruises and neither of them had bruises;

5. The Respondent, J.B. was found hiding in R. S.'s bedroom and was arrested by the Cape Breton Regional Police Officers;

6. Myself and Doug thorn contacted our Supervisor, David Brown and a Risk Management Conference was held and it was decided on an interim basis, at that R. M. S. would be permitted to go to Cape Breton Transition House with children if the Respondent, R.M.S. was willing to do so;

7. On December 21, 2009, I attended at Cape Breton Transition House to provided R.M.S. with a cheque to be used to purchase Christmas presents for her children and I was advised by a Crisis Worker at Transition House that they suspected that R.M.S. was using drugs;

8. On December 29, 2009, I telephoned the Cape Breton Transition House and I was advised by the Crisis Worker at Transition House that there were concerns about R.M.S.'s ability to care for her children as R.M.S. leaves the shelter in the morning on a regular basis; R.M.S.had been asked again if she was using drugs and she continued to deny this use;

9. In the same conversation, the Crisis Worker advised that R.M.S. does not appear to understand why she is staying at

Transition House and that she has advised the Crisis Worker that she is not being abused and that J.B. is a good guy;

10. During the same conversation, the Crisis Worker indicated that Transition House has a zero policy for drugs and alcohol and that R.M.S. appears to be under the influence of a substance and this is being observed by other women who are staying at Transition House;

11. Later on December 29, 2009, I received a message from staff at Transition House indicating that R.M.S. was asleep in the office at Transition House with two of her children and they were not able to wake her up;

12. On December 29, 2009, a Risk Management Conference was held in relation to R.M.S. and during that Risk Management Conference the Agency's historical involvement with R.M.S. dating back to 1995 was reviewed and it was noted that the Agency's concerns were centered around the issues of drug use and supervision of the children;

13. It was noted that while the children were residing with the two Respondents under a Supervision Order for the first half of 2009, that the two younger children, S. and J. M., were re-apprehended on June 30, 2009, as the two Respondents were not complying with the existing Court Order requiring them to participate in random drug testing and that on or about September 3, 2009, the Court had ordered the two younger children to be returned to the care of R.M.S. under a Supervision Order; the Supervision Order provided there would be no contact between J.B. and his children, S. and J. M., except as arranged by the Children's Aid Society of Cape Breton-Victoria;

14. It was also noted at the Risk Management Conference that in contravention of the existing Court Order, J.B. had been found hiding in a bedroom of the home of R.M.S. and R.M.S.had not

notified the Agency of J.B.'s contact with his two younger children as required by the Court Order;

15. At the conclusion of the Risk Management Conference it was decided that the children, S. and J.M.S. cannot be adequately protected while in the care of R.M.S. and as a result it was necessary to remove J.M.S. and S.S. from the care of R.M.S. and place them in the care of the Agency to ensure their safety;

16. After the Risk Management Conference on December 29, 2009, I attended at the Cape Breton Transition House where the children were apprehended and R.M.S. was served with a Notice of Taking Into Care.

[21] An Order under s. 42 (1) (d) of the *Children & Family Services Act* was thus issued and adjourned to January 20, 2010 on the following conditions:

(a) The Respondents, R.M.S. and J.B. shall participate in hair sample drug testing and/or random urinalysis drug testing and/or any other type of accepted drug testing as required by the Agency;

(b) That the Respondents, R.M.S. and J.B., shall make referrals to the Addiction Services and follow any recommended treatment that results from these referrals;

(c) That the Respondents, R.M.S. and J.B. both refrain from the consumption of alcohol and the consumption of illegal or prescriptive drugs unless the prescriptive drugs are used as directed by a physician.

(d) That the Respondents, R.M.S. and J.B. comply with all reasonable requests, inquires, directions or recommendations of the Agency, including making the children available to the Agency representatives.

(e) The Respondents, R.M.S. and J.B. are to work with the child, R., on continuing her education;

> (f) The Respondents, are to inform the Agency of any criminal charges or undertakings in relation to either or both of them within a reasonable time;
>
> (g) The Respondents are to inform the Agency of any changes in their address prior to the change and to provide the Agency with all updated contact information;

[22] The matter was adjourned to February 26, 2010 and concluded on April 12, 2010 where the Applicant presented evidence seeking permanent care without access to the Respondents' children as per the amended plan of care dated January 27, 2010.

[23] The Respondent opposed the application seeking return of the children.

APPLICANT EVIDENCE AND POSITION

[24] The following witnesses testified on behalf of the Applicant, namely Cheryl Crane, Bayshore Nurse; Wendy Clark, Records Manager Addiction Services; Corrine MacNeil, Adolescent Clinical Therapist (Addiction Services); Lillian Chadwick, Cape Breton Transition House Co-ordinator; Sherry Johnston, Protection Worker; Dr. Amil Nanji, Medical Biochemist & Toxicology Expert; and Mr. Joey Gareri, Analytical Toxicology Expert.

[25] The Respondents, R.M.S. and J.B. also testified along with R.S., the 17 year old daughter of R.M.S..

[26] According to the evidence of **Cheryl Crane** the Respondents were to make themselves available for random urine collections (7) seven days a week between 7:30 a.m. and 9:30 a.m.. Samples were provided as required from September 5, 2009 to October 15, 2009. The witness testified that it was sometimes difficult to gain access to R.M.S.'s apartment building and on September 27th and 28th, 2009 there was no answer when she knocked on the apartment door and voice mail messages were not returned.

[27] Cheryl Crane testified as of October 15, 2009 drug testing was put "on hold" and resumed on December 12th and 16th, 2009 resulting in no contact with R.M.S.. R.M.S. was located at Transition House on December 20, 2009 and samples were obtained December 22nd, 27th and 29th, 2009. On January 5, 2010 R.M.S. was found not to have remained at Transition House and attempts to contact R.M.S. on January 8th and 10th, 2010 proved unsuccessful. As a result random drug testing was again placed "on hold" on January 12, 2010.

[28] **Wendy Clarke** testified that according to Addiction Services' records, marked as Exhibit No. 4, R.M.S. met with Corrine MacNeil, M.S.W. for one hour on June 4, 2009 and one and a half hours June 26, 2009. R.M.S. failed to show for a scheduled appointment on June 12th and July 7th, 2009.

[29] Ms. Clarke further testified R.M.S.was referred to Methadone Treatment Program on January 3, 2010 but left the program against the advise of the program administrator on January 8, 2010. The records further confirm R.M.S.did not meet with Marjorie MacDonald or enlist in the methadone program.

[30] **Corrine MacNeil**, M.S.W. confirmed that scheduled counselling with R.M.S.was not completed.

[31] The next witness for the Applicant Agency was **Lillian Chadwick,** who received R.M.S.in the Transition House on December 19, 2009 until December 29, 2009. Ms. Chadwick further testified that she observed on at least three occasions the following:

* That she believed R.M.S.to be under the influence of "something";
* That she could not smell anything;
* That R.M.S.'s eyes appeared "dazed";

* that her eyelids closed more;
* That there was a stagger to her walk;
* That she spoke very slowly;
* That she appeared to be going to sleep at different times;
* That R.M.S. confirmed she was taking prescription medication for chronic back pain.

[32] Because of the above noted observations Ms. Chadwick had concerns about Ms. S.'s drug use and wrote up a schedule for R.M.S.to take three pills a day. Ms. Chadwick further testified that after the children were apprehended by the Applicant Agency on December 29, 2009, R.M.S.was asked to leave Transition House due to the House Drug Policy. R.M.S.advised Ms. Chadwick that she would be admitted to the Addiction Services Methadone Program the following week, which did not occur according the earlier evidence.

[33] **Sherry Johnston**, Protection Worker testified to the events of December 18, 2009 at which time J.B. was found hiding in R.M.S.'s bedroom contrary to the court order. She confirmed that R.M.S.was taken to Transition House on that date and that the children were re-apprehended on December 29, 2009, as a result of numerous calls from crisis workers at Transition House. Once advised that R.M.S.was asleep and could not be woken up a Risk Management Conference as convened and the decision was made to take the children into their care and custody.

[34] Of concern to the Applicant Agency is that R.M.S. had not engaged in services; that drug testing was sporadic and that she did not complete counselling with Addiction Services. Ms. Johnston testified that J.B. is now willing to engage in services; provide urine samples and take addiction counselling. Ms. Johnston testified there is not sufficient time to complete their services.

[35] The Applicant Agency is of the belief the children remain at risk and they are seeking permanent care with no provision for access but the witness did confirm that there is a strong bond between the Respondent's and the children, including R. and that current access arrangements were working well.

[36] Ms. Johnston testified that an extended family placement was considered by the Agency, however it may mean separating the children which was not supportable by the agency. Hence their position of permanent care.

[37] **Dr. Amin Nangi** was qualified as an expert to give opinion evidence in the interpretation of Toxicology results and the clinical effects that drugs have on people. The doctor reviewed the test results regarding R.M.S.and submitted his report marked Exhibit No. 5 which states as follows:

Benzodiazepines - The positive tests for benzodiazepines reflect the fact that RS has been prescribed clonazepam, a benzodiazepine derivative with anticonvulsant muscle relaxant and anxiolytic properties. It can be deduced from the urine drug tests that she is taking a dose of clonazepam which is higher than what would otherwise be considered normal. It is important to point out that no physician would prescribe clonazepam in qualities that would lead to a positive urine drug test result. Common side effects of such higher doses are drowsiness, impairment of cognition, judgment or memory, irritability, aggression and lack of motivation.

Oxycodone - Toxicology analysis on the urine of RS given opioid prescriptions provided an important piece of information - evidence that RS was taking oxycodone in quantities larger than what is normally prescribed (10-40 mg/24hrs).

Absence of the prescribed medication in a urine sample suggests that reasons for a negative urine result include:

a) taking less medication than prescribed; and
b) adulterating the urine sample so as to hide illicit drug use.

On the other hand, the presence of a positive screen was evident that RS was taking high doses of the drug.

Hydromophone - Hydromophone is a hydrogenated ketone derivative of morphine that acts as a narcotic analgesic. It has a shorter duration of action than morphine. Hydromorphone is approximately 8 times more potent on a milligram basis than morphine. In addition, hydromorphone is better absorbed orally than is morphine. Hydromorphone exerts its principal pharmacological effect on the central nervous system and gastrointestinal tract.

Its primary actions of thereapeutic value are analgesia and sedation. Hydromorphone appears to increase the patient's tolerance of pain and to decrease discomfort.

> In the case of RS, hydromorphone was positive on one occasion (December 27, 2009). The fact that there is no evidence of RS being prescribed hydromorphone suggests illicit use of the drug.

[38] The doctor testified, in his opinion, that R.M.S. exceeded the "cut off" levels and was taking at least five times the prescribed amount to reach the level of positivity noted for the prescription drug benzodiazepine.

[39] Regarding the prescribed drug endocet or oxycodone, Dr. Nangi testified it was his expert opinion that R.M.S.was taking at least five times more than prescribed which exceeded "cut off levels". The doctor testified there is no reason why any doctor would prescribe such a high level of the drug. It should be noted in this regard Ms. S.'s prescription stated "take as directed".

[40] R.M.S.also tested positive for hydromophone which is an opiate morphine derivative. The doctor testified that there was no prescription for this drug which suggested "illicit use" in his opinion . He further testified the test results definitely indicate a high dosage was taken to reach the high level reported.

[41] In general the doctor testified that to achieve the “therapeutic effect” of a drug it is generally reached at lower levels (i.e.) prescribed amount. Extremely high levels result in people getting high and once the result exceeds beyond cut off levels indicates an “extremely high” dosage has been taken which causes the person to “seek the drug”.

[42] On Cross Examination the doctor agreed that 25 mg/day of the prescribed drug endocet is a high dosage, but testified that a prescription in that amount would probably not explain the high test results. The doctor stated a normal dosage of this drug would be 5-10 mg/day. The doctor agreed that tolerance can be a factor and that given those circumstances a person may have to take more of the drug to get the same effect.

[43] In terms of symptomology the doctor testified that Benzodizapine can make a person excessively sleepy with no motivation to do physical activity. A person would not be hungry and generally feel numb.

[44] Extremely high dosages of oxycodone can result in mental confusion and the person not being able to construct thoughts or have coherent conversation.

[45] Regarding hydromophine the symptomology would be similar to that of oxycodone, but more potent because of the morphine component.

[46] The symptoms as described by Lillian Chadwick were brought to the doctor's attention by the Court and the doctor testified, in his opinion, they were indicative of drug use. He stated there may be other cause factors but would first rule out drugs.

The doctor stated:

"It would be the first thing I would think about"

The doctor did agree, however, that sleep deprivation could cause similar symptoms with the impact of the drug making the symptoms worse.

[47] **Mr. Joe Gareri** also testified. He was qualified to give expert opinion in the field of analytical toxicology. Exhibit No. 8 reflects the contents of his report dealing with hair analysis of R.M.S..

[48] The hair tests proved positive for the drugs benzodizepines and oxycodone in amounts that the witness described as "consistent" with the prescribed amount and considered to be in the "Low Range". Mr. Gareri did confirm in his evidence

these results cannot specify the daily dosage and he cannot confirm that that person is consistent with taking the prescribed amount. In other words he cannot determine if there has been over use, nor can it be determined how impaired a person would have been without actually testing that individual.

[49] Mr. Gareri confirmed in his opinion there was “illicit use” of the drug hydromophine.

RESPONDENT EVIDENCE AND POSITION

[50] **R.M.S. testified**. She is 34 years of age with a grade nine education. The witness confirmed the medication she takes for chronic back pain resulting from a fall when she was 10 years of age. She states she takes four to five pills per day but the prescribed amount is four. R.M.S.confirmed she took hydromophine without a prescription on December 27, 2009. She testified she took one capsule from a friend to try it.

[51] R.M.S.now resides with J.B. and her daughter R.. She testified she now sees counsellor Marjorie MacDonald and taking no drugs other than those prescribed.

[52] R.M.S.admitted to a long standing drug problem dating back to 1994 and that she previously attended Addiction Services in 2006 - 2007 pursuant to a requirement of the Agency.

[53] R.M.S.acknowledged she missed some drug tests and did not complete the assessment with Corrine MacNeil, M.S.W.

[54] She further testified that she did inquire about the methadone maintenance program but elected instead to remain on her current medication. As she stated:

"I know I depend upon medication"

[55] R.M.S.acknowledged she was in violation of many of the September 3, 2009 court ordered conditions, but did not do so intentionally.

[56] She requests this Court to order the return of her children to her care and states J.B. is a "great dad" and he is close to all the children.

[57] The seventeen year old daughter, **R.S.** also testified. She testified it was her decision not to attend school and she was encouraged by both Respondents not to quit. She plans to return to school in the fall of 2010.

[58] R.S. testified about the stress of this process has had on her and her family as a whole. In her opinion her mother is capable of caring for her two sisters and requests that the Court order their return to their mother.

[59] R.S. spoke very positively about J.B. and described a good relationship between he and her mother and the children.

[60] **J.B.** was the final witness to testify. He has been together with R.M.S. for four years and is the biological father of J.M.S. and the child due to be born in June, 2010.

[61] He acknowledged he made mistakes in not complying with the court order and stated on December 18, 2009 he was at R.M.S.'s apartment to give her grocery money. He did not leave because he "just missed his kids".

[62] J.B. testified he does not drive nor does he have a drug problem. He testified if the children are returned he will spend a couple of weeks with them and then go to work in *.

[63] J.B. testified there is no violence in the home and things are going good presently.

[64] J.B. confirmed he has not complied with any testing since the September 3, 2009 court order. When questioned about what changes he has made in his life he stated:

"I have nothing to change"

SUBMISSIONS

[65] The applicant submits once the Court makes a protection finding a plan can then be put forward to address concerns. In this instance the Applicant Agency has concerns about drug use and abuse by the named Respondents. Counsel for the Agency argue once protection concerns are identified the focus switches to Remedial Services to determine whether or not the risk can be eliminated or reduced.

[66] The Agency submits the Respondents have taken a similar position to what they took at the September 3, 2009 hearing (i.e.) They don't have any problems. It is submitted this flies in the face of the protection finding and amended plan of care filed by the Agency.

[67] It is submitted it was within their control to pursue Remedial Services and follow through with addiction counselling.

[68] Counsel for the Agency points out that at this stage of the proceeding the Court has two stark options: (1) order permanent care or (2) dismiss the case. It is submitted the Respondents have not taken the necessary steps to reduce risk to their children and request the Court order permanent care to the Agency with no provision for access by the Respondents.

[69] Ms. S.'s counsel argues that the evidence of drug abuse is less than when the original order was made. With the exception of the hydromophine finding it is submitted R.M.S.has been compliant with her prescription medications.

[70] It is submitted the Court should not lose sight of the ultimate question, namely has the risk to the children been eliminated or reduced. It is submitted there is no risk in returning the children to R.M.S..

[71] Alternatively it is submitted, should the Court grant a Permanent Care Order that it include a provision for access for the Respondent, R.M.S..

[72] Counsel for J.B. acknowledges it was wrong for J.B. not to follow the court order. It is urged upon the Court to consider the risk of harm versus destroying the family unit. It is submitted the purpose of the protection legislation is to keep families together using the least intrusive measures, not tear the family apart.

[73] It is submitted R.M.S.and J.B. love their children and the evidence is not sufficient to warrant a permanent care finding. J.B.'s counsel referenced the evidence of Mr. Gareri which is submitted to support R.M.S.'s medication use and that the children would not be at risk in her care.

Counsel also urged the Court to make an order for access in the event permanent care was ordered.

[74] R.S. was also represented by counsel at this proceeding. It is pointed out to the Court about the strong bond that exists between all the members of this family. It is submitted there is no drug or alcohol abuse by the Respondent and the family would be devastated by a Permanent Care Order.

[75] In the alternative a submission was made supporting access for the Respondent and R. in the event of permanent care is ordered.

BURDEN OF PROOF

[76] The burden of proof in this proceeding is the civil burden on the balance of probabilities but one that must take into consideration the consequences of a request to have a child placed in the permanent care of an agency. The burden of proof is on the agency to show that a Permanent Care and Custody Order is in the child's best interest.

LEGISLATION

[77] The Court must consider the requirements of *Children and Family Services Act, S.N.S. 1990, c. 5* in reaching its' conclusion. I have considered the preamble, which states:

AND WHEREAS children are entitled to protection from abuse and neglect;

> AND WHEREAS parents or guardians have responsibility for the care and supervision of their children and children should only be removed from that supervision, either partly or entirely, when all other measures are inappropriate;
>
> AND WHEREAS children have a sense of time that is different from that of adults and services provided pursuant to this Act and proceedings taken pursuant to it must respect the child's sense of time;

[82] I have also considered Sections 2(1) and 2(2), which provide:

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

[83] I have also considered the relevant circumstances of Section 3(2), which provides:

> 3(2) Where a person is directed pursuant to this Act, except in respect of a proposed adoption, to make an order or determination in the best interests of a child, the person shall consider those of the following circumstances that are relevant:

> a) the importance for the child's development of a positive relationship with a parent or guardian and a secure place as a member of a family;
>
> (d) the bonding that exists between the child and the child's parent or guardian;
>
> (e) the child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs;
>
> (i) the merits of a plan for the child's care proposed by an agency, including a proposal that the child be placed for adoption, compared with the merits of the child remaining with or returning to a parent or guardian;
>
> (k) the effect on the child of delay in the disposition of the case;
>
> (l) the risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent or guardian;
>
> (m) the degree of risk, if any, that justified the finding that the child is in need of protective services;

[84] Other relevant Sections include Sections 42(2), which provides as follows:

> (2) The court shall not make an order removing the child from the care of a parent or guardian unless the court is satisfied that less intrusive alternatives, including services to promote the integrity of the family pursuant to Section 13,
>
> (a) have been attempted and have failed;
>
> (b) have been refused by the parent or guardian; or
>
> (c) would be inadequate to protect the child.

[85] I have reviewed the least intrusive alternatives, including services to promote the integrity of the family.

Section 42(3) provides:

> (3) Where the court determines that it is necessary to remove the child from the care of a parent or guardian, the court shall, before making an order for temporary or permanent care and custody pursuant to clause (d), (e) or (f) of subsection (1), consider whether it is possible to place the child with a relative, neighbour or other member of the child's community or extended family pursuant to clause (c) of subsection (1), with the consent of the relative or other person.

[86] Section 42(4) provides:

> (4) The court shall not make an order for permanent care and custody pursuant to clause (f) of subsection (1), unless the court is satisfied that the circumstances justifying the order are unlikely to change within a reasonably foreseeable time not exceeding the maximum time limits, based upon the age of the child, set out in subsection (1) of Section 45, so that the child can be returned to the parent or guardian. 1990, c. 5, s. 42.

DECISION (PERMANENT CARE VS DISMISSAL)

[87] I have reviewed the evidence together with the plans and submissions of the parties. I have applied the burden of proof to the Agency.

[88] I have considered the law and the legislation provisions of *the Children and Family Services Act.*

[89] I find that the Order requested by the Agency is the appropriate one. Both S.S. and J.M.S. continue to be children in need of protective services. It is in the best interests of their children that they be placed in the Permanent Care and Custody of the Agency pursuant to S. 42(1)(f) and S. 47 of the Act.

[90] This was a difficult decision to reach as I recognize the love which R.M. S., J.B. and R.S. have for the children. I also recognize that their home is clean, safe and there is no apparent violence. Most importantly I recognize the bond which exists between these children and their family. Despite their positives, I must, nonetheless, grant the application for permanent care.

[91] According to the legislation which I must follow, the Court has only two options available at this time (1) dismiss the proceeding and return the children to one or both of the Respondents or (2) place the children in the permanent care of the Agency. There is no middle ground.

[92] I cannot return the children to either one or both of the Respondents because the children remain in need of protective services. A Permanent Care Order thus must issue.

[93] I find the factors outlined in S. 42(2) of the *Act* have been proven by the Agency. I find that less intrusive alternatives, including services to promote the integrity of the family have in some respects been attempted and failed and in other respects would be inadequate to protect the children.

[94] I draw this conclusion based upon the following findings:

> 1. R.M.S. continues to abuse drugs. I reject the evidence that there is no drug abuse. I accept the evidence of Lillian Chadwick that she had concerns about R.M.S.'s drug use and the indicia of impairment that she observed and reported. I accept the evidence of Dr. Nanji who reported high levels of drugs in R.M.S.'s test results. Even where Dr. Nanji and Mr. Gareri evidence conflict there still remains the issue of the "illicit use" of hydromorphone. I reject R.M.S.'s evidence that she took only one capsule of same based upon Dr. Nanji's opinion. I also reject the notion that sleep deprivation alone and not the effect of drug misuse caused the symptoms exhibited by R.M.S.
>
> 2. I find the failure of the Respondents to consistently be available for drug testing as arranged by the Agency was the result of concern that the tests would be positive. I do not accept the excuses offered by the Respondents for their failure to take the tests which the Court notes were placed "on hold" on two separate occasions for extended periods. I find that one or both of the

> Respondents intentionally failed to answer the door or answer the phone so that the Court ordered tests could be avoided.
>
> 3. The Respondents do not understand the significant risks associated with substance abuse and parenting. Because of this lack of understanding both Respondents continue to place the children at risk.
>
> 4. Neither Respondent has completed successfully the services needed to either conquer addictions or establish that there is no longer any addiction concerns.
>
> 5. The unresolved addiction concerns can lead to poor parental decision making in the future. Until these issues are resolved, the children will remain at risk, and by that I mean significant risk that is apparent on the evidence.

[95] Although the Respondents appear to be trying and R.S. gives them her full support, the Permanent Care Order, nonetheless will issue. It is not safe to return the children and I find that the circumstances justifying the order are unlikely to change within a reasonable, foreseeable time. The Permanent Care and Custody Order is therefore granted.

ACCESS

[96] In view of the above finding I must now consider the issue of access. The Agency is of the view that access is not in the best interest of the children and have plans for adoption. The Agency is not opposed to R.S. having contact with her sisters, however request an access provision not be included in the order.

[97] The Respondents seek access to their children. They rely upon the best interests of the children and note the positive bond which exists between them.

[98] Justice T. Forgeron stated as follows in the **Children's Aid Society of Cape Breton-Victoria v M. H., C. B., J. B. and S. B.** 2008 NSSC 242 commencing at paragraph 25 to 31 as follows:

> [25] If access is sought once an order for permanent care is made, the burden of proof shifts to the respondents as noted in s. 47(2) of the Children and Family Services Act and as reviewed by Cromwell J. in Children's Aid Society of Cape Breton-Victoria v. A.M. (2005), 232 N.S.R. (2d) 121 (C.A.). The Act contains a presumption against access once a permanent care order has issued.
>
> [26] Section 47(2) of the Act has been a source of heated debate as thoughtfully reviewed by Levy J. in Family and Children's Services of Kings County v. M.J.B. and K.B. [2008] N.S.J. No. 153, 2008 NSFC 12 (Fam.Ct).
>
> [27] Section 47(2) of the Act reads as follows:
>
> > 47(2) Where an order for permanent care and custody is made, the court may make an order for access by a parent or guardian or other person, but the court shall not make such an order unless the court is satisfied that
> >
> > (a) permanent placement in a family setting has not been planned or is not possible and the person's access will not impair the child's future opportunities for such placement;
> >
> > (b) the child is at least twelve years of age and wishes to maintain contact with that person;

(c) the child has been or will be placed with a person who does not wish to adopt the child; or

(d) some other special circumstance justifies making an order for access.

[28] In Children's Aid Society of Cape Breton-Victoria v. A.M., supra, Cromwell J. noted that the access decision contemplated in s. 47(2) of the Act was a "delicate exercise that requires the judge to weigh the various components of the best interests of the child." Cromwell J. further directed that in performing this "delicate balance," the court was required to consider both the importance of adoption in the particular circumstances of the case and the benefits and risks of making an order for access.

[29] In two other appeal cases, Children's Aid Society and Family Services of Colchester County v. E.Z. and J.M. [2007] N.S.J. No. 410, 2007 NSCA 99 and A.J.G. v. The Children's Aid Society of Pictou County and J.G. [2007] N.S.J. No. 284, 2007 NSCA 78, Bateman J.A. makes comments relevant to the interpretation of s. 47(2). In E.Z. and J.M., supra, Bateman J.A. notes that s. 47(2) of the Act cries out for legislative clarification. She further states that permanent placement of a child takes precedence over access, and that access must not be made where it will impair a child's opportunity for permanent placement at para. 56:

56 As others have commented, the wording of s. 47(2) cries out for legislative clarification. It suffices to say here that, at a minimum, this is statutory recognition that permanent placement of the child (which is usually, but not always, accomplished through adoption) takes precedence over access and that an access order must not be made where it will impair a child's opportunity for permanent placement.

[30] In A.J.G., supra, Bateman J.A. confirms that the amendments to s. 78 of the Children and Family Services Act did not alter the prerequisites for the granting of access once a permanent care order has issued at para. 31:

> 31 As stated above, the amendments are reflected in ss. 78(5) and (6). It is key here that s. 47(2) remained unchanged. The

> amendments to the CFSA permitting the continuation of a pre-existing access order on adoption did not alter the prerequisites for the granting of access on permanent care.

[31] Further, Bateman J.A. confirmed the parameters to the meaning of "special circumstances" in A.J.G., supra at para. 33:

> 33 A.G. urges this Court to provide guidance as to what would constitute "special circumstances". The potential fact situations are so varied that it is impossible to provide any specificity. It must be highlighted, however, that "special circumstances" are only available as a basis for access where "a permanent placement in a family setting has not been planned or is not possible and the person's access will not impair the child's future opportunities for such placement" (s. 47(2)(a)).

[99] The obligation to act in the children's best interests is one which I take seriously. I will do all within my power to ensure that their best interests are met. The interests of the Agency, the Respondents and R.S. are secondary to the best interests of the children.

[100] I find that it is in the children's best interests to have access with their parents, and sister notwithstanding the ongoing protection concerns which exist and the permanency planning which has been made. I make this finding for the following reasons:

> a) The children have a positive, healthy attachment to their parents, and sister. I accept that the access visits are positive and nurturing. I

find that future access visits will continue to be positive. I find that the children will continue to benefit from access visits with their parents and sister.

b) I find that permanency planning for the children will not be impaired by an order for access. There is no evidence before this Court to suggest otherwise.

c) The bond between the children, the Respondents and R.S. must be permitted to grow and the delicate balance favors access to the Respondents. R.M.S., J.B. and R. S. have met the heavy burden which was upon them.

CONCLUSION

[101] The order for permanent care and custody is hereby granted, subject to the right of access. Supervised access will continue on the condition that neither party is under the influence of alcohol or nonprescription medication at the time of the visits, including being unduly or obviously under the influence of prescription medication.

J