IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Nova Scotia (Community Services) v. C.M., 2011 NSSC 112

Date: 2011/03/17
Docket:65623
Registry: Sydney

Between:

Minister of Community Services

Applicant

v.

C. M. and G.M.

Respondent

Editorial Notice

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

Judge:	The Honourable Justice Kenneth C. Haley
Heard:	July 29, 2009; August 6, 2009; August 24, 2009; October 21, 2009; January 19, 2010; March 25, 2010; April 1, 2010; April 26, 2010; May 10, 2010; May 18, 2010; July 22, 2010; October 12, 2010; November 12, 2010; December 3, 2010; December 8, 2010; December 13, 2010; December 15, 2010; February 21, 2011; February 23, 2011, in Sydney, Nova Scotia
Counsel:	Sanaz Gerami, for the Applicant Douglas MacKinlay, for the Respondent, C.M. David R. Campbell, Q.C., for the Respondent, G.M.

By the Court:

[1] This is the application of the Minister of Community Services, hereafter called the Agency, seeking an Order pursuant to Section 42(1)(f) of the *Children & Family Services Act*, that the children M.J. age 8; A.J. age 7; O.M. age 3, and L.M. age 2, be placed in the permanent care and custody of the Agency, with no provision for access. The Respondents oppose the application.

[2] The history of the file is as follows:

- July 29, 2009 - apprehension date.

- August 6, 2009 - Five Day Section 39 Interim Hearing.

- August 24, 2009 - Completion of Section 39 Hearing, placing the children in the temporary care of the agency with supervised access to the Respondents.

- October 21, 2009 - Protection Order issued. Children found to be in need of protection services.

- January 19, 2010 - Disposition Hearing - status quo continued.

- March 25 and April 1, 2010 - Disposition Hearing - status quo continued.

- April 26, 2010 - Disposition Review - status quo continued.

- May 10 and 18, 2010 - Disposition Review - status quo continued with two older children being placed with the grandmother.

- July 22, 2010 - Disposition Review - status quo continued.

- October 12, 2010 - Disposition Review - status quo continued with joint supervised access visits to be initiated.

- November 12, 2010 - Disposition Review - status quo continued with increase in supervised access.

[3] Due to the length of the proceeding complications developed throughout resulting in the statutory time lines as defined by the ***Children and Family Services Act*** having been necessarily exceeded.

[4] As a result the Court found, with the consent of counsel, that it was in the best interests of the children to exceed the statutory time lines to afford the necessary time for the parties to present all relevant evidence and to permit the Court to fairly and properly adjudicate upon the matter.

[5] 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 section 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 section 45."

[6] The Permanent Care Hearing was heard by this Court on December 3; 8; 13; 15, 2010, and February 21 and 23, 2011.

[7] The Agency called the following witnesses, namely:

- Cst. Tara Myler - R.C.M.P.

- Ms. Chris Bailey - Clinical Therapist.

- Mr. Ed Burke - Social Worker.

- Ms. Alana Brown - Clinical Therapist.

- Mr. David Brown - Adoption Placement.

- Ms. Michelle MacLean - Family Support Worker.

- Reverend K.L. - United Church.

- Ms. Ashley Rice - Access Facilitator.

- Ms. Nancy Pastuck - Access Facilitator.

- Ms. Jamie Pollett - Access Facilitator.

- Ms. Donna Mikklesen - Temporary Care Worker.

- Ms. Monique Gibson - Long Term Protection Worker.

[8] Counsel for the Respondent, C.M, called the following witnesses in opposition to the application, namely:

- Ms. J. M. - teacher.

- Ms. V. H. - teacher.

- Mrs. R. R. - maternal grandmother of the children.

- C.M. - Respondent.

- Ed Burke - Social Worker.

[9] The Respondent, G.M. was also called to testify on his own behalf in opposition of the application.

[10] During the course of this proceeding the following Exhibits were tendered:

Exhibit #1 - Book of Pleadings.

Exhibit #2(a) - Book of Case Recordings (Volume 1)

Exhibit #2(b) - Book of Case Recordings (Volume 2)

Exhibit #3 - Book of Case Records Re Children

Exhibit #4(a) - Book of Access Facilitators Reports (Volume 1)

Exhibit #4(b) - Book of Access Facilitators Reports (Volume 2)

Exhibit #5 - Letter of Ed Burke

Exhibit #6 - Affidavit of Dave Brown

Exhibit #7 - Affidavit of Michelle MacLean

Exhibit #8 - Developmental Assessment

Exhibit #9 - Brief Psychological Assessment

Exhibit #10(a) - Medical Records

Exhibit #10(b) - Medical Records

Exhibit #11 - Amended Affidavit of Donna Mikklesen

Exhibit #12 - Amended Affidavit of Monique Gibson

Exhibit #13 - Journal of A.J.

Exhibit #14 - Report Card of A.J. to end of November, 2010.

Exhibit #15 - Journal of M.J.

Exhibit #16 - Report Card of M.J.

Exhibit #17 - Certificate

EVIDENCE

[11] The M. children were apprehended July 29, 2009 due to a reported breach of a "no contact" provision against Mr. M. regarding Mrs. M. The Agency was concerned that Mr. M. had returned to the home, and in view of past reported incidents of domestic violence; addiction and mental health issues, the Agency intervened.

[12] The Agency's concerns are noted in the Affidavits of **Donna Mikklesen** dated December 13, 2010, marked Exhibit #11, and **Monique Gibson** dated December 13, 2010 marked Exhibit #12.

[13] The Agency's main concerns are as follows:

- past and present domestic violence and addiction concerns;

- failure to properly supervise the children in a safe manner;

- lack of insight into the emotional, behavioral, and educational needs of the children;

- the reconciliation of the Respondents which raised further concerns about the repetition of domestic violence including the alleged misconduct of Mr. M. with the family babysitter.

[14] The Respondents responded well to services in 2009, and the reports from service providers were initially positive until a reported incident of domestic violence in November 2009, which resulted in Mrs. M. ending the relationship. Criminal charges against Mr. M. flowing from this incident were ultimately dismissed.

[15] Mr. M. left the area and was placed on an Undertaking to have no contact with Ms. M.

[16] The Agency's plan was, at that time, to support Mrs. M. in her efforts to have the children returned to her care as evidenced by the Agency's Plan of Care dated January 2, 2010, and marked Exhibit #1, Tab #4.

[17] In July 2010 Mrs. M. recommenced her relationship with Mr. M. on the understanding that he would address his drinking and violence issues. The evidence supports Mr. M.'s contention that he has been sober and alcohol free since April 2010.

[18] The Agency did not support the Respondents' new plan to have the children returned to them as a couple, and amended its plan to seek permanent care of the children. The Agency did, however, agree to monitor the situation and provide services. In this regard it should be noted that the Respondents sought out additional personal counselling and services on their own initiative.

[19] The Agency in seeking permanent care, nonetheless acknowledge that the Respondents were putting "some effort" into their reconciliation, and confirmed that Mrs. M. had completed some programs regarding parenting, abusive relationships, children's needs, stress management and emergency preparedness.

The Agency maintains these programs are insufficient to address their concerns regarding the safety of the children.

[20] Since October 2010 the Agency confirmed that the joint access visits with both parents were going well, and that there were no signs of violence between the parties since November 1, 2009.

[21] Further Agency evidence confirmed that the child, M.J. , age 8, has been doing much better in the foster care of her maternal grandmother, and would like to return home, as evidenced by her journal marked Exhibit #15. Initial concerns of defiance, aggression, sexualized language and behavior have diminished since being placed with her grandmother. M.J. is partially deaf, and has been assessed by **Dr. Stephen MacEachern, PHD**, whose report was tendered with the court and marked Exhibit #9. His recommendations regarding providing educational assistance to M.R.J. are contained therein.

[22] The child, A.J. , age 7, was placed with her maternal grandmother, and developmental concerns have been addressed in school through a tutor. A decision has been made that no psychotherapy is required, and the child is happy, well

adjusted, and a “typical little girl”. A.J. would also like to return home, further evidenced by her journal marked Exhibit #13.

[23] The child O.M.’s behaviors of aggression, spitting, smearing feces, screaming, not sleeping, interacting with children, and speech difficulties have been and are being addressed. The child is in daycare and interacts well with the other children. He is responding better in his foster home, and although he still has some outbursts, it has become much easier to address same.

[24] **Dr. Reginald Landry, PHD** completed a developmental assessment on O.M. dated October 27, 2010, marked Exhibit #8, which was tendered by consent. O.M. is not autistic, but does have difficulties with regulating his behavior, which may be related to his language difficulties and attention challenges.

[25] The youngest child, L.M., age 2, continues to do well in another foster care home, with no reported issues. Unlike her siblings, L.M. does not display emotional, cognitive or developmental setbacks, and is a happy and well adjusted child.

[26] The Access Facilitators' evidence is consistent in confirming that the children are happy to see their parents and one another. Supervision concerns regarding Ms. M. improved during twenty observed visits from June 10 to September 21, 2010, and also improved since October 2010 when Mr. M. was permitted to join the visits.

[27] Supervision concerns are noted in the Affidavit of **Michelle MacLean** marked Exhibit #7. It was nonetheless acknowledged that once the joint visits started "things started to improve" regarding her main concerns of safety and supervision. Ms. MacLean testified supervision of four children would be a challenge to most parents, and that the agency goal is to achieve "good and consistent parenting, not perfect parenting".

[28] There was some evidence of specific access visits which presented supervisory and nutrition issues, such as the change table fall, and car seat buckle incident; but overall improvements were generally noted, and **Nancy Pastuck** testified in her opinion the seat belt buckle incident was accidental.

[29] Additional Agency evidence identifies concerns about the Respondents "missed sessions" and/or insufficient sessions with service providers to satisfy the Agency that risk to the children has either been reduced or eliminated.

[30] Nonetheless the evidence was consistent in identifying the Respondents attempt at reconciliation was "genuine and sincere" in their efforts to reunite all the family. In this regard **Ms. Chris Bailey** testified although the session time was limited with Mr. M. that:

- He was very candid;

- In her opinion he was sincere;

- There was every indication he wants to continue sessions;

- She sees him trying to cope and learn from strategies;

- She believed he could learn from counselling.

[31] **Mr. Ed Burke** testified after three initial sessions with the Respondents that:

- They appeared to be more secure in their relationship;

- They appeared sincere and candid;

- They have been straight forward;

- There are grounds for optimism, but the prognosis is guarded due to the limited session time as of December 3, 2010.

[32] Mr. Burke was later recalled to testify on February 21, 2010. After having completed a further five sessions with the Respondents. He testified that:

- Their level of engagement was very good;

- He believed they are benefiting and learning from the sessions;

- They continue to be forthright;

- They are more focused and less distracted on the topics being covered which include Healthy Conflict Handling; Stress Reduction; Building of Truth; Building of Support Systems, Transmission of Assertion Messages and Self-Esteem;

- They are more empathic in that they try harder to understand each other's point of view, and

- They are more relaxed and appear less nervous and agitated.

[33] **Reverend K. L.** concluded after only three “pastoral counselling sessions” with the Respondents that the couple:

> - Were on the same page;
>
> - That she was absolutely sure they were working hard to keep alcohol out of their lives;
>
> - That it was clear to her that they love their children very much, and
>
> - That they are committed to working together.

[34] **Mrs. R. R.** testified on behalf of the Respondents. She is the maternal grandmother, and currently has the two older children in her care as a foster placement. At this time she has not committed to becoming a permanent adoptive placement should the need arise.

[35] Mrs. R. testified the children want to be reunited with their parents, and when together they are a “normal loving family”.

[36] Mrs. R. has observed significant improvement in the Respondents' parenting and marriage skills. She testified that her daughter and son-in-law have done a "complete circle".

[37] Mrs. R. further testified as follows:

- All in all I have seen a complete change in G.;

- They talk to each other;

- They are happy;

- They communicate honestly and opening;

- They work together;

- They are clear in their decision making.

[38] Mrs. R. fully supports the return of her grandchildren to the Respondents, and will remain involved with her husband B. , to assist the parents in any way, such as keeping the two older children with her until the end of the school year in June, which has been proposed by the Respondents.

[39] Mrs. R. is confident Mr. M. is genuine, sincere, and committed to his new life path and testified:

> "I am very proud of G. for pursuing assistance with his addition problem."

RESPONDENT - MRS. M.

[40] Mrs. M. testified she and her husband are getting along "wonderfully well". They talk to each other without getting upset, and work on resolving their issues without losing their tempers. Mrs. M. fully supports Mr. M. in his struggle to remain sober, and attends A.A. meetings with him so she can better understand how to deal with a person who has an addiction.

[41] Mrs. M. candidly acknowledged the problems in the past, but believes Mr. M.'s issues and problems regarding addiction and domestic violence are behind them, given all the services, education, support and knowledge Ms. M. has completed and attained before, after, and during their separation. She is committed to being a better parent and wife.

[42] Ms. M. plans to be a stay at home mother in their new home in * , Nova Scotia, having recently relocated from * , *, Nova Scotia. Pictures of the said residence confirm that the home is suitable for family living. Mrs. M. is of the opinion that she and her husband no longer present any risk to their children, and look forward to bringing the children to their new home.

RESPONDENT - MR. M.

[43] Mr. M. testified his counselling has worked well, and there is no doubt in his mind that he and his wife can take care of their children competently.

[44] Mr. M. believes he now has the tools to properly handle and control the issues that lead to the intervention of the Minister in the first instance.

[45] As Mrs. M. and Mr. M. candidly admitted the mistakes of his past, and he is now willing to do whatever it takes to keep his children safe and free from being affected by his past issues.

[46] Mr. M. has remained sober since April 2010, and has job prospects as a * with *. He attends A.A. meetings regularly, and has also completed programs with Second Choice and a father's group called Family Place.

[47] Mr. M. was vigorously cross-examined about his mental health issues, and his most recent hospital admission in September 2010. He testified:

> "I was not thinking clearly, but I did not act other than to get help."

[48] Mr. M. agreed he still has stressors, but they are now being dealt with properly by virtue of the services and support he has received, and plans to continue. He stated he now has the proper tools and education to address his issues, and requests the children be returned to his and his wife's care.

[49] Mr. and Mrs. M. additionally disputed there was any wrong doing on Mr. M.'s part in relation to the reported babysitting incident. Both Respondents denied there was any physical violence directed toward Mrs. M. as a result of the event of November 1, 2009. Both of these matters did not proceed to prosecution, and were withdrawn and/or dismissed.

[50] Finally both Respondents denied there was any wrongdoing on either of their parts in relation to the reported October 14, 2010 incident at Walmart where Mrs. M. allegedly threatened her ex-husband, V. M..

[51] The evidence is that Mr. V. M. reported the incident to police, and that charges were laid without the police having interviewed Mrs. M. Mrs. M. testified Mr. M. is the biological father of the two older children, and that he has no relationship or involvement with them.

[52] Mrs. M. testified Mr. M. approached her about seeing the children, and she told him to go through the courts. She denied threatening Mr. M.. The matter is still before the courts.

[53] **Constable Tara Myler** was called by the Agency to provide evidence regarding the incident, but she had no personal knowledge of the circumstances, other than having received the complaint from Mr. M.. Cst. Myler was not aware that Mr. M. had previous assault convictions against Mrs. M., as it was not her normal practice to do a background check on the victim.

AGENCY SUBMISSIONS

[54] Counsel for the Agency submits:

- That the *Children & Family Services Act* must always be interpreted according to a child centered approach in keeping with the best interest principal as defined in Section 3(2) of the Act. In terms of assessing risk of harm it directs the court to consider various factors unique to each child including those associated with the child's emotional, physical, cultural, and social development needs.

- That the Respondents have had a seven year relationship that has been characterized by domestic violence including physical and verbal altercations.

- That Mrs. M. has a history with the Agency dating back to 2001, 2003, and 2009.

- That the court should take into consideration Mrs. M's lengthy involvement with the Agency, her past relationships, and her past parenting.

- That past history of the Respondents may be used in assessing present circumstances in terms of their ability to properly care for their children.

- That Mrs. M. did not sufficiently complete services to eliminate and reduce the risk to her children.

- That the court should be concerned about Mr. & Mrs. M.'s reconciliation.

- That the court should be concerned that Mrs. M. applied to the court to have her no contact provision with Mr. M. Varied without the knowledge of the Agency.

- That the court should be concerned about the confusion surrounding Mr. M.'s rescinding of his Release of mental health records to the Agency.

- That the Respondents inconsistent and inadequate attendance to counsellors Ed Burke, Reverend L., Alanna Brown, and Chris Bailey should raise concerns about whether or not the risk to the children has been successfully reduced or eliminated.

- That Mr. M.'s mental health issues still remain unresolved.

- That the Respondents' attempts to change their behavior has come too late, and that sufficient and acceptable change has not been established within the statutory time lines.

- That the Respondents' plan of care does not realistically meet the behavioral, emotional, and development needs of the four children.

- That it is an unrealistic assurance on the part of the Respondents to state they will make sure the children attend all their required appointments when they failed to do the same.

- That the Respondents lack insight into the factors why the children were placed in protective services.

- That the Respondents do not understand the impact that their past lives have, and continue to have on the children.

- That the Respondents' history of domestic violence, not being forthright with the Agency, their inadequate engagement of services, combined with their unresolved relationship issue should cause the court to question the seriousness

and the long term viability of their relationship, including their plan to look after the day to day care of four children.

- That the Agency is in the best position to address the challenges and needs of the children by ensuring that the children continue to receive their required intervention and services.

- That the children require the stability and permanency that the adoptive home would provide.

- That the children placed in the permanent care and custody of the Minister of Community Services pursuant to Section 42(1)(f) with no provision for access.

RESPONDENT MR. M. SUBMISSIONS

[55] Counsel for Mr. M. submitted:

- That the Respondents have taken steps to change the direction of their relationship.

- That on a balance of probabilities the evidence favours return of the children to the Respondents.

- That it is more likely than not that the best interests of the children will be served by returning them to the parents as opposed to putting them out in the potential waste land proposed by the Agency.

- That there is no certainty that the children won't be separated under the Agency adoptive plan.

- That geography played a major part in the Respondents not attending all scheduled service sessions in that it was difficult for them to travel from *.

- That the Respondents have made a real effort to change their relationship to the benefit of them and their children.

- That the Respondents realize that the children's interests are first and foremost in their lives.

- That the Respondents do not object to being monitored by the Agency.

- That Mrs. M.'s plan to stay at home with the children, and Mr. M. to obtain employment is responsible and in the best interests of the children.

- That the Agency has failed to discharge the burden of proof upon it, and the proceeding should be dismissed, with the result the children be returned home with their parents.

RESPONDENT MRS. M. SUBMISSIONS

[56] Counsel for Mrs. M. submitted:

- That the totality of the evidence shows that the Respondents have adequately and substantially reduced the previous substantial risk to the children.

- That the familiarity is very important in terms of determining the best interests of the children.

- That maintaining contact with extended family members is important in terms of determining the best interests of the children.

- That strong bonds exist between the Respondents, their children, and their extended family.

- That the best plan for guaranteeing the relevant factors above-mentioned and as set out in Section 3(2) of the Act would be the return of the children to the Respondents.

- That the Agency Plan grasps on to certain supposed events, some of which did not occur the way that the Agency chooses to believe (i.e.) V. M. threat allegation.

- That it is not correct to characterize Mrs. M. as having a long term involvement with the Agency (i.e.) prolonged lapse of time involving the Agency.

- That Mrs. M. showed good judgment in ending a short relationship with one J. S. in June 2010.

- That the Agency made no effort to remain in contact with Mr. M. from November 2009 to July 2010 to determine what, if any, progress he may have made.

- That the Agency made no effort to follow up on the evidence of Ed Burke given on December 3, 2010, knowing that further sessions were planned with the Respondents.

- That the Respondents have successfully addressed their parenting difficulties, and there is no risk in returning the children back to their care.

- That the fact the Respondents are willing to continue services demonstrated they are committed to continue improving themselves as parents.

- That the Application for permanent care has not been established on a balance of probabilities, and should be dismissed.

BURDEN OF PROOF

[57] A proceeding pursuant to the *Child and Family Services Act* is a civil proceeding **NS.(MCS)v DJM [2002] NST No. 368 CCA)**.

[58] The burden of proof is on a balance of probabilities which is not heightened or raised because of the nature of the proceeding. **I. C. R. v. McDougall [2008], 3SCR 41**, The Supreme Court of Canada held at paragraph 40:

> 40 Like the House of Lords, I think it is time to say, once and for all in Canada there is only one **civil** standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the serousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected for the reasons that follow:

> 45 To suggest that depending upon the seriousness, the evidence in the **civil** case must be scrutinized with greater care implies that in less serious **cases** the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all **cases**, evidence must be scrutinized with care by the trial judge.
>
> 46 Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[59] The burden of proof is on the Agency to show that the Permanent Care and Custody Order is in the children's best interest.

[60] **TEST ON STATUTORY REVIEW** - The Supreme Court of Canada set out the test to be applied on statutory review hearings in child protection proceedings in the **Catholic Children's Aid Society of Metropolitan Toronto v M.C.,** [1994] S.C.J. No. 37, where the Court held that at a status review hearing it is not the Court's function to retry to original protection finding, but rather, the court must determine whether the child continues to be in need of protective services. Writing for the majority, L'Heureux-Dube, J. stated as follows at paragraph 35:

35 “It is clear that it is not the function of the status review hearing to retry to original need for protection order. That order is set in time and it must be assumed that it has been properly made at that time. In fact, it has been executed by the courts on status review is whether this is a need for a *continued* order for protection ...

36 The question as to whether the grounds which prompted the original order still exist and whether the child continues to be in need of state protection must be canvassed at the status review hearing. Since the act provides for such review, it cannot have been its intention that such a hearing is simply a rubber stamp of the original decision. Equal competition between parents and the Children’s Aid Society is not supported by construction of the Ontario legislation. Essentially, the fact that the Act has as one of its objectives the preservation of the autonomy and the integrity of the family unit and that the child protection services should operate in the least intrusive and disruptive manner, while at the same time recognizing the paramount objective of protecting the best interests of children, leads me to believe that consideration for the integrity of the family unit and the continuing need of protection of a child must be undertaken.

37 The examination that must be undertaken on a status review is a two-fold examination. The first one is concerned with whether the child continues to be in need of protection and, as a consequence, requires a court order for his or her protection. The second is a consideration of the best interests of the child, an important and, in the final analysis, a determining element of the decision as to the need of protection. The need for continued protection may arise from the existence or the absence of the circumstances that triggered the first order for protection, or from circumstances which have arisen since that time.”

LEGISLATION

[61] 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;

[62] 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.

[63] 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;
>
> (b) the child's relationships with relatives;
>
> (c) the importance of continuity in the child's care and the possible effect on the child of the disruption of that continuity;
>
> (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;
>
> (f) the child's physical, mental and emotional level of development:
>
> (g) the child's cultural, racial and linguistic heritage;
>
> (h) the religious faith, if any, in which the child is being raised;

(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;

(j) the child's views and wishes, if they can be reasonably ascertained;

(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;

(n) any other relevant circumstances.
[Emphasis added]

[64] Other relevant Sections include Sections 42(2) (3) (4) , 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

(10c) would be inadequate to protect the child.

(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 © of subsection (1), with the consent of the relative or other person.

(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.

ANALYSIS AND DECISION

***ISSUE 1*:**

SHOULD THE CHILDREN BE PLACED IN THE PERMANENT CARE AND CUSTODY OF THE AGENCY OR RETURNED TO THE CARE OF THEIR PARENTS?

[65] I have reviewed the evidence together with the plans and submissions of the parties. Although I may not have specifically commented on all of the evidence in this decision, I have nonetheless considered the totality of the evidence in reaching this decision.

[66] I have applied the burden of proof to the Agency. There is only one standard of proof and that is proof on a balance of probabilities, a burden which must be discharged by the Agency.

[67] I have considered the law and legislative provisions of the *Children & Family Services Act.*

[68] According to the legislation which I must follow, the court has only two stark options available at this time: (1) order permanent care or (2) dismiss the proceeding and return the children to the Respondents

[69] There is no middle ground. As noted by the Nova Scotia Court of Appeal in **G.S. v. Nova Scotia (Minister of Community Services** [2006] NSJ No52(CA) at paragraph 20:

> "If the children are still in need of protective services the matter cannot be dismissed."

[70] The need for protection may arise from the existence or absence of the circumstances that triggered the first order for protection, or from circumstances

which have arisen since that time (Catholic Children's Aid Society of Metropolitan Toronto v. M.C. (SCC) supra).

[71] It is therefore not the Court's function to retry the original protection finding, but rather, the Court must determine whether or not the children continue to be in need of protective services.

[72] I have scrutinized the evidence with care, and I am not satisfied that the evidence of the Agency is sufficiently clear, convincing, and cogent to satisfy the balance of probabilities test. The contention that the Respondents pose a substantial risk or real chance of danger to the children has not been proven on a balance of probabilities.

[73] I find the Order requested by the Agency is not appropriate having considered the totality of the evidence. It is not in the best interests of the children to be placed in the permanent care and custody of the Agency, and therefore the matter must be dismissed with the result that the children be returned to the care and custody of their parents.

[74] I am satisfied that the children are no longer in need of protective services, and it is in their best interests to be reunited and returned home to their parents. This court is fully satisfied that any risk to the children has been substantially reduced and/or eliminated, and that the Respondents are capable and competent to properly care for their children.

[75] I find that the factors outlined in Section 42(2) of the Act have not been proven by the Agency. I find that less intrusive measures, including services to promote the integrity of the family have not failed, and the children can be adequately protected in the care and custody of the Respondents.

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

(1) The Respondents have reconciled and have impressed the court with the committed effort they have both made to change their past behaviours in terms of domestic violence, addiction, mental health and safety issues affecting the children.

(2) I find that the Respondents are capable of caring for their children and provide the devotion and dedication necessary to provide the children the care and services they need.

(3) The whole of the evidence, including that of the Agency, supports the return of the children to the Respondents. The evidence of service providers is consistent in establishing to the Court's satisfaction, that the Respondents no longer pose a risk to their children. They now understand the significant issues associated with their children and I am satisfied that the pre-apprehension issues and concerns have now been adequately addressed.

(3) Reliance on past history is not the best litmus test, in this particular instance, to predict future events. The Respondents' efforts to be reunited as a family are well established by the evidence which satisfied the Court on a balance of probabilities, that the children are no longer in need of protective services at this time.

(4) Mr. M. understands the risks he posed to the children by virtue of his addiction to alcohol and resulting domestic violence and mental health issues. He has taken the initiative to address these matters, and notably has remained sober since April 2010.

(5) The Court finds Mr. & Mrs. M. to be credible witnesses, and accepts their evidence that they have learned from their past mistakes, and that they no longer pose a risk to their children.

(6) Both Respondents, in the Court's view, have successfully completed sufficient remedial services to satisfy the Court that they have gained insight into their domestic, addiction, and mental health issues. The Court rejects the Agency's position to the contrary.

(7) The evidence confirms both Respondents have changed for the better, and this change is substantive, sufficient, and real enough for this Court to be satisfied that the children are no longer in need of protective services at this time and can be safely returned home

[77] The Court is, thus, not satisfied that the Agency has proven, on a balance of probabilities, that the circumstances justifying the Order are unlikely to change within a reasonably foreseeable time, not exceeding the maximum limits. The circumstances have changed substantially which mandates this family be reunited as intended by the legislation.

[78] A Permanent Care Order is, thus, neither permissible nor appropriate pursuant to Section 42(2)(4), and the matter must therefore be dismissed. The Respondents have demonstrated significant change and improvement in their lives, a fact which the Court finds that the Agency did not reasonably assess in its determination that the Respondents would continue to expose the children to significant risk, and by that I mean significant risk, or real chance of danger, that is apparent on the evidence.

[79] Both Respondents have acknowledged throughout this proceeding how much they have changed as a result of the services provided to them by the Agency, including services they sought out on their own initiative. They have testified they plan to continue services in the event their children are returned , and additionally are willing to have the Agency continue to monitor them should the application be dismissed.

[80] As a consequence of this dismissal, this Court has neither the jurisdiction to order continued involvement by the Agency, nor that the Respondents continue to engage in services. Nonetheless it appears to this Court that the Respondents are quite sincere in their attempts to reconcile and reunite as a family, and now that

they have achieved their goal I would expect and am satisfied that they will honour their commitment to continue to engage in such services as may be necessary to reinforce and support their new and changed life together as a family.

[81] As stated in **N.S.(M.C.S.) v. LLP** [2003], N.S.J. No. 1 (CA) at paragraph 25:

> "The goal of 'services' is not to address the [parents] deficiencies in isolation, but to serve the children's needs by equipping the parents to fulfill their role in order that the family remain intact. Any service-based measure intended to preserve or reunite the family unit, must be one which can effect acceptable change within the limited time permitted by the *Act*. If a stable and safe level of parental functioning has not been achieved by the time of final disposition, before returning the children to the parents, the court should generally be satisfied that the parents will voluntarily continue with such services or other arrangements as are necessary for the continued protection of the children, beyond the end of the proceeding. Ultimately, parents must assume responsibility for parenting their children. The *Act* does not contemplate that the Agency shore up the family indefinitely."

[82] It goes without saying that this decision in no way diminishes the investigative role of the Agency, and that their continued involvement may be an additional assist to this family to ensure they continue on the path of success which they have now established for themselves and their children. As earlier stated the Respondents are open to the same should the Agency elect to remain involved.

CONCLUSION

[83] The Application is therefore dismissed. The children can be safely returned to the care and custody of their parents, Mr. and Mrs. M. , as they now can provide a consistent, stable and permanent placement for the children with the necessary structures to ensure the children's best interests.

[84] The evidence has established to the court's complete satisfaction the children M.J., A.J., O.M., and L.M. are no longer in need of protective services.

[85] The children shall be returned to the Respondents as soon as can be conveniently arranged without disruption in their best interests.

[86] In view of this decision there is no need for the court to address the secondary issue of access.

[87] Order Accordingly

J.