IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Nova Scotia (Community Services) v. J. D., 2011 NSSC 113

Date: 20110317
Docket:061581
Registry: Sydney

Between:

Minister of Community Services

Applicant

v.

J.D., J.H.

Respondents

Editorial Notice

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

Judge: The Honourable Justice Kenneth C. Haley

Heard: April 16th and 23rd, June 23rd and 28th, October 14th and 20th, November 9th, 26th , 2010 and January 19th and 20th, 2011 in Sydney, Nova Scotia

Counsel: Ms. Tara MacSween, for the Applicant
Mr. Alan Stanwick, for the Respondent, J.D.
Mr. Douglas MacKinlay, for the Respondent, J.H.
Ms. Lisa Fraser Hill, guardian for the children, J.H., C.H.

By the Court:

INTRODUCTION

[1] This is the final Disposition Review wherein the Minister of Community Services, hereinafter called the Agency, seeks a permanent care order, without access, for the Respondents' four children, namely, C.H., age 9,hereinafter referred to as C.H. (9), J.H.,age 10, C.H., age 6, hereinafter referred to as C.H. (6) and E.H., age 5, pursuant to Section 42 (1) (f) of the ***Children and Family Services Act***.

[2] The Respondents oppose the Application and seek return of their children, or in the alternative request access in the event permanent care is ordered for their children.

[3] Evidence was heard on April 16, 23, June 23, 28, October 14, 20, November 9, 26, 2010 and January 19, 20, 2011.

[4] 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.

[5] 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.

[6] 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."

BACKGROUND

[7] This matter initially came before the Court on November 21, 2008 where an Interim Order pursuant to Section 39 (4) (e) was made in favour of the Agency on December 15, 2008.

[8] A Protection Hearing was held on February 2, 2009 at which time the Respondents both consented to a protection finding for all four children under Section 22 (2) (b) and (i) of the ***Children and Family Services Act***.

[9] The Disposition Review Hearings held throughout 2009 were generally consented to by the Respondents, however the issue of access remained a matter of dispute between the parties and access was ultimately suspended in December, 2009.

[10] A full hearing regarding the issue of access was held February 8, 2010. On February 9, 2010, the parties reached consensus to permit both Respondents telephone access to their children and the Court so ordered.

[11] The matter of access was again extensively reviewed by the Court on March 2 and 9, 2010 with an oral decision being rendered by this Court on March 16, 2010.

[12] During the course of this Access Hearing the Court heard evidence regarding the boy's behaviours, namely C.H.(9) and J.H, which identified them as being violent; aggressive; using profane language; committing dangerous acts, towards each other, such as punching, kicking, throwing things; hoarding food and bed wetting.

[13] It was the foster parent's opinion these behaviours amounted to more than just "sibling rivalry" and that the boys required 24/7 supervision. The boys were then separated after which J.H's behaviour began to improve.

[14] C.H(6) and E.H initially did not speak when placed in foster care in January 2009. The girls had major food issues in terms of hoarding and nocturnal visits to the fridge. The girls had to be re toilet trained. Improvement in the girls' behaviour was noted in March 2009, however regression in the their behaviour was observed both before and after access visits.

[15] During the period March 2009 to November 2009 many different approaches were utilized by the Agency, in terms of the number of visits, location of visits and whether the children be kept together during the visits in an attempt to implement meaningful access for the children. Unfortunately maintaining access on a consistent basis proved to be difficult.

[16] The general theme of the access hearing evidence was that the initial visits with Ms. D. were "chaotic and out of control". There were concerns expressed about Ms. D.'s ability to intervene and take charge of the four children during the visits. Also, there was concern that Ms. D.'s focus was more on the girls and not the boys, which contributed to disruption in the room including a couple of occasions when C.H(9) reportedly grabbed his mother's breast. Eventually C.H

(9) was removed from the equation and granted solo visits with his mother. Visits were commenced at the maternal grandparent's house allowing for the presence of C.H's(9) older step-brother, B. and the visits seemed to improve. Access was nonetheless suspended in December 2009.

[17] Mr. H. had limited access to the children during this period. He visited with the children on December 29, 2008, January 5, 7 and 9, 2009. From all reports these visits went well. Mr. H. was then unavailable for considerable time due to his incarceration for acts of domestic violence against Mrs. D. As a result of court ordered telephone access Mr. H. had telephone contact with C.H(9) and J.H on February 19, 2010.

[18] The evidence was that the telephone call between Mr. H. and C.H(9) went well and that J.H would not speak to his father. The Agency, nonetheless, unilaterally determined that court ordered telephone contact with the two girls was not in their best interest based upon their assessment of the boy's calls with their father.

[19] Regarding the difficulties in establishing the court ordered telephone access this Court stated as follows on March 16, 2010:

> The Court was disappointed to learn of the delays with the Agency telephone access which was agreed to on February 9, 2010 regarding the agreement of telephone access:
>
> "I think the essence of the agreement was that there would be some sort of telephone access that would be happening this week and next week, so I would impress upon the Agency the importance of moving on this as quickly as possible"
>
> The Court expects no such further systemic delays from the Agency's perspective from this point onward as time is short between now and the commencement of the Final Disposition Hearing on April 16, 2010.

[20] At the Access Hearing, Agency counsel, urged the Court to limit or terminate access submitting that there was a direct link between the children's negative behaviours and the access visits with Ms. D.

[21] Respondents' counsel submitted the contrary suggesting that the "cause and effect relationship" argued by the Agency was tenuous and that there could be other factors at play causing the negative behaviours, such as the very nature of the foster care relationship and/or the access visits coming to an end thereby causing "separation anxiety".

[22] The Court at this juncture had not been provided with any expert evidence in terms of the manifested negative behaviours of these children. This Court expressed concern about the lack of such evidence and stated on March 16, 2010 as follows:

> "The Court has limited evidence as to the nexus between the conduct of the children and the cause of the reported behaviours. The Court is asked to speculate as to the cause and effect of the reported behaviours....."

> "The Court is, of course, concerned about the children's behaviour subsequent to and surrounding access visits. It may ultimately be determined what the cause is, or that the cause cannot be identified with any certainty. In that instance access may have to be viewed in a different light, but in the Court's view it currently has insufficient evidence to rule as the Agency has requested."

[23] This Court ultimately concluded:

> The Court is not satisfied that continued access is not in the best interest of the children, at least not on this evidence. The Court has reviewed evidence from both Ms. D. and Mr. H., they are no longer a couple. They are individual parents who have demonstrated, from the Court's perspective, their individual love and commitment to these children. In the Court's view, the children could benefit from the parents having an opportunity to reconnect with both of them individually and collectively as a family unit. If this access proves not to be in the best interests of the children, then it can be suspended and/or terminated, but at this juncture the Agency must re-assess, in the Court's view, its function, particularly as it relates to section 9 and section 13 of the *Act*.

[24] This Court thus ordered that the children have one on one "in person" access with both Ms. D. and Mr. H. as follows:

> The Court will thus order that Ms. D. and Mr. H. will have in person access with the four children. This will be supervised at the Agency's office in *. The Court is recommending that the visits be once a week, and each parent have a visit once per week with the children. The Court has deliberated and thought at length regarding how this access should occur. The Court is mindful of the behaviour which have been described in the evidence, particularly in relation to J.H who seemed to be acting out not only after the visit but before. The Court does not recall specific evidence relating to the girls overly acting out beforehand except for the evidence of Ms. MacCormick regarding her driving the girls to the visits. The evidence is clear that C.H (6) appeared to not be in anyway negatively affected by visits with the parents. As a starting point the Court recommends that each parent have in person access with the children on a one on one basis....
>
> C.H's (9) access will remain as is in addition to what the Court has just ordered.

PERMANENT CARE HEARING EVIDENCE

[25] The Permanent Care Hearing commenced on April 16, 2010. On that date the Court heard evidence from the following witnesses, namely:

1. Cadet Michael Ashford
2. Cst. Wayne MacDonald
3. Cst Todd Samson
4. Cst Charlotte Price
5. Jocelyn Keilty

[26] **Cadet Michael Ashford and Cst Wayne MacDonald** testified that on July 13, 2010 they responded to a domestic call at XXX XXXXXX Road, *, Nova Scotia at approximately 8:30 p.m. Upon their arrival they noted people hollering and that the Respondent, Ms. D. and her boyfriend, J. B. "appeared upset" with one another. Ms. D. was noted to have a cut to her facial area which was explained as "an accident" and was received when she was moving the fridge in the apartment. Mr. B. was co-operative and calm at the time so the police left and did no further investigation.

[27] **Cst. Todd Samson** - was later called to the same address at approximately 10:45 p.m. on July 13, 2010. He noted Mr. B. with no shirt on and he was chasing a car being driven by one G. B. with Ms. D. in the passenger seat. Mr. B. appeared agitated and Ms. D. was crying. Cst. Samson testified everyone appeared to be impaired and as a result no statements were taken by him at the scene. Ms. D. indicated she did not want to get involved with the Courts and no charges were laid with the exception of Mr. B. being arrested for breaching his parole conditions.

[28] **Cst. Charlotte Price -** testified she responded to the same address on XXXXXX Road two days later on July 15, 2010 at 11:20 a.m., at the request of Ms. D.'s landlord who wished her removed from the apartment.

[29] Cst. Price described the apartment at being in "disarray" with dog feces on the floor and a smell of urine. She noted Ms. D. to be asleep upon her arrival and "very hostile". Ms. D. advised that she was fearful of Mr. B and that he tried to kill her the previous day.

[30] Ms. D. was escorted from the apartment under police direction, but she refused to give a formal statement regarding Mr. B.

[31] **Jocelyn Keilty -** is a clinical therapist with Family Services, Ms. D. was her patient. Ms. Keilty submitted a letter (Exhibit No. 1) which reported the session history she had with Ms. D.. The following details the session history:

> February 19, 2009 - the first session which included generating intake information and general information. Supportive services such as counselling, stress management, self esteem and parenting were identified as areas to review and access.

> From that date onward and up to and including April 14, 2009, Ms. Keilty scheduled 24 additional sessions with Ms. D.. Over that period of time Ms. D. completed eight sessions on March 27, May 27, June 12, October 9, November 19, December 11, 2009 and February 10, April 7, 2010.
>
> The File had been closed on September 18, 2009 but re-opened when Ms. D. called to request another opportunity to complete the sessions. When Ms. D. subsequently failed to show or cancelled for the 14th time since February 19, 2009, Ms. Keilty formally closed the file.

[32] Ms. Keilty testified that usually 10 sessions are necessary to complete effective counselling and it was very difficult to identify the presenting issue with Ms. D. due to her gaps between sessions.

[33] During the eight completed sessions Ms. Keilty described Ms. D. as being "fairly engaged" and that she made "some progress" on "some issues". On one occasion Ms. D brought some parenting books to the session.

[34] Ms. Keilty testified there was little progress made with anxiety and coping strategies. In fairness to Ms. D. she had called a number of times to re-schedule, but there was equally a number of unexplained no shows by Ms. D. over this time period.

[35] Evidence continued on June 23, 2010 when the Court heard from the following witnesses, namely:

6. Michelle MacLean
7. Colleen Petite
8. Lori Coombs
9. Joanne McCormick

[36] **MICHELLE MACLEAN** - has been a family support worker for eight years and was assigned to Ms. D.'s file on March 6, 2009. The issues to be covered with Ms. D. were parenting, communication, safety and health child relationships. Ms. D. was provided with booklets and articles in co-ordination with the Protection Worker, to provided a basis to discuss parenting issues.

[37] Ms. MacLean tried to meet with Ms. D. once a week, but testified there were numerous cancellations and no shows. Ms. MacLean completed 20 sessions, however 40 had been scheduled.

[38] During the sessions that Ms. D. attended she was noted to be quiet, however, she would listen and did appear to understand what was being discussed.

[39] During the course of her involvement with Ms. D., Ms. MacLean reviewed videos of Ms. D.'s access visits with the four children from August to November 2009. Ms. MacLean testified that Ms. D. had an inability to engage all four children and would focus on one child at a time. She stated that Ms. D. did not address issues of corrective behaviour and that she had difficulty reading the children's cues. Ms. MacLean questioned why Ms. D. would not respond when the children called her by name.

[40] Overall it was Ms. MacLean's assessment that there was not a lot of progress and minimal improvement with Ms. D. by November 2009. Ms. MacLean nonetheless acknowledged there was nothing to suggest Ms. D. did not have a healthy bond with the children.

[41] On December 7, 2009 Ms. MacLean reviewed the file with access facilitator, Joanne McCormick. As a result Ms. MacLean reviewed with Ms. D. "areas of concerns", such as rough and aggressive behaviour; no follow through on direction; focussing on one child over the others; the lack of positive feedback; the girls receiving more attention than the boys and the apparent need for facilitators to

intervene. Subsequent to this meeting Ms. MacLean terminated services on January 7, 2010 as “insufficient progress” had been made.

[42] Ms. D. later requested Ms. MacLean to re-open her file and Ms. MacLean complied with a meeting on February 18, 2010. A series of additional sessions were scheduled, with the last meeting being held on April 20, 2010. Attendance by Ms. D. was again “sporadic” as evidenced by the following:

May 21,2010	called to cancel
May 28, 2010	no show
June 4, 2010	no show
June 7, 2010	called sick
June 8, 2010	no show
June 10, 2010	called to cancel
June 14, 2010	no show
June 21, 2010	no show

[43] Ms. MacLean testified that although Ms. D.’s parenting skills had improved since coming off some medications, there were still areas which required

improvement primarily that of addressing the children's aggressive behaviours. As stated by Ms. MacLean in her evidence:

> "It is crucial that she (Ms. D.) notice these behaviours and address them".

[44] Ms. MacLean acknowledged during cross - examination that the access visits were held in a small Agency office which was confining. She agreed a "home setting" would have been more natural for the children. Ms. MacLean agreed that office visits do not mirror reality, but there was no way to know if home visits would have been any different.

[45] **COLLEEN PETITE** - is an access facilitator with one year experience who was assigned to observe C.H's(9) visits only. She had no contact with Ms. D. but was assigned to oversee scheduled visits between C.H(9) and his father, Mr. H. on April 23;30, 2009; and June 11;18, 2009. Ms. Petite confirmed that the June 18, 2009 visit went well, but that C.H(9) did not want to attend the other visits and the decision to go or not to go was left up to the child.

[46] **LORI COOMBS** - an access facilitator of two years experience, was next to testify. She described visits that were "busy and chaotic" and that Ms. D. did

not intervene enough to correct the children's behaviours. On July 22, 2009 access of three days a week was suspended and replaced with weekly visits, however the behavioural issues remained.

[47] In September 2009 solo visits with C.H (9)were established and, in his absence, the visits with the remaining three children "settled down". Ms. Coombs further testified that overall the visit on March 24, 2010 resulted in improvement.

[48] Ms. Coombs confirmed that Mr. H. attended 11 out of 13 access visits and the two occasions he did not attend were excusable and not the fault of Mr. H. Ms. Coombs agreed that Mr. H.'s initial visits December, 2008 to January 2009 went well and were positive.

[49] **JOANNE MCCORMICK** - an access facilitator, had previously testified at access hearings on February 8 and March 2, 2010. She indicated there was improvement noted with Ms. D., however, there still remained some supervision concerns.

[50] On June 28, 2010, the Court heard from the following witnesses namely:

10. Dr. Reginald Landry
11. Susan MacMillan

[51] **DR. REGINALD LANDRY** - is a clinical psychologist and was qualified by the Court to give expert opinion in the fields of parental capacity and the mental health of children.

[52] Dr. Landry prepared a Parental Capacity Assessment in relation to Ms. D., dated August 31, 2009 and marked Exhibit #3. His report is broken down into the following topics:

- Reason for referral
- Previous contact with the Children's Aid Society
- Assessment Guidelines and Method of Assessment
- Relationship History
- Social History
- Clinical Evaluation
- Observation of Current Parenting Ability
- Summary and Conclusion

[53] Dr. Landry states at page 5 of his report as follows:

> "Ms. D. presented as generally being open to the process of the assessment although she sometimes minimized the extent of the challenges within the family unit particularly the challenges faced by the children".

[54] Regarding this statement Dr. Landry testified as follows:

> "Well, I don't think it was a deliberate minimization. I think Ms. D. has experienced a long history of mal treatment, some maltreatment. Some maltreatment, but also some difficulties in her family, so some of the things she may have seen as being more, for lack of a better word, more normal, more typical would be things that other people may have seen as more significant. So it wasn't that she is deliberately playing it down, she seemed to think it was more normal."

> "....I am not sure how much experience she has had with healthy relationships, but I think the difficulties in her life have made it more difficult to recognize when she is experiencing some of the more challenging experiences."

[55] Dr. Landry went on to testify that he assessed Ms. D.'s self esteem and self efficacy at being "fairly low". When asked what impact that can have on one's ability to parent he testified as follows:

> "Um, in terms of the, um, self esteem issue, it certainly can, um, predispose one towards difficulties with depression, you don't feel good about yourself, there is a higher risk of becoming depressed, in terms of self efficacy that sense of being able to solve problems or to take challenging behaviours and do something with them, people who are lower in self efficacy tend to respond more possibly to challenges and in a parenting context it would be, the child was presenting with difficult behaviour, people with lower self efficacy may have a tenancy to let those things go until it gets out of hand."

[56] Dr. Landry was also of the opinion the children will require intervention throughout their childhood. He testified in this regard as follows:

> "In addition, um, both, ah, C.H(9) and J.H present with fairly significantly learning disabilities, which will require a great deal of intervention at school, both in terms of remediating and providing adaptations for school which unfortunately increases the risk of certain...C.H(6) and E.H also, they are not in school yet, but both of them also have some weaknesses in terms of their language skills relevant to their other non-verbal abilities which make it likely that they may have learning challenges as well."

[57] Regarding Ms. D.'s permissive parenting style, Dr. Landry testified:

> "Um, in terms of what, um, the children are thought to need, their needs, limits offer a way to contain any types of serging negative affect, anxiety, depression, um, upset, you know effective limits that helps keep all that in, so in situations where those limits are less clear, let's say with more permissive parenting styles it makes it harder for kids to learn those self regulation skills, right, makes it harder to learn what you need to be able to contain frustrations, contain upsets."

[58] Dr. Landry further referenced page 6 of his Report in terms of Ms. D.'s acceptance of responsibility where he stated:

> "Ms. D. noted some of the difficulties at home were domestic violence. However, Ms. D. minimized some of these difficulties associated with the children's behaviour noting that they had a few behavioural challenges when they were in her care."

[59] Dr. Landry also testified to the stress in Ms. D.'s life and the affect that would have on Ms. D.'s parenting ability. At page 7 of his Report he states:

> "....When stressors are minimal she may be able to cope more effectively, however, these efforts may give way under the slightest pressure. Her feelings of despair may then reactivate and she will again feel misunderstood and maltreated thereby provoking her feelings of depression, irritability and hopelessness."

[60] Dr. Landry further commented in his evidence regarding the effect of stress on Ms. D. as follows:

> "The would be, um, given her personality, um, and her learning style, um, Ms. D. may have been perceptible to stress in terms of you know of having a bit more difficulty coping with it however with a person who may be traumatized, and with that suggestion in the report, um, stress can have an even more disorganizing effect, right, because that is what anxiety does, like what skills you do have it can, it can, it can erode their effectiveness, right, you can forget to use them when you are stressed out and so for a person who is, um, who possibly may be suffering from post traumatic stress, it can exacerbate that tendency to get extremely over aroused and over whelmed very easily, very reactive."

[61] As a continuum to the above the following question and answers during Dr. Landry's direct evidence are relevant:

> "Q. You would agree that, um, parenting four children can be stressful?
> A. That's right.
> Q. And particularly four children with, um, significant behavioural issues and, um, learning issues?
> A. That's right.

[62] Dr. Landry made the following recommendations in his Report at page 11 to 12.

> 1. Ms. D. may benefit from a psychiatric assessment to further evaluate any potential mood disorders that may be affecting her mental state and, in particular, the challenge of anhedonia.
>
> 2. Ms. D. may benefit from psychotherapy that if focussed on helping her to resolve some of her own issues but also to deal with her current challenges particularly her lack of self-efficacy. This is likely related to her own poor self-esteem and lack of self-confidence.
>
> 3. Ms. D. will require some concerted support in dealing with the behavioural, educational and mental health needs of her children. For example navigating the education system can be challenging for any parent who has a child with special needs. It may be particularly difficult when the children's needs have not been clearly defined. Ms. D. may need some support helping her to understand the children's needs and to become an advocate for them at school. She may also benefit from the support of a mental health professional who is able to provide some additional advocacy.
>
> 4. J.H and C.H(9) have significant behavioural difficulties in addition to their educational needs. Ms. D. may require some support in learning how to manage their behavioural challenges. The children may benefit from some counselling to deal with some of the issues that may be motivating these behaviours.
>
> 5. Ms. D. would benefit from an approach to these skills that was based more on modelling than a more didactic, verbal approach as noted above. She likely has had fewer appropriate models from which to learn these appropriate behaviours.

> 6. If the children are to be returned, Ms. D. may benefit from returning the children gradually. For example, it would be beneficial for the two girls to return first so that they can have some time in their family home to adapt. In addition, given that the girls may have the least challenging behavioural difficulties, Ms. D. may experience some success managing their behaviour.

[63] In the course of Dr. Landry's assessment of Ms. D. he acknowledged that Ms. D. has shown some insight into the past and current situations. He opined that she is:

> "Obviously resilient despite some of her chronic mental health challenges given to stressors with which she has had to cope."

[64] Dr. Landry further reported at page 11 that Ms. D. "may have" the ability to parent her children with the proper supports in place to ensure that she is not over whelmed.

[65] However, he further testified as follows:

> "Well, the assessment was done a year ago and assuming that if she has not accessed any services and if she continues to feel depressed and distressed by anxiety then it would be a challenge to have four children with the extent of their needs returned to her care without any intervention."

[66] Dr. Landry then focussed his evidence on his most recent assessment dated June 7, 2010 and marked as Exhibit No. 4. Regarding his opinion on both Respondents having access visits with their children Dr. Landry states on page 1 of this report as follows:

> "It should be noted that this document is not an assessment of parental ability. It is an effort to better understand the observation of others that the children are having challenges and adjusting to access visits with their parents.

Dr. Landry concluded at page 3 of his report:

> "However as noted above, during the visits were generally positive oriented toward the parents and actively engaged with them displaying affection and interests. This would indicate some level of attachment. Consequently some of the distress experienced after the access visits may be related to the distress of separation worsened by the existing problems with self control."

[67] Dr. Landry concluded in his report that there would be little reason to permanently end access visits, other than part of permanency planning that is before the Court.

[68] Dr. Landry was asked in Direct Examination what impact a Permanent Care Order with continued access may have on the children. He testified as follows:

> "Well, um, the challenge with continued access is that it, um, is that it could just keep regenerating some of these feelings of, um confusion, ambivalence, trauma possibly if there wasn't any treatment for that."

[69] The next witness called by the Applicant was **Susan MacMillan**, a Protection Worker, who was assigned the file January 27, 2009 to August 19, 2009.

[70] At the time Ms. MacMillan took over the file, Ms. D. was residing in * and had not yet engaged in any services. Ms. MacMillan confirmed Ms. Keilty's testimony that Ms. D. did not complete the sessions offered by Family Services.

[71] Ms. D. had advised Ms. MacMillan in July 2009 that the counselling sessions did "absolutely nothing for her" and that she tended to forget about the appointments. Ms. MacMillan stated in her evidence that she confirmed with Ms. D. that it was her responsibility to attend the counselling sessions.

[72] In May 2009 Ms. D. was encouraged to see her doctor and get a referral to mental health. At this time Ms. D. was experiencing symptoms of anxiety and on medication.

[73] Ms. D. also discussed her past relationship with Mr. H. and that she was still afraid of him. Ms. MacMillan testified she expressed her concern to Ms. D. about hanging around violent people and that Ms. D. agreed to have no further contact with Mr. J.B

[74] Ms. MacMillan testified the Agency stressed the importance for Ms. D. to participate in services to obtain the necessary knowledge and skills to reduce the risk to the children. At the time Ms. MacMillan left her role as protection worker in August 2009. Ms. D. had not completed the recommended services. Ms. MacMillan, however, acknowledged Ms. D. had completed services in * prior to her return to Nova Scotia in 2009.

[75] Regarding Mr. H., Ms. MacMillan testified that he had access in December 2008 and January 2009. Mr. H. had no contact with the children January to August 2009 as he was incarcerated and bound by an undertaking during that period.

[76] Ms. MacMillan testified she made no attempts to contact Mr. H. and that the Agency was not going to solicit his involvement because he was not making

himself available. When questioned why Mr. H. was not asked to participate in the Parental Capacity Assessment Ms. MacMillan testified:

> "I am not sure."

[77] A number of organizational pre-trial conferences were held throughout the summer months and evidence was re-commenced on October 14, 2010. The Court heard from the following witnesses at that time, namely:

12. Ms. Glennis Nathanson
13. Dr. Brian Foley
14. Michelle MacLean

[78] **DR. BRIAN FOLEY** - is a psychiatrist employed by the Cape Breton District Health Authority. He has been practising psychiatry for 23 years and associated with the Cape Breton Regional Hospital for 19 years where he now serves as Clinical Director of Mental Health Services.

[79] Dr. Foley was qualified by the Court in the field of general psychiatry and referenced the medical records of Ms. D. which had been introduced into evidence

previously through **Glennis Nathanson**, Acting Director of Health Records and marked Exhibit No. 6.

[80] Dr. Foley first met with Ms. D. on January 26, 2010 at which time his impression was that Ms. D. was suffering from "an adjustment disorder with depressed and anxious mood" and possibly "post traumatic stress disorder". Dr. Foley based this diagnosis on the history provided to him by Ms. D.. He testifies as follows:

> Q. Okay. And what about Ms. D.'s presentation, um, helped you form that opinion?
>
> A. You form the opinion from, from the history and, and the general presentation of what's called a mental state.
>
> Q. And what in particular of Ms. D.'s history, um, helped you form that?
>
> A. She gave a history of, ah, um, I will just look at these notes. She gave a history of, um generally, um, lacking energy, lacking ambition, mood was done, a sense of loss and emptiness, um, um, little real engagement or activity, little real enjoyment in life, um, over a period of time.
>
> Q. And with respect to, ah, your opinion that she was suffering from post-traumatic stress disorder, what in particular lead you to, um, ah, to that opinion?

> A. I didn't, ah, I didn't diagnose post-traumatic stress disorder, I just put it in a differential, just in a sense, because it would be, ah, something that would have to be given some consideration given Ms. D.'s , ah, um, um, formative history and, and background.

[81] During the course of this session Ms. D. confirmed with Dr. Foley that she had concerns and fears about the whereabouts and possible return of her ex-partner, Mr. H.. Ms. D. explained to Dr. Foley that this fear was the result of an "abusive situation".

[82] Dr. Foley next met with Ms. D. on March 30, 2010 where he found Ms. D. "a little more engageable" but the mood presentation remained the same. It was agreed Ms. D. would be prescribed an anti-depressant to help her sleep.

[83] A third session was held on June 25, 2010 at which time Dr. Foley found Ms. D. was demonstrating the same symptoms. Dr. Foley further testified that:

> "I felt that she endorsed anxiety and depressive symptoms, um, with long standing feelings of emptiness, futility, some what restricted life style, dependent pattern within relationships.
>
> I felt it was most likely, at this time, a dysthymic picture, rather than a major depression".

[84] Dr. Foley testified that Ms. D. did not see herself as being depressed and related her symptoms to the fact she no longer had custody of her children. Under cross-examination Dr. Foley agreed the loss of Ms. D.'s children was a contributing factor to her symptoms, but not a major factor.

[85] At the next meeting on August 20, 2010 Dr. Foley found Ms. D. to be "feeling better and doing better". He testified:

> "I felt that she was more engaged, and she was more energetic and, ah, um, her mood was better".

Ms. D. failed to show up for the scheduled September 30, 2010 meeting without explanation.

[86] Dr. Foley was of the overall opinion that Ms. D. suffered from a "low grade depression" which could be treated by way of medication and counselling to address life style issues; mood improvement and problem solving.

[87] **MS. MICHELLE MACLEAN** - then testified and she had previously testified in the proceeding. Ms. MacLean was called to update the Court about her involvement with Ms. D. since June 21, 2010.

[88] Ms. MacLean testified that following through with correcting the children's negative behaviours is very important and especially so for children with issues. Children demonstrating sexualized and/or aggressive behaviours must be given immediate proper correction from the very beginning, otherwise the children could have difficulty with self control and generally problems in life.

[89] Ms. MacLean testified Ms. D. appears to have made "some progress" but seems to have a "high tolerance level" for inappropriate behaviour which she tries to manage by "ignoring it" so, inconsistencies remain. Also Ms. D. did not play the role of disciplinarian in the H. household and thus she feels she is being "mean" by imposing consequences for negative behaviour.

[90] In terms of current one on one access visits with C.H(9), J.H, C.H(6) and E.H, Ms. MacLean testified it was going "fairly well" and that there were no major outstanding concerns with the children being separated. Ms. MacLean

testified it would, nonetheless, be very difficult for Ms. D. to manage all four children together:

> "I think ...I feel with what I have viewed the information that I have and in my role with Ms. D., I believe it would be very, very difficult for her to manage four children together. C.H's(9) behaviours, are, ah, at times, very aggressive, can be sexualized, um, C.H(9) even though I haven't viewed any of the visits in the last while, I have seen C.H(6) in access visits, she can be very demanding, I have seen both J.H and C.H(9) in our office in *, when they are together their behaviours can be extremely challenging, um, I have seen, ah the access people across the hall from me with the four children waiting to go into their visits separately, I think it took a lot of effort and a lot of skill to manage the four children together while they waited for that hour to go into their visits separately, ah, I think someone is going to have to be very, very skilled, very dedicated and devoted, you know, in insuring that these children get the services they need, um, I think it would be very difficult to manage the four children at one time."

[91] Since June 21, 2010 Ms. D.'s attendance to sessions continued to be an issue and a concern to Ms. MacLean. Ms. D. attended 9 out of 16 sessions and Ms. MacLean testifies she considered the seven missed sessions to be "a lot" when asked the following by the Court:

> THE COURT: Ms. MacLean, I just have a couple of questions before you step down, the ...initially in your direct testimony you were talking about the number of visits that you had with Ms. D., you indicated that you scheduled some 16 and you had nine sessions were attended and seven were missed?
>
> A: Yes

Q. And I think you indicated that you considered missing seven visits was a lot, and I am just curious what impact does that have on your ability to perform a service when that many visits are missed by a participant?

A: Time wise, it really restricts my ability to get information imparted that needs to be imparted and it makes the whole process that much more difficult and that much more lengthy. Does that answer your question?

Q: So I take it then that when you develop the number of sessions then there must be a plan or strategy behind it to have things hopefully completed within a certain time line?

A: Yes.

Q: And when the visits are missed then that time line would be basically off the table?

A: It becomes extended and creates more work.

In relation to concerns regarding attending sessions Ms. MacLean stated the following under cross-examination:

"...and when I refer to being dedicated and devoted what I was thinking more of with that is services that these children are going to need in order to ensure good mental health, a parent is going to have to be very dedicated and devoted to arranging, making time dedicated to getting children to these services as they are going to require quite a bit of additional services"

[92] On October 20, 2010 Protection Worker **Sherry Johnston** was called to testify. She took over the file in December 2009 from Susan MacMillan at which time the presenting issues were parenting; sibling rivalry; managing difficult behaviour and discipline.

[93] Ms. Johnston was questioned at length by counsel and she testified that although services were put in place for Ms. D. her attendance to same was "sporadic" and thus the issue of concerns were not being addressed.

[94] Ms. Johnston referenced the Agency plan of care dated February 5, 2010 and marked as Exhibit No. 7 which indicated the Agency was seeking Permanent Care for the Respondents' children with no provision for access. The plan of care further states at page 11:

> "The Agency is committed to providing the children with a secure and long term attachment through adoption."

The underlying rationales for this position is described as follows at page 10 to 11of the plan of care:

> (4) Where the Agency proposes that the children be placed in the permanent care and custody of the Agency:
>
> (a) Why the circumstances justifying the proposal are unlikely to change within a reasonable foreseeable time not exceeding the maximum time limits:
> The objective of the Agency's intervention was to provide services to Ms. D. that would alleviate the conditions that initially placed the children in need of

> protective services. Ms. D. has a longstanding history of domestic violence involving Ms. D. and Mr. H.. Although, Ms. D. has ended her relationship with Mr. H., Ms. D. is currently involved with J. B. who has an extensive criminal history. Although, Ms. D. is aware of Mr. B.'s past, she has continued to participate in this relationship. There have been allegations that Mr. B. has abused Ms. D., but these have not be substantiated.
> Although Ms. D. has left Mr. H., she is unable to recognize the factors that continue to impact this situation. Ms. D. has expressed that the children's behaviours are primarily caused by limited access. Ms. D. does not possess an accurate understanding of the psychological damage that the children have endured. The needs of the children are high, but Ms. D. has little insight into the children's needs.
> Ms. D. has been involved with family support since February 2009; however, there has been minimal progress. Ms. D. has been provided with information to help parent the children but she is unable to follow through. Ms. D. has difficulty redirecting her attention to another child when she is already engaged with one, is inconsistent with addressing rough play, provides more time and attention to the younger children, does not engage with the children or talk on their level, Ms. D. has been unable to identify the negative aspects and positive aspects of the access visits. Ms. D. often stated that the access visits go well, while the access facilitator identify concerns during the visit.

Regarding Mr. H., the Agency Plan of Care states at page 9:

> "....Mr. H. has not followed up with the recommendations of the agency and is not actively involved with the Agency at this time. Mr. H. is not having access visits with the children."

It was however confirmed that the access Mr. H. did have did go well.

[95] Ms. Johnston testified that since the decision to seek permanent care was taken by the Agency there had been "some improvement" with Ms. D.'s level of engagement at the counselling sessions and that "some progress" has been made, however, attendance remained a concern and not sufficient progress had been made to displace the ongoing concerns of the Agency regarding the risk to the children.

[96] Also Ms. Johnston testified given the limited progress to date there is insufficient time under the Agency's statutory mandate to have Mrs. D engage in further services in an attempt to reduce or eliminate the risk.

[97] Ms. Johnston testified that the Agency is opposed to access as it would cause a breakdown in the adoption process and would be confusing to the children which would make it difficult for the children to connect with the potential adoptive family. Ms. Johnston did not believe that neither present access nor possible future access is or would be in the best interests of the children.

[98] Under cross-examination Ms. Johnston acknowledged that she had some mistaken entries on her file in terms of dates; had omitted to mark some entries on the file regarding internal office communication and had not communicated effectively with fellow care worker, Ryan Ellis, to the point she was "not aware" of some events relative to access arrangements regarding C.H(9) and JH., including a report dated July 13, 2010 prepared by Ryan Ellis. This revelation was concerning to the Court and I will make further comment upon same later in my decision.

[99] **RYAN ELLIS** - was called to testify on November 26, 2010. He is a social worker with 6 years experience and has been a child care worker for two years. His general role is to assess children who are in temporary care and works with the foster parents and protection worker.

[100] Mr. Ellis has been involved with the file since October 20, 2009. He testified about the history of the file and the concerns of the Agency which have been repeatedly referenced in the earlier evidence. It is clear from the evidence that Mr. Ellis is very involved with the children's service needs and he has regular contact with the children.

[101] In his opinion C.H(9) requires "constant supervision" due to reported suicidal idealization. It is challenging to find C.H(9) a suitable foster placement. C.H(9) had been in four foster homes from October 2009 to June 2010 which also included periods of lengthy respite. C.H(9) is reportedly doing well in his current placement.

[102] With C.H(9), the goal is permanency and efforts are being made to find a placement that is permanent, consistent with much structure. Mr. Ellis testified

there will be long term counselling for C.H(9). He will also require long term support academically and an outreach worker to help him with life skills in the community. Although counselling has not yet been confirmed, it is apparent that C.H.(9) will require follow-up assessment and treatment and, as well, he will require long term support from the school to help address any of his academic issues.

[103] When cross-examined about the number of foster placements C.H (9) had, Mr. Ellis testified:

> Q. Would you agree with me that, ah, because of the ah...that, that C.(age 9) is experiencing some emotional harm while in care?
>
> A. I would think the changing, um, placements is, would have an impact on; however, I believe there's other issues as well, that impact him.
>
> Q. Well my question is, he is experiencing emotional harm, is he not?
>
> A. He'd be ,yeah, experiencing separation and loss and attachment break.

[104] Mr. Ellis testified regarding C.H(6) and E.H's long term goals as follows:

> "Permanency, structure. There will be ongoing, um, will assess their need for counselling. Um, right now it's, um, it's consult only. Um, my understanding that has to do with their age. As they age we will look at, ah, further counselling, ah, that's necessary for them because I believe they will need that. Um, family services will be considered, if Child and Adolescent Services, um is, is, do not feel they are suitable for their service. We will be looking at the psycho-educational assessments for the girls for the long term. Um, they will be need, ah, at least C.H(age 6), we know at this point, there are some concerns academically. There are some concerns at school. So they'll have to be constant liaise with the, ah, with the school."

[105] J. H has ongoing issues with aggression, which will require long term counselling along with long term tutoring and out reach programming. Mr. Ellis testified that J.H requires "long term" services to provide the necessary structure, permanency and support to address J.H's issues which includes a developmental language disorder.

[106] Regarding J.H, Mr. Ellis testified there is identified frustration with academics. There is possible grief and loss. For J.H there is possible post trauma and attachment related issues. He will need a lengthy period of structure, permanence with excessive and extreme supports to help him deal with the stressors of life as they emerge.

[107] Regarding looking after all four children together Mr. Ellis's testimony was similar to that of Ms. Michelle Maclean stating:

> "MS. MACSWEEN: And, ah, you're the worker for all four of these children, um, in terms of the interventions that these four children require, what kind of time commitment, and what kind of commitment for their, their um, their child, their care-givers required to ensure that all of their, um mental health needs are met, and all their educational needs are met, in addition to their day to day needs?
>
> A. Yes. That's a large commitment. The foster parents, um, really needs to spend a lot of one on time with the, one on one time with the kids. Um, really need to spend, ah, a lot of time providing direction, support, affection with the kids. Um, it's a constant, it's constant support that's needed for the kids. It's, um, hours and hours daily."

[108] The **Respondent, Ms. D.** testified on January 19, 2011. Ms. D. now resides at XXX XXXXXX Road, *, Nova Scotia which is a three bedroom house situate near schools the children could attend.

[109] Ms. D.'s plan is to have all four children returned to her care and she believes she is up to the task of caring for her children.

[110] Ms. D. has confirmed medical care for the children; has support from her mother and aunt; plans to keep the children active in various sporting activities and is willing to participate in any programs for the benefit of the children and herself.

[111] In terms of services and programs Ms. D. testified she last saw Dr. Foley on January 11, 2011 and will continue to see him on a monthly basis; is on the waiting list for a psychotherapy placement; has completed a domestic violence course at Transition House and plans to attend the Family Resource Centre. She stated:

> "As soon as something comes up I am willing to go"

[112] Prior to the November 2008 apprehension Ms. D. testified the children were happy and not doing the things they are reported to be doing now (i.e. hoarding food; sleep disturbances and school issues). Ms. D. nonetheless testified that C.H(9) had attended Mental Health while residing in * to address some behavioural problems. She stated:

> "He was not wanting to go outside and play with the other kids; he was wanting to stay in the house and play video games all... and if the video games were taken from him he would get upset about it"

Ms. D. also acknowledged that C.H.(9) would sometimes be aggressive. Regarding J.H., Ms. D. testified she had no problem.

[113] In April 2008 an incident of domestic violence occurred wherein Mr. H. threatened to kill Ms. D. and in her words

> "He stabbed the wall above my head with a butcher knife"

Ms. D. had told Mr. H. she no longer wanted to be in a relationship and was assaulted as a result. The police were involved; charges were laid against Mr. H. and Ms. D. re-located to * with the request to the Agency that her file be transferred.

When questioned about other incidents of domestic violence Ms. D. testified:

> "Not like that, no, I mean we argued a lot, we hollered a lot at each other, but we weren't always physical. The last physical contact we had together was back in 2004 when I hit him for calling Children's Aid accusing me of throwing an empty plastic bag at C. (age 9)....."

As a result of the April 2008 incident Mr. H. was criminally charged and placed on an undertaking to have no contact with Ms. D. as evidenced by Exhibit No. 10. He was ultimately incarcerated.

Ms. D. acknowledged Mr. H. attempted to visit her in * in June 2009 and he was arrested for breach as a result. When Ms. D. returned to Cape Breton

she testified after three weeks at her mother's house with five children present, inclusive of her eldest son, B., who is not subject to this proceeding, she agreed with Mr. H. to move back to their former matrimonial residence at XX XXXXXXX Street, *. She testified this was arranged through a third party and that Mr. H. was not living at the residence at that time.

When questioned about the November 2008 apprehension Ms. D. testified as follows:

> "My understanding what I was told was that Wendy Campbell and Nicole Stubbert seen J. go out the front door of the house....but yet they told me that they seen J. leaving the residence when it wasn't J., it was a friend of mine, J. W..... that was their excuse for taking them."

[114] Ms. D. further testified that Mr. H. was in Halifax at this time and that their relationship was over and that the only contact she has had with Mr. H. since has been the result of the court proceedings.

[115] Ms. D. testified that she had a relationship while in * which ended due to the man's drinking and upon her return to * she dated Mr. J.B for approximately ten months.

[116] Ms. D. confirmed the earlier police evidence regarding the events of July 13, 2010 but denied she was assaulted by Mr. J.B. She ended he relationship in October 2010 stating:

> "...Because I felt my children were more important than a relationship and it had to end."

[117] Since November 2010 Ms. D. testified she continues to see Dr. Foley and that she is learning "to keep herself calm" as a result of the sessions. She also has been attending the Family Resource Centre attending seven out of ten sessions which dealt with being consistent; sibling rivalry and dealing with challenging behaviours.

[118] When questioned about Dr. Landry's recommendations noted in Exhibit No. 3, Ms. D. testified she would be compliant with same and is willing to do whatever it takes to offer assistance to her children.

[119] Regarding access Ms. D. testified she has not seen C.H(9) in five months because he does not want to go the visits. She testifies C. H(9) never missed a visit when they were held at her mother's home. She states:

> "It was just like having them home again"

[120] Ms. D. testified about an interpersonal conflict with access facilitator Joanne McCormick, which resulted in visits being moved back to the Agency office. When asked to compare the visits at the office to her home and her mother's home Ms. D. testified:

> "They were ten times worse. C.H(9) gets bored quick. His attention span is shorter then a normal child so he doesn't want to be cooped up in a nine by nine room for an hour and a half...he wants to be out playing and doing things."

[121] Regarding foster care placement Ms. D. testified as follows about C.H(9):

> Q. How many foster homes had C. been in Ms. D. do you know?
>
> **THE COURT:** Ms. D. do you wish to take a break, you've been on the stand for about an hour and fifteen minutes.
>
> A. Oh I am fine.

Q. You're sure.

A. About four or five.

MR. MCKINLAY: and what do you think about that?

A. It is not right because the way I see it nobody wants to deal with him. It almost seems like when one person gets him they don't want to deal with him, so they ship him off to somebody else. Is that going to happen, is he going to keep being shipped and shipped and shipped because nobody wants to deal with him. I am sorry but he's my son, I want to deal with him, I want them to come home. I can be there everyday to help him and to help him through everything and every problem that he had, I always was. He always came to me with his problems and always told me his problems and now I can't get anything out of him. I was told not to hug them, I was told not to kiss them, to ask permission and everything and then I am being accused that I wasn't giving them enough affection and then when I do give them affection then it is eh...like it don't matter what I do something goes wrong.

Q. Without stating things that the children have stated, said, what is your understanding Ms. D. as to C.'s(9) wishes as to where she wants to go.

A. I don't know where she wants to be. In my mind she probably wants to be home but I can't I can't say what she wants because I don't get enough time with them to find anything out.

Q. And what about E.?

A. Same thing.

Q. Okay and what about J.'s issues, do you know?

A. No.

[122] Ms. D. expressed her love for each of her children stating:

> "They give me my purpose of living, they give me my purpose of being who I am, a mom."

Ms. D. misses her children and wants them to come home. She fears otherwise they will get lost in the system.

[123] During cross-examination Ms. D. testified about her failure to complete the counselling sessions with Jocelyn Keilty. Ms. D. testified she had nothing to say to the counsellor and did not understand why she was referred.

[124] Ms. D. questioned why the referral to go to Transition House initially to which Ms. D. stated:

> " I have a lot of anxiety. I take panic attacks and hide in a corner."

[125] Ms. D. is now more confident and less anxious and is getting out more. She states:

> "I 'm trying to participate in services now."

however she no longer wishes to maintain a relationship with Protection Worker, Sherry Johnston.

[126] The **Respondent, J. H.**, was the last witness to testify on January 20, 2011. He is age 34 and resides in Halifax in a two bedroom apartment and requests the children be returned to his care.

[127] Mr. H. testified he took an equal parenting role with the children, although it would appear from the evidence that Mr. H. was the disciplinarian.

[128] Mr. H. testified that C.H(9) had significant behavioural problems in that he was "overactive and hard to slow down" and J.H had some reading difficulties.

[129] Other than those observations regarding C.H(9) and J.H., Mr. H. testified none of the children were experiencing any of the reported issues regarding

hoarding of food; trouble sleeping and toilet training concerns; being aggressive and expressions of suicide.

[130] Mr. H. testified he had no knowledge of the reported concerns of the Agency until he heard the evidence of same during this proceeding. Mr. H. questioned why the children are now manifesting these behaviours stating:

> "They weren't like that before"

He believes the expert reports confirm the problems are as a result of separation disorder.

[131] Regarding the apprehension in November 2008 Mr. H. testified he was neither present at nor living at XX XXXXXXX Street, *. Mr. H. testified he was living at XX XXXX Street with a friend and in the process of moving to Halifax.

[132] Mr. H. acknowledges he was in breach of his then undertaking for not residing at XXXXXXX Street and he pleaded guilty to charges which were laid as a result. He nonetheless stated he had at no time resided with Ms. D. at XX XXXXXXX Street.

[133] Mr. H. confirmed that he had a volatile relationship with Ms. D. which resulted in much arguing between them over the years. He testified the only physically violent encounters was in April 2008 which resulted in his imprisonment.

[134] Mr. H. confirmed he went to * in June 2009 in an attempt to see his children, but was arrested, charged and convicted for breaching his court undertaking to have no contact with Ms. D..

[135] Mr. H. testified he has accepted for some time there is no possibility of a relationship between himself and Ms. D.. He has moved on and now has a steady girlfriend of six months in Halifax, namely C. P.

[136] Since November 2008, Mr. H. has had limited access to his children. He was candid in admitting that his incarceration and subsequent re-location to Halifax in December 2009 played a part in his limited access, although he believes his requests to see his children more often since his release have not been fairly considered by the Agency. I will speak to this issue later in my decision.

[137] He testified the Court ordered access in March, 2010 went well, although he found it difficult to travel to the * Agency office. Currently C.H(9) is not attending the visits but he testified the visits he had did go well.

[138] Mr. H. testified he often requested increased access and in particular telephone access with C.H(9). He testified the Agency response was always the same "that there must be a Risk Management Conference" but no positive change occurred in his view.

[139] Mr. H. testified he took an anger management course while incarcerated and he states he learned to be more positive and not get so extremely mad. He testified:

> "Talk, don't yell"

[140] Mr. H. has also completed to Second Chance Program on December 20, 2010 as evidenced by his certificate marked Exhibit No. 13. Although Mr. H. was not offered any remedial services by the Agency he acknowledged that he was aware of same in December 2008 . He went on to testify:

> "I do not need programs to properly parent my children."

[141] Mr. H. testified his plan is to take all four children with him to Halifax and that he would manage the children the same way as he did in the past. Mr. H. testified he would like to have the children re-assessed, but that he would nonetheless continue with any recommended counselling.

[142] In the alternative Mr. H. would support to return of the children to Ms. D. or another family member. Mr. H. opposed the permanent care. He stated:

> "Temporary care has them pretty messed up."

[143] During cross-examination Mr. H. would not acknowledge any of the reported behavioural concerns of the children pre-existed the apprehension. He stated:

> "Nothing like I am hearing now"

The Court will also address this comment later in the decision.

[144] In spite of his qualified support for Ms. D. he did acknowledge there were times he was frustrated with Ms. D.'s parenting skills in terms of her ability to deal with them all. He testified:

> "she was not able to focus her attention on them all at one time."

[145] Regarding the possible return of children to a family member Mr. H. acknowledged he had not requested any of his family to get involved in this matter.

[146] At the conclusion of the evidence the Court requested written submissions from counsel, which were provided to this Court on February 4, 2011.

APPLICANT'S SUBMISSION

[147] The Agency submits that:

> - during both the pre and post apprehension period that the evidence demonstrates Ms. D. had difficulty managing the challenging behaviours of all four children and had difficulty dividing her attention between the children.
>
> - that the remedial services offered to Ms. D. have been exhausted either by way of Ms. D.'s inability to complete or refusal to participate in the services offered.

> - that Ms. D. still has unresolved issues regarding domestic violence; general parenting and mental health, submitting the children remain at risk and in need of protective services. The Applicant relies upon the evidence of Jocelyn Keilty; Susan MacMillan; Sherry Johnston; Dr. Reginald Landry; Dr. Foley and Michelle MacLean in this regard.

[148] The Agency acknowledges that there has been some improvement by Ms. D. in addressing Agency concerns but that progress has been minimal and not in a timely manner evidenced by her sporadic attendance to sessions and not having yet commenced psycho therapy.

[149] The Agency further acknowledges improvement with the access visits, but submits Ms. D., nonetheless, still struggles to set boundaries and manage the children's behaviours.

[150] The Agency further submits that:

> - there still remains concerns that Ms. D. has been unable to make healthy choices in her relationships, in particular Mr. H. and Mr. B. This also - further places the children at risk that by maintaining a relationship with Mr. B while seeking return of the children demonstrates a consistent lack of insight into the effect of her unhealthy relationships on the children.

- that the services designated to help Ms. D. alleviate the risk to the children in relation to domestic violence and her parenting have been attempted and failed.

[151] Regarding Mr. H., the Agency submits that:

- Mr. H. still has unresolved anger issues;

- that the seriousness of the violent act committed upon Ms. D. and in the presence of the children in April 2008 cannot be overlooked when examining whether the risk to the children has been reduced;

- that Mr. H. has failed to engage in remedial services so as to reduce the risk to his children;

[152] The Agency relies upon the evidence Sherry Johnston who testified that Mr**.** H. made no attempt to contact the Agency until after the Agency had determined to seek permanent care, although he would have been aware services were available. As a result the Agency did not put forward any services for Mr. H. because his re-involvement was only months before the legislated deadline by which this proceeding was to be concluded.

[153] The Agency further submits that:

- that Mr. H.s recent efforts to engage in services is “too little too late: and does not address their risk concerns for the children.

[154] In general the Agency submits:

- that this matter is out of time as the legislated deadline has been exhausted and extended;

- that the domestic violence between the Respondents and the challenges they face in parenting four children, all with significant behaviours and learning difficulties, should not be minimized;

- that the Respondents have failed to adequately engage and successfully complete remedial services to reduce the risk;

- that the Respondents’ lack of insight into their domestic violence and parenting issues requires the children not be returned to either Respondent;

- that given the risk that the Respondents continue to pose to the children and given that the Respondents’ plan to care for the children would be inadequate to meet their needs, the children require the stability that an adoptive home can provide;

- that it is in the best interests of the children to be placed in the permanent care of the Agency with no provision for access;

- that adoption is a viable plan for all four children and that any access order would impede any adoption.

RESPONDENT Ms. D. SUBMISSIONS

[155] Counsel for Ms. D. submits:

- that Ms. D. currently resides in a three bedroom home and is fully ready for the return of the children;

- that Ms. D. is not currently in a relationship;

- that Ms. D. has the support of her parents; aunts; close friends; and doctors in the event the children are returned to her;

- that Ms. D. regularly sees a psychiatrist and has been referred to psycho therapy;

- that having ended the relationship with Mr. H., the concerns about domestic violence has been addressed and there is no risk to return the children to Ms. D. under the circumstances;

- that the evidence suggests that the children were doing fine prior to the apprehension in that there was no hoarding of food; eating of wall paper; urinating in closet; stealing; eating excessively; or suicidal idealation ;

- that the agency misconstrued the circumstances at the time of apprehension and that Mr. H. was not present at * Street, * which was the basis upon which the Agency acted;

- that the Respondents did, can and will communicate as separated co-parents for the benefit of their children;

- that with the permanent separation of the Respondents as of April 2008, the risk of domestic violence has been eliminated as a risk for the children;

- that there is good reason to be confident that the children will not witness any more violence between the separated Respondents;

- that the main justification for the apprehension is gone and there remains no further substantial risk of emotional harm or any other type of harm;

- that the evidence suggests there was no incident of domestic violence between Ms. D. and Mr. H.;

- that the concerns about Ms. D.'s passive parenting style and lack of follow through does not amount to a "substantial risk" sufficient to warrant disintegration of a family;

- that the goal of achieving "permanency and stability" for the children has not and will not be achieved by the Agency which is evidenced by the parade of different protection workers and foster placement the children have been exposed to thus far;

- that only dismissal will guarantee an ongoing relationship between C., J. and their stepbrother B.;

- that the only continuity the children have had and will have is with Ms. D. and that the children have suffered while not in her care;

- that there are strong and loving bonds between Ms. D. and her four children;

- that there is no evidence or probability that the four children will or can be adopted by a family;

- that Ms. D. is open to continued Agency involvement and support, however Ms. D. does not want any further association with the protection worker, Sherry Johnston;

- that in the event permanent care is granted it is in the best interests of the children to have ongoing access with the Respondents.

RESPONDENT Mr. H.'S SUBMISSION

[156] Counsel for Mr. H. submits:

- that there are no circumstances justifying an Order for Permanent Care and Custody;

- that the circumstances that would have justified such an order no longer exist, specifically a relationship between the Respondents with the potential for domestic violence and corresponding risk of harm to the children;

- that it is in the best interests of the children that the Agency application be dismissed and the four children be placed in the care and custody of Mr. H.;

- that in the alternative the children should be placed with Ms. D..

GUARDIAN

[157] Ms. Lisa Fraser Hill was retained in March, 2010 to act as guardian for the two children, C. H.(9) and J. H. She has been in attendance throughout these proceedings.

[158] Ms. Fraser Hill advised by letter dated November 22, 2010 and marked as Exhibit No. 14 which formed part of the record by consent, that she had several interviews with the children to discuss their living arrangement, relationships and access with their parents and siblings.

[159] Ms. Fraser Hill advises she reviewed the following material and reports with the children, namely:

1. Protection Application filed November 18, 2008;

2. Protection Application filed October 28th, 2003;

3. Application for Disposition Order filed March 31st, 2004;

4. Affidavit of Wendy Campbell filed June 22, 2004;

5. Interim Custody Application filed by Mr. H. April 22, 2008;

6. Ex Parte Custody Order issued April 22, 2008;

7. Notice of Protective Care Placement issued June 27th, 2008;

8. Affidavits of Diane Watson filed July 14th, 2008;

9. Review Applications issued February 5th, 2010 and May 11th, 2010;

10. Plan of Care and Disposition Application dated April 1st, 2009;

11. Psychological Assessment of Parental Capacity dated August 31st, 2009;

12. Psycho-educational assessments - C. H. (Age 9) and J. H.;

13. Disclosure materials from Minister of Community Services;

14. Dr. Reginald Landry - report re access dated June 7th, 2010;

15. Access notes and facilitators' case notes;

16. Plan of Care filed February 5th, 2010;

17. Disclosure materials - October 1st, 2010 - November 3rd, 2010;

18. Child's Comprehensive Plan of Care - J. H.

[160] Ms. Fraser Hill comments about J.H's wishes at page two of her report as follows:

> During my meetings with J. he appeared very content at the foster home and said that he like living at this home. He told me he had been residing there with the same foster parents since he was in grade two. He has friends at school and in his neighbourhood. J. was exceptionally shy and quiet during my meetings with him and was initially reluctant to provide any detailed information regarding his wishes about his future care. He indicated that he loved both of his parents and like having visits with them every week. It was quite obvious that J. has a close bond with his parents and his siblings. He misses his family and would like to be able to have visits with them outside of the agency office. He now goes to restaurants for access with his brother, C. and really seems to enjoy these times. With respect to his future care, J. seemed to believe that he would be residing at the foster home for a long time. He said this was ok with him as he liked living there, however wants to return to the care of either his mother or father. He would not choose, and I did not feel it was in his best interests to put him in a position where he felt like he had to pick one parent over the other. During my recent visit with J. he seemed very content and more willing to discuss school and his activities and visits with his family. Although I found J. was more open, he would state that he liked living in his present foster home and had no complaints, except that he continued to miss his parents and family.

Regarding C.H (9) Ms. Fraser Hill further states:

> I met with C.(age 9) on four occasions from April, 2010 to October, 2010. My first three meetings with C.(age 9) were at his foster home. I had an extremely difficult time attempting to have any meaningful discussion with C.(age 9) at each meeting. He did not want to talk to me about his family, school, access or his future care. During my three visits with C.(age 9) at the foster home he would leave the room, holler and run away from me stating that he did not want to talk. The foster mother attempted to assist by asking C.(age 9) to stay in the room with me. Unfortunately I was unable to get C.(age 9) to talk about his mother, father or siblings. He would put his hands over his ears and holler in an attempt to avoid having any meaningful communication with me. He discussed school and games he liked to play but would become very quiet and distracted when asked about his family. He was adamant that he would not discuss his circumstances. During my last meeting at the foster home he finally spoke to me and said that he would not

> get what he wanted no matter what he said. When I asked what he meant he said he wanted to stay with his foster mother at that time. He is no longer residing at the same foster home and was moved June 2010.
>
> I attempted to meet with C.(age 9) agin in October, 2010 at the agency office in Sydney. He absolutely refused to talk to me and would not even come into the office. He insisted on leaving the building and would not stay to meet with me. C.(age 9) requires a great deal of constant supervision by his primary care givers.

[161] Ms. Fraser Hill states that upon her review of the file material and family history it is clear that both J.H and C.H(age 9) have significant behavioural challenges that will require counselling and treatment on an ongoing and consistent basis in the future.

[162] Ms. Fraser Hill is of the view that C. H.(age 9) and J. H. require a stable family environment and ongoing counselling and treatment to deal with their behavioural challenges and educational needs.

[163] Ms. Fraser Hill also states as page 3 of her report:

> Given the severity of the children's problems, it will be challenging for the primary care giver to cope with the behaviours, follow through consistently with recommended treatment and provide appropriate discipline and a safe environment. The children would require constant supervision, especially C.(age 9) who has very recently been physically aggressive at school, struggling academically, having outbursts of unpredictable anger, suicidal ideations and has caused harm to animals.

[164] Ms. Fraser Hill nonetheless acknowledges that the children have a close bond with their parents and siblings and truly miss their family,

BURDEN OF PROOF

[165] A proceeding pursuant to the *Child and Family Services Act* is a civil proceeding **NS.(MCS)v DJM [2002] NST No368CCA)**.

[166] 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.

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

[168] **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."

[169] Section 22 (2) of the *Children Family and Children Services Act* states:

s. 22 (2) A child in need of protective services where

(b) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (a)
[clause (a) states: the child has suffered physical harm, inflicted by a parent or guardian of the child or caused by the failure of a parent or guardian to supervise and protect the child adequently.]

LEGISLATION

[170] 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;

[171] 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.

[172] 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]

[173] 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

(c) 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 (c) 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.

DECISION

ISSUE 1

[174] **-(a) Should the children be placed in the permanent care and custody or returned to the care of either Ms. D. or Mr. H.?**

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

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

[177] I find that the Order requested by the Agency is the appropriate one. I agree with and accept the Agency's submissions. J.H., C.H., (age 9), E.H. and C.H. (age 6) continue to be children in need of protective services. It is in the best interests of the 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. In particular S. 47(1) states as follows:

> "47(1) - Where the court makes an order for permanent care and custody pursuant to clause (f) of subsection (1) of section 42, the Agency is the legal guardian of the child and as such has all the Rights, Powers and Responsibilities of a parent or guardian for the child's care and custody."

[178] I recognize the love both Ms. D and Mr. H. have for their four children. Both have been part of a protracted legal proceeding which has been on going since November 2008, but I am satisfied that it is not in the best interests of the children to be returned to either of the Respondents at this time.

[179] 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 either of the Respondents.

[180] 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."

[181] 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).

[182] 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.

[183] I cannot return the children to either Ms. D. or Mr. H because the children remain in need of protective services. A Permanent Care Order must then issue.

[184] 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.

[185] I recognize the love both Respondents have for their children and I am quite sure they will be saddened by this result.

[186] In Ms. D's case the Court has limited evidence regarding her home, but there is also no evidence to suggest it is nothing other than a suitable environment for the children. I also recognize there is no apparent violence at this time as Ms. D. Has broken off past and existing relationships and is prepared to focus fully on her children's care. Most importantly I recognize the bond which exists between the children and their mother. Despite these positives I am satisfied it is not in the children's best interests to be returned to Ms. D.'s care.

[187] In terms of Mr. H.'s plan of care I am satisfied that there is not sufficient stability and certainty surrounding same to ensure the children would be safe from harm and free from risk. Other than Mr. H.'s testimony outlining his plan to the Court there is no other evidence to confirm or corroborate his stated intentions. Mr. H.'s plan is largely speculative and thus the Court cannot and will not endorse same in the children's best interests.

[188] I draw the above conclusions based upon the following reasons:

> 1. I accept the evidence that the children require a stable environment which, in addition to being loved and nurtured, will require significant devotion and dedication to ensure they continue to receive ongoing remedial services and counselling;
>
> 2. I find that Ms. D. and/or Mr. H. are not capable to care for their four children and provide the devotion and dedication necessary to provide the children the care and services they need. The Respondents' love for their children is not disputed, however the children do and will require significant care which neither of them is either physically or emotionally capable of providing;
>
> 3. I find the Respondents do not understand and, to an extent minimize, the significant issues associated with their children. This lack of understanding continues to place the children at risk and simply placing the children back in their pre-apprehension environment is not a blueprint for success in an effort to address the children's behavioural and educational issues.

The cause of the children's behaviour is not known. The Agency submits it is a function of the Respondent's poor parenting skills, combined with domestic violence issues. The Respondent submits the children's behaviour are a function of the foster placements and being separated from their parents. Based upon the evidence it is the Court's view that a "cause and effect" finding is not a necessary determination for the Court to make in addressing the primary issue of whether or not the children remain in need of protective services. There can be several factors which have contributed to the present situation for the children, included among them the respective views of the litigants. Regardless of the reasons for the children's behaviours the evidence is sufficiently clear, convincing and cogent for this Court to conclude on a balance of probabilities, that the challenging and educational issues for the children are existent at present and will continue to be an ongoing reality for them. The inability of the Respondents to successfully deal with all four children's needs is clear. The Court is satisfied the children remain in need of protective services .

4. Neither Respondent has successfully completed the services needed to either reduce or eliminate the risk to these children. Simply put, their good intentions are laudable but not enough to ensure the children will be free from risk or harm if in their care. The unresolved issue surrounding domestic violence is troubling to this Court. Ms. D. Has shown a propensity to select poor partners who should not be in the presence of her children. I reference the events of July 13, 2010 with one J.B. If the evidence of that event does not support a conclusion that Ms. D. was subjected to domestic violence, it surely supports a conclusion that Ms. D. was surrounded by and/or involved with violence, whether or not it was directed towards herself. This suggests to the Court that Ms. D. has yet to learn and accept the dynamics of domestic violence and the fact that she is not currently in a relationship provides the Court with little or no comfort regarding the potential risk to the children.

> 5. The unresolved parenting concerns and Ms. D's current mental health issues 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. The Court has great empathy for Mrs. D. She has stood up well throughout these proceedings and her evidence establishes that she has made improvements, but she has more work to do in terms of improving her overall mental stability. She presents to the Court as still remaining somewhat fragile and based upon the behavioural and educational issues of the children described to this Court it is clear from the evidence that Mrs. D does not have the capacity to competently care for her children at this time.

[189] The obligation to provide services is not without limit. In **Children's Aid Society of Shelburne County v. S.L.S.** , [2001] N.S.J. No. 138 (C.A.), the Court of Appeal held, at paragraphs 35-37:

> "35 The trial judge was well aware of this issue which the appellant now raises. It was put to the trial judge, by trial counsel, in terms of giving the appellant "another chance". The trial judge noted in his decision that "any further services would be inadequate to protect the child".
>
> 36 In any event **the obligation of the Agency to provide integrated services to the appellant is not unlimited**. Section 13(1) of the Act obligates the Agency to take "reasonable measures" in this regard.
>
> 37. I agree with the submission of counsel for the Agency that the main limitation on the provision of services in this case was the appellant herself." [Emphasis added]

[190] Ms. D. was given every opportunity to seek out remedial services and her sporadic participation concerns the Court. Regarding Mr H., I reject the suggestion that the Agency did not support him in seeking remedial services. He could have done more to avail himself to service providers. In the end, Mrs. D and Mr. H. have only themselves to blame for the position taken by the Agency.

[191] As referenced earlier, the Court wishes to address concerns with what appears to be a lack of meaningful communication between some Agency workers and Mr H. I accept Mr H.'s evidence that his efforts to rehabilitate his relationship with the Agency were largely dismissed by the Agency once the permanent care plan was put in place. Although Mr H. is not without fault, it is the Court's view that better efforts should have been made by Agency workers to remain in contact with Mr H. and keep him informed of information relevant to the proceedings, particularly as it related to scheduling his access.

And again, although not affecting the result, I, nonetheless, wish to express additional concern regarding file maintenance and disclosure procedures of Agency workers in this instance who did not share relevant file reports regarding the Respondents on a regular and timely basis. It is apparent to this Court that Agency workers work within a team environment and rely upon each other's assessments in

making determinations which affect the children and parents alike. Agency workers must be diligent in maintaining regular contact with each other so that all relevant file information is available to each other, and the Agency hierarchy, before making any interim or final decision regarding the children's best interests.

Protecting the children's best interests is not a license for the Agency to be insensitive to the informational needs of parents or other parties to a proceeding. I am satisfied that was not the agency's intention, nor the message to be sent, but the evidence suggests otherwise in terms of the Respondents' testimony regarding their respective interactions with some agency representatives. The Agency should consider re-examining its policies in this regard to ensure that litigants to a proceeding are kept well informed of the agency mandate and the reasons for which certain actions are being contemplated or taken.

[192] The Court has not received any evidence regarding a potential family placement. In particular, Mr. H. raised this matter, however acknowledged he had not contacted anyone in his family to get involved. There is an onus on the Respondent to put before the Court a reasonable alternative family plan. In

Children's Aid Society of Halifax v T.B., [2006] NSJ No 225 CA the Court of Appeal found as follows at paragraph 30 and 31:

> 30 Justice Cromwell's words should not be interpreted as imposing either upon the agency or the Court a statutory burden to investigate and exhaust every conceivable alternative, however speculative or fanciful. He spoke of reasonable family or community options. Neither the agency nor the Court is obliged to consider unreasonable alternatives. Their statutory obligation is nothing more than to assess the reasonableness of any family or community alternatives put forward seriously by their proponents. By "reasonable" I mean those proposals that are sound, sensible, workable, well conceived and have a basis in fact.
>
> 31 **The onus of presenting such a reasonable alternative must surely be upon the person or party seeking to have it considered.** It is hardly the responsibility of the agency or the Court to propose the alternative, provide the resources for its implementation, or shepherd the idea through to completion.

[193] In the end, without proper support, from both within and without her family, Ms. D. is far too fragile, in the court's opinion, to undertake the demanding role of parenting. It is not safe to return the children to her. Similarly, Mr. H is not sufficiently equipped to care for his children and it is not safe to return the children to his care. I find the circumstances justifying the order, in each instance, are unlikely to change within a reasonable, foreseeable time. The Permanent Care and Custody Order is therefore granted.

ISSUE 2:

SHOULD ACCESS BE GRANTED

[194] In view of the above finding I must now consider the issue of access under the pre-conditions enumerated under S. 47(2) of the *Children & Family Services Act* which states 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.

[195] The Nova Scotia Court of Appeal has held that the onus to show access be granted under an Order for Permanent Care and Custody is upon the person requesting the right of access. In **Children's Aid Society of Cape Breton-Victoria**

v. A.M. [2005] N.S.T., No. 132 (C.A.), Justice Cromwell noted that the access decision contemplated in S. 47(2) of the Act is a "delicate exercise that required the Judge to weigh the various component of integrity of the child". Cromwell, J. Further commented that the court must consider the importance of adoption in the presented circumstances of the case and the benefits and risks of making an order for access. At paragraph 36 he stated:

> "36 These submissions must be considered in light of three important legal principles. First, I would note that **once permanent care was ordered, the burden was on the appellant to show that an order for access should be made**: s. 47(2): *New Brunswick (Minister of Health and Community Services) v. L.(M.)*, [1998] 2 S.C.R. 534 at para. 44 and authorities cited therein. Second, I would observe that, as Gonthier, J. Said in L.M. at para. 50, the decision as to whether or not to grant access is a "...delicate exercise which requires that the judge weigh the various components of the best interests of the child." It is, therefore, a matter on which considerable deference is owed to the judge of first instance for the reasons I have set out earlier. I would note finally that, in considering whether the appellant had discharged her onus to establish that access ought to be ordered, the judge should consider both the importance of adoption in the particular circumstances of the case and the benefits and risks of making an order for access." [Emphasis added]

[196] The Nova Scotia Court of Appeal has recently considered S. 47(2) of the *Act* in **Children & Family Services of Colchester County v. K.T.** [2010], N.S.T., No. 474 (Application for Leave to Appeal to SCC dismissed) at paragraphs 39-41 as follows:

> "39 Therefore, from my reading of s. 47, three conclusions relevant to this appeal are clear. First, the Agency effectively replaces the natural parents. This puts the onus on the natural parents (or guardian) to establish a special circumstance that would justify continued access. Second, by virtue of ss. 47(2)(a) and (b), an access order must not impair permanent placement opportunities for children under 12. Section 47(2) (c) is consistent with this. It provides that if no adoption is planned then access will be available. This highlights the importance of adoption as the new goal and the risk that access may pose to adoption. **Third, for children under 12, the "some other special circumstance" contemplated in s. 47(2)(d), must be one that will not impair permanent placement opportunities.**
>
> 40 Therefore, to rely on s. 47(2)(d) as the judge did in this appeal, the (special) circumstances must be such that would not impair a future permanent placement. When then would s. 47(2)(d) apply? Consider for example a permanent placement with a family member which will involve contact with the natural parent. Presuming that the adopting parents would be content with that arrangement, the adoption would not be deterred. See Children's Aid Society of Cape Breton Victoria v. M.H., 2008 NSSC 242 at para. 34.
>
> 41 In short, **access which would impair a future permanent placement is, by virtue of s. 47(2), deemed not to be in the child's best interest**. This presents a clear legislative choice to which the judiciary must defer."

[197] The Respondents seek access to their children. They rely upon the best interest of the children, and the positive bond which exists between them.

[198] The Agency is opposed to this position and has relied upon the above comments by the Nova Scotia Court of Appeal in support of its position.

[199] Justice Bateman of the Nova Scotia Court of Appeal commented upon the meaning of "special circumstances" in **Children's Aid Society of Pictou County v. A.J.G.** [2007] SNT, No. 284 (CA) stated at paragraph 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))."

[200] This position is further highlighted by the comment of Chief Justice Michael MacDonald in **Children's Family Services of Colchester County v. K.T.**, supra, at paragraphs 37 and 38:

> "37 Before the issuance of a permanent care order, the legislative focus is on preserving the family unit. This would understandably mean that when the children are in temporary Agency care, parental access is to be encouraged so as to hopefully rehabilitate the family. However, with a permanent care order, the focus shifts. Any hope of preserving the family within the legislated time limits is presumably lost and the focus becomes a stable alternate plan. Thus, upon securing a permanent care order, the Agency under the *CFSA* effectively becomes the parent:
>
> > 47(1) Where the court makes an order for permanent care and custody pursuant to clause (f) of subsection (1) of Section 42, the agency is the legal guardian of the child and as such has all the rights, powers and responsibilities of a parent or guardian for the child's care and custody.

> 38 This provision suggests the termination of the natural parents' relationship with the children. However, in special circumstances, post-permanent care access is possible although given the stark change in focus, such circumstances are rare and limited to those that would not jeopardize the new focus, namely an alternate stable placement. Thus, it is not surprising that the provision allowing for such access is highly restrictive."

[201] 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 and the Respondents are secondary to the best interests of the children.

[202] As stated by Chief Justice MacDonald at paragraphs 29 and 34 of the K.T. decision, supra:

> "29 Yet when considering a child's best interests, a trial judge must work within the operative statute. In other words, a judge in a child protection matter does not write his or her own standards that are inconsistent with the statutory standards governing the child's best interests.
>
> 34 In summary, while a consideration of a child's best interests is fundamental and important to a judge's role, specific statutory prerequisites cannot be sacrificed in attainment of this goal. It is, after all, within the province of the Legislature, if it so chooses, to prescribe how a child's best interests will be met. This is not the exclusive bailiwick of the judiciary."

[203] The Agency has confirmed its plan to seek a permanent placement for J.H., C.H., (age 9) C.H. (age 6) and E.H. through the process of adoption.

[204] At page 9 of the Agency Plan for Care it states:

> "(b) Description of the arrangements made or being made for the child's long-term stable placement (refer to the child's present placement, any intended changes to that placement, any special needs of the child, availability of long-term placements, agency plans to identify a permanent placement for the child, adoption prospects, etc.)
>
> The Agency will seek adoption placement for these children. The children will remain in the agency approved foster homes until an appropriate adoptive placement is identified. The Agency will seek adoption placement for the children as a sibling group.
>
> (c) Access, if any, proposed for the child and any terms and conditions to be included in such access arrangements.
>
> Given that the Agency Plan is to place the children, J., C.(age 9) , C (age 6) , and E. for adoption, continued access is not planned. A final visit would be arranged at the request of the Respondents, J.D. and J.H."

[205] In my view the awarding of access to the Respondents would impair the contemplated permanent placement, and thus by virtue of S. 47(2) such access is deemed not to be in the children's best interest.

[206] Therefore the requested access Order by the Respondent is denied. The Respondents have not discharged the burden upon them.

[207] I would, nonetheless, encourage the Agency to consider extending access to provide a “weaning off period” for the children and the parents so long as it does not interfere with the permanency planning contemplated by the Agency and the Agency, in its sole discretion, deems that it would not be contrary to the best interest of the children pending the completion of the adoption process.

CONCLUSION

[208] An Order for Permanent Care and Custody in favour of the Agency will issue, with no provision for access to the Respondents.

[209] Ms. D. and Mr. H. are not up to the task of parenting and I foresee the continued involvement of the Agency should the children be returned to either of them.

[210] The Court has an obligation to ensure these children’s best interests are protected and that is best achieved by placing them in the permanent care of the Agency.

Order accordingly

J.