IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
**Citation:** Mi'kmaw Family and Children Services v V.P., 2011 NSSC 449

**Date:** 20111205
**Docket:** 072775
**Registry:** Sydney

**Between:**

MI'KMAW FAMILY AND CHILDREN'S SERVICES OF NOVA SCOTIA

Applicant

v.

V.P. and R.P.

Respondents

| **Editorial Notice** |
| --- |
| Identifying information has been removed from this electronic version of the judgment. |

**Judge:** The Honourable Justice Kenneth C. Haley

**Heard:** November 9, 2010; February 14, 2011; March 1, 2011; April 6, 2011; June 14, 2011; September 14, 2011; October 12, 2011; October 13, 2011, October 31, 2011

**Written Decision:** December 5, 2011

**Counsel:** Robert Crosby, counsel for the Applicant
Alfred Dinaut, counsel for Respondent, R.P.
Alan Stanwick, counsel for Respondent, V.P.

**By the Court:**

**BACKGROUND**

[1] This is the application of the Minister of Community Services, hereinafter called "the Agency", seeking an order pursuant to Section 42 (1) (f) of the *Children and Family Services Act*, that the children, G.P. age 7; A.P. age 5; and K.J. age 3, are in need of protective services and should be placed in the permanent care and custody of the Agency, with no provision for access. Mr. P. is the biological father of the two older children. Both respondents oppose the application.

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

- A previous application in this matter was commenced on November 1, 2008 by the Agency. The children were taken into care in January 2009.

- On November 9, 2010 the matter was dismissed by consent, and on the same date a new application was initiated by the Agency and this matter was re-commenced.

- On November 9, 2010, all parties consented to a finding of protection and the children were placed in the temporary care of the Agency and dates for disposition were set down.

- On February 14, 2011, a Disposition Hearing was conducted with the result that the protection order of November 9, 2010 would continue.

- At this time, counsel for both respondents were permitted to withdraw due to conflict issues between counsel and their respective clients.

- On March 1, 2011, the matter was adjourned for hearing to April 6, 2011.

- Due to delays in the respondents obtaining new counsel the matter was again adjourned to June 14, 2011 for hearing.

- On June 14, 2011, the Agency commenced evidence by calling clinical psychologist, Mr. Michael Bryson, at which time it was discovered that new counsel did not have complete disclosure of Mr. Bryson's reports. In view of this unforseen and blameless complication, the court adjourned the matter to October 12, 2011 to permit counsel time to receive and review the reports in question.

- A Review Hearing was held on September 14, 2011 to formally confirm the permanent care dates of October 12 and 13, 2011.

[3] On October 12, 2011, the Agency called the following witnesses; namely:

(1) Mr. Michael Bryson, Clinical Psychologist
(2) Ms. Debra Walsh, Family Support Worker
(3) Mr. Malcolm Campbell, Long Term Protection Worker

[4] The Agency tendered the following exhibits:

Exhibit #1 - C.V. of Mr. Bryson

Exhibit #2 - Psychological Assessment of Parental Capacity for Respondent Mr. P. dated December 10th, 2010

Exhibit #3 - Psychological Assessment of Parental Capacity for Respondent Ms. P. dated December 13, 2010

Exhibit #4 - Psychological Assessment of Parental Capacity for Respondent Ms. P. dated November 6, 2009.

Exhibit #5 - Agency's Notice of Motion, Affidavit, and Plan of Care, filed by Mr. Malcolm MacDonald dated January 21, 2011

[5] On October 13, 2011, Mr. Dinault, called his client, Mr. P., to testify and tendered Exhibit #7 - Plan of Care of Mr. P.

[6] Mr. Stanwick called:

(1) Ms. P. - Respondent
(2) Mrs. S. C. - mother of Ms. P.'s partner, J. C.

[7] During the cross-examination of Mr. Malcolm MacDonald, Mr. Stanwick tendered Exhibit #6, namely, Family Healing Program Services Report regarding Ms. P.

[8] Final submissions were heard by the Court on October 31, 2011.

**EVIDENCE**

[9] The Agency's referral for permanent care is outlined in the affidavit of Malcolm MacDonald along with the Agency's Plan of Care marked as Exhibit#5:

> 5. (a) **"Explanation of why the child cannot be adequately protected while in the care of the parent or guardian (refer to the condition or situation on the basis of which the child was found to be in need of protective services)**
>
> The agency has been involved with this family since September, 2008 because of the numerous referrals regarding domestic violence. Subsequently, in January 2009 because of domestic violence and alcohol and drug abuse on the part of both respondents, the children were placed in the care and custody of the Agency and placed in foster homes.
>
> The Agency worked extensively with the family to assist in addressing the presenting issues along with inadequate parenting of the children by the parents. The Agency has

provided assistance and direction to this family under a Temporary Care Order with counselling services and a Family Skills Worker and Protection Worker have worked extensively to address the protection issues identified by the agency with improvement that has been nominal and has not been adapted as the foundation for normal family functioning. The Family Skills Worker assisted Ms. P. with education and hands on training to help develop skills that were lacking as outlined in the Parental Capacity Assessment completed by Michael Bryson. Mr. Bryson reports that Ms. P. lacks the understanding and practical experience of parenting children in a manner that provides the necessary attention and care for their well being and safety.

Mr. P. submitted a plan of care for his children on January 16, 2009, and agreed to cooperate with the Agency's request for drug testing. Supervised access visits were put in place and scheduled for 3 visits per/week, Mr. P. has been followed closely by the Agency during the period of January, 2009 to May 14, 2009 and has been advised that his resistance in addressing the identified addiction concerns of the Agency continued to place the children: A.P. and G.P. at risk and as a result had to place access visits with the children on hold. Mr. P. has not accessed services and has not made any progress to stop using drugs and alcohol. The Agency was intending on offer services to Mr. P. should he choose to participate in the Agency's current case plan.

The Parental Capacity Assessment was completed on Mr. P. in December, 2010. The assessor Michael Bryson, indicated in the report that Mr. P. have supervised with his children. The Agency scheduled a supervised access visit for Mr. P. and

his children, however, when arrangements were being made by the Assess facilitator, Mr. P. appeared to be under the influence and the visit was placed on hold.

(b) **Description of past and present services:**

**Services that have been attempted and their current status (include any reasons why the services have failed, if applicable)**

Ms. P. has attempted to engage in the case plan on several occasions and been drug and alcohol free for a period of months.

Ms. P. has missed several visits with the children since their coming into the care of the Agency. Access Facilitators have provided access to her with the three children. Ms.P. has not been creative in attending to the needs of the children by providing activities that foster normal parent/child relationships. Her focus appeared to be on her relationship with her current partner rather than on providing adequate housing for herself and the children.

**Services that have been refused by the parent or guardian (specify the reasons for the refusal and any renewed offer of services made subsequent to that refusal)**

The Respondents have not refused services but there has been little progress made by both parents in understanding the need to develop identified parenting skills.

> **Services that have been considered, but would be inadequate to protect the child (specify why the services would be inadequate to protect the child)**
>
> The Agency has attempted to provide appropriate and necessary services to both parents and, in doing so, has considered all services presently available in the process of this case plan. The parents have also been encouraged to provide to the Agency any other additional services that they feel would be helpful in improving their parenting abilities and increasing the likelihood of a return of the children to the care of the parent however, no other services were identified by the Respondents."

[10] The Agency is of the view that, although the respondents have not specifically refused services, there has not been sufficient, or "little", progress made by either respondents in understanding the need to develop identified parenting skills. Paragraph 7 at Page 4 of the Case Plan states:

> "The goal of the previous case plans, dated June 19, 2007 and November 25, 2008, was for the Respondents, Ms.P. and Mr. P. to obtain the necessary knowledge and skills to adequately parent their children and to make the necessary parenting and lifestyle changes to enable them to meet their children's needs for supervision, safety, stability, and nurturing. While both Respondents had indicated that their long term plan involved completing the services set out in the Order dated November 10, 2009 including resuming full time care

> and supervision of their children, the position of the Agency is that they have not been able to demonstrate the ability to do so."

Regarding Ms. P. specifically, the Agency Plan goes on to state on Page 5:

> ..."there has been no improvement demonstrated in the areas identified as deficient and it is not expected that after the length of time that the Agency has been involved that she will be able to demonstrate and maintain such changes by the end of the statutory time line."

[11] Malcolm Campbell testified that the two older children were in foster care with an off reserve family in *, however, the foster mother is a First Nations person who is fluent in Mi'kmaw. The youngest child was placed with a family relative in *.

[12] Mr. P. was afforded supervised access, but his visits have been limited with his last visit being April 2011. The Agency's contact with Mr. P. to follow-up in this regard proved to be difficult. Mr. P. is a * whose work would have him away for 4-5 days at a time.

[13] On June 14, 2011, after a court hearing, the Agency confirmed Mr. P.'s address and phone particulars, Mr. Campbell testified:

> "I wanted to speak to him, um, to confirm his address and telephone number for contact and to talk to him about his participation in the drug testing; and for him to contact me when he came in, I know he was *, so I wanted him to contact me when he came in from * so that we could make arrangements for some access and just to ensure that the Bayshore people were going to the right address."

[14] Mr. Campbell had no further contact with Mr. P. after June 14, 2011. Mr. Campbell testified Bayshore Testing, regarding Mr.P., indicated that he was a "chronic user of alcohol" and that there were also other substances in his body; because of these concerns, supervised access for Mr. P. was stopped in April 2011.

[15] Mr. Campbell had no further contact with Mr. P. after June 14, 2011, Mr. Campbell testified:

> "If there was a phone message that came to my attention, I would call him back."

[16] Mr. Campbell and the Agency are not supportive of Mr. P's Plan of Care

which is marked as Exhibit #7.

[17] Regarding Ms. P., the Agency requested her to have an apartment where she could have access with the children. Mr. Campbell testified:

> "I told her outside the court when...I believe it was in February... 2011, that there was a worker with her who accompanied her from the *, to go to regional housing and talk to them about an application and indicate to them that she was basically homeless, that her children were in the temporary care of the Agency, and that she needed accommodations and to...to also look in the local area for apartments that may be available."

[18] Ms. P. eventually obtained an apartment on * in *,

however some deficiencies had to be addressed before the Agency deemed it an appropriate place for children. The deficiencies were not addressed and Ms. P. was forced to vacate the apartment. At this time, Ms. P. returned to the residence of Mrs. S.C, in *. Mrs. S.C.'s son, J.C. and Ms. P. were in a relationship

at this time and have a child who is in the joint care and custody of Mrs. S.C. and her son J.C.

[19] In May, 2011, Ms. P. advised Mr. Campbell she was now living at * in *. Mr. Campbell testified he had difficulty arranging to visit Ms. P. at this address. They met after court on June 14, 2011. Mr. Campbell testified:

> "And so, I asked her after the court appearance to give me the apartment number because I had visited that apartment building and couldn't get into...she wasn't there. I went around to all the units there and couldn't get an answer at any door. So she gave me apartment number four and a telephone number that I could contact her; and, I...I attempted to contact her at that building on three separate occasions but had no luck."

[20] There was no contact between Malcolm Campbell and Ms. P. until Mr. Campbell returned a call on August 30, 2011. During this time Ms. P. had no access between June 14, 2011 and August 30, 2011. Mr. Campbell testified he had returned calls made by Ms. P., but he could not make contact as he was unable to leave messages.

[21] On August 30, 2011, Ms. P. raised her concern about not having access. No

such concern was voiced by Ms. P. on June 14, 2011; at which time Mr. Campbell testified the following was discussed:

> A. Okay, um, well we talked a little bit about the time line and so on and I wanted to confirm with her her correct address and at that time I talked to her about the testing, the drug testing, and the hair sample that was going to be required for her to produce. Ah, I asked her at that time, if she wanted to begin counselling and to address some issues that were identified as risks to the children and those are the kinds of things we talked about.
>
> Q. Um, and what was her response to any of those items?
>
> A. Um, she said that she had completed everything that she needed to do.
>
> Q. And in specific, were there specific services that...
>
> A. I talked about counselling services, and drug addiction counselling, and family skills, those items.
>
> Q. And what was her response?
>
> A. She had said that she had completed them all.

[22] Regarding Ms. P.'s August 30, 2011 question concerning access, Mr. Campbell testified:

> A. Well, at that time I spoke to her about the fact that we hadn't had any drug testing on her and we didn't have a hair sample that was supposed to be produced by her and that there was concerns because of her past use of alcohol and drugs, and we needed to get those things done; and we needed some clean testing in order to have access.

[23] Mr. Campbell had earlier contacted Bayshore to arrange for testing after his June 14, 2011 meeting with Ms. P., he testified:

> A. The correspondence came from Bayshore indicating that there was three failed tests. They had no contact with her.

[24] In an effort to re-instate testing, Bayshore was again contacted to arrange testing of Ms. P. at the residence of Mrs. S.C. in *. In this regard, the following evidence was received by the court:

> Q. And was a sample ever received?
>
> A. No, Bayshore makes a...an appointment to harvest the hair but they never were able to contact her.
>
> Q. Now to be clear, what information did you give Bayshore to contact Ms. P?

A. I told them that she is residing at Mrs. S.C's' on XXXXXXXXX in *...

Q. Alright?

A. ...and they knew the address and the number of the house.

Q. And how did they know that?

A. They had been there previous times.

Q. With testing for Ms. P.?

A. Yes.

[25] Mr. Campbell testified he had no further contact from Ms. P. since August 30, 2011, although he had returned messages from Ms. P. with no results. He also had attended her residence without success leaving business cards in the door.

[26] Regarding Ms. P.'s plan for the children, Mr. Campbell testified as follows:

Q. Well, what did she present to you if the children were returned to her care?

A. If the children were returned to her care, she told me she would move with her boyfriend, J.C., and reside with him in *.

Q. That's in *?

A. Yes.

Q. Do you...do you know anything about the accommodations J.C. has in *?

A. No.

[27] During cross-examination Mr. Campbell confirmed that Ms. P. has successfully completed Family Violence Education Modules evidenced by Exhibit #6; outlined by the Family Healing Program. Mr. Campbell was then asked:

Q. And is it fair to say upon reading that report that Ms....Ms. P. had...had successfully addressed that Protection Concern?

A. I would agree.

[28] In this regard, Mr. Campbell also agreed there were no concerns about Ms. P's boyfriend, J.C. being a perpetrator of Family Violence, but stipulated there are still outstanding concerns to be looked at regarding Ms. P.'s housing issues and addressing deficiencies. Mr. Campbell was cross-examined as follows:

Q. ...And, ah, and you were looking for Ms. P to...to obtain her own separate accommodations?

A. Yes.

Q. And she did obtain an apartment or a house on *?

A. She did.

Q. And the Agency felt it was not an appropriate place for the children?

A. That's correct.

Q. And so there were some safety concerns in relation to the children?

A. Yes.

Q. And deficiency had to be addressed?

A. That's correct.

Q. So, did you safety proof the home?

A. I went through it myself, yes.

Q. So it was safety proofed?

A. I brought those concerns to the attention of Ms. P.

Q. Did the Agency entertain the possibility of assisting Ms. P. with paying the costs of addressing these deficiencies to make the home safe for access

for the children?

A. No.

Q. So it was left with her to try and correct these deficiencies?

A. Through her landlord, yes.

Q. ....So, if you had of taken a more proactive approach and assisted with rectifying these deficiencies, ah, than there may be been a home on * where access could of occurred and it would have been a safe environment for the children?

A. It's not the mandate of the agency to rectify deficiencies in accommodations.

Q. And isn't it fair to say that a protection concern that you raised here was inadequate housing that Ms. P. had?

A. And again, they were addressed through the supervisor...he was made aware of those, or she was at the time, and nothing further took place. Ms. P. eventually left that abode and went onto *.

Q. ....wouldn't it be part of the mandate of the agency to...to assist in rectifying these deficiencies so that the protection concern could disappear?

A. I don't think I'm qualified to answer that question.

[29] During cross examination it was confirmed that access which occurred by Ms. P. with the children at the residence of Mrs. S.C. went well until May 2011 when the Agency became aware of Ms. P.'s five positive tests results for "cannabis use" from tests conducted in February 2011. Due to this concern, supervised access was stopped until clean test results were provided by Ms. P. Mr. Campbell justified the Agency's position as follows:

> Q. ....what's your justification for terminating access, because you've got a positive test for cannabanoids?
>
> A. That in itself would be justification. The positive testing. It indicated to us that Ms. P. was not following the requirement to be drug and alcohol free as one of the protection concerns.
>
> ...we'd also justify the position that Ms. P. was not cooperating and giving her samples, her hair sample and her drug testing was put on hold.
>
> Q. She didn't think that those were necessary, did she? She made it perfectly clear to you in June of 2011 she didn't feel that those were necessary did she?

A. But that’s her opinion.

Q. Yeah, that’s right. And that’s your opinion that they were necessary isn’t it?

A. They were necessary.

[30] No further test results were provided to the Court. Mr. Campbell did acknowledge that the above access restrictions on Ms. P. did not affect her ability to interact with her youngest child who remains in the joint custody of Mrs. S.C. and J.C.

> Q. ...And, so she...she’s (Mrs. S.C.) to supervise access between Ms. P. and the child A.C., is that what the agency expects?
>
> A. Yes, that’s what the agency expects, yes.
>
> Q. So you terminate access between Ms. P. and G.P. and A.P. and K.P. because of a positive marijuana test, but the agency hasn’t done anything to terminate any access between Ms. P. and the youngest child A.C. in light of that...that positive test, have you?
>
> A. Well the Agency is not overseeing the access with Mrs. S.C. and the baby A. with Ms. P.

[31] When asked whether or not the Agency had or would consider a plan involving Mrs. S.C.'s residence as a placement option, Mr. Campbell testified that it was never raised as a possibility by Ms. P. and the issue was, thus, never addressed. Ms. P.'s plan of care is to relocate to *, * to be with her partner who is [*editorial note- identifying information removed*]. Mr. Campbell and the Agency do not support this plan.

[32] Debra Walsh is a Family Support Worker and was referred this case on February 26, 2009. Ms. Walsh described her contact with Ms. P. as follows:

> May 26, 2009 - First Meeting
> August 20, 2009 - No further contact - Services suspended
> January 21, 2010 - Re-start family support
> November 23, 2010 - Services suspended

[33] Ms. Walsh testified she had no success in delivering Family Support Services to Ms. P. A parenting program was not completed and a full case plan could not be established without Ms. P.'s input.

[34] Ms. Walsh requested Ms. P., in December 2010, to contact her when she was able to work on the Family Support Services offered. That was the last contact Ms. Walsh had with Ms. P.

[35] Under cross examination, Ms. Walsh did confirm that she viewed a number of access visits Ms. P. had with the children. Ms. Walsh testified Ms. P. asked the children relevant questions and was attentive to the children overall. Ms. Walsh felt Ms. P.'s interaction with the children was appropriate. The last access visit Ms. Walsh attended was in November 2010.

[36] Mr. Michael Bryson prepared extensive and detailed Parental Capacity Assessments of both respondents.

**MS. P's REPORTS**

[37] In Ms. P.'s case two reports were completed, dated November 6, 2009 (Exhibit#4) and December 13, 2010 (Exhibit#3)

[38] Mr. Bryson concluded his November 6, 2009 report with the following recommendations at Page 56:

> **<u>Recommendations:</u>**
>
> 1. It is recommended that Ms. P. receive counselling and education on the effects of domestic violence on families.
> 2. It is recommended that Ms. P. remain abstinent from alcohol and other psychoactive drugs such as any street drug or any medication that is not prescribed to her.
> 3. It is recommended that Ms. P. attend parent training with a Family Skills worker, addressing: stress management, stages of child development, communicating with children, and limit setting.
> 4. It is recommended that with the successful completion of Recommendations 1, 2, and 3, that the dependant children, A.P, G. P. and K.J be returned to the care of Ms. P.
> 5. It is recommended that G.P. and A.P. work with a child therapist to assist them with managing their mood, aggressive behaviours, and to express themselves in an appropriate manner.

[39] Ms. P. did complete some of the recommended services and, in particular, the Family Healing Program Services Report dated October 2010 and marked Exhibit #6, confirms same at Page 1:

> "....The emphasis of intervention was twofold; provide the client with information on family violence and its impact on the family; and secondly, build capacity in life skills with a special consideration on self care."

And at Page 3:

> "....Ms. P. was issued certificates in both Family Violence & Parenting. Ms. P. was provided with contact numbers to the Family Healing Program, in which support is available 24 hours a day, seven days a week.
>
> Since May 26, 2010, Ms. P. has not contacted the Family Healing Program for any additional support."

[40] Mr. Bryson's second report regarding Ms. P. is dated December 13, 2010 and marked Exhibit #3. At Page 45 it states:

> "Despite her awareness that MMFCS required her to be abstinent from alcohol, street drugs (including marijuana), and prescription medications that were not prescribed to her, Ms. P. is not successful at abstaining from the use of psychoactive substances. Ms. P. denies that her use of marijuana or alcohol is problematic."

And at Page 46:

> "Her risk of using psychoactive substances remains a barrier to the stability necessary to adequately care for children."

[41] Mr. Bryson concluded at Page 49 of his December 13, 2010 report with the following recommendations:

1. It is recommended that the dependent children: G.P. , A.P., and K.J remain in the care of Mi'kmaw Family and Children's Services of Nova Scotia.
2. It is recommended that Ms. P. attend and successfully complete an inpatient addiction treatment program, such as *.
3. It is recommended that Ms. P. remain abstinent from alcohol, all street drugs, and any medication that is not prescribed to her.
4. It is recommended that Ms. P. completed sessions with a Family Skills Worker on: Stress management, stages of child development, communication with children and limit setting.
5. It is recommended that Ms. P. attend counselling with a mental health counsellor to assist her with assertiveness training. Ms. P. appears to be a meek individual who has difficulty asserting herself with others.

[42] In his evidence, Mr. Bryson expressed the opinion that Ms. P. was not "forthcoming" in her responses. He noted that Ms. P. was adamant that she had not used marijuana during her pregnancy with the youngest child, yet there were a number of positive urine screens. Ms. P. explained that it was second hand smoke, which Mr. Bryson's opined was "not likely." Eventually Ms. P. did acknowledge marijuana use with her sister.

[43] Mr. Bryson expressed the opinion that use of marijuana is a "substance abuse problem" and that would affect life obligations and Ms. P.'s ability to care for the children.

> Q. From you...your review of the material, um, what is your comment on whether, ah, Ms. P.'s use of marijuana and/or alcohol is problematic?
>
> A. Ah, it was my opinion that it was problematic. Her use does meet the the diagnostic criteria the DSM-4TR in terms of a substance abuse problem
>
> Q. And in your recommendations, you're recommending that the three children remain in the care of the applicant?
>
> A. Yes.
>
> Q. Ah, can you...can you indicate to what extent the ah...the ah...the problematic use of marijuana or substances played in you coming to that recommendation?
>
> A. I thought she'd be at high risk for continuing to use substances. She did not appear to have, ah, much insight into how the substance use was problematic in the past or how any use of substances in the future could be problematic or a concern. So I thought use of substances did play a role in those recommendations.

[44] During cross examination the following evidence was provided by Mr. Bryson:

> A. ....it was my recommendation at that time that Ms. P. remain absent from alcohol and other psychoactive drugs such as any street drug or any medication that is not prescribed to her.
>
> Q. ...you look a lot at...at these objective tests, the SASSI and the DSM-4 but obviously would you agree that anecdotal evidence is equally as important to see whether or not, um, the use of alcohol and/or marijuana may be so pervasive in someone's life that it could impair their ability to take care of kids?
>
> A. I want to try and understand what you're suggesting. I guess to be clear, I don't believe that the use of marijuana at any time is appropriate when parenting. Or whether someone has it anecdotally or not. Similarly, when alcohol use has caused problems in a person's life in the past, I don't believe that ongoing alcohol use is...is appropriate for the care of children or children present.
>
> A. ....But if a person's use jeopardizes, on an ongoing basis, their ability to have a relationship with their children and the parent has agreed and they've made a commitment to attending treatment in acknowledgment of the substance use because it's been recommended, I think that suggests the person is not making choices in the best interests of themself or the child.
>
> A. If a person continues to engage in a behavior, substance use, and you know that substance use is very much connected with difficulties in parenting and inadequacies in parenting. That if a person continues to use a substance, is not able to stop using a substance, than that jeopardizes their relationship with their child.

Q. ....so your saying that those people out there in society who might have a couple of drinks a night and have kids , or might occasionally smoke marijuana; that they're somehow jeopardizing the care of kids, is that what you're saying?

A. Yes, we know that children who are brought up in homes where there are substance use issues have a whole wealth of negative experiences. It affects the communication between the parents, it affects parenting, it affects the ability to parent or nurture the child.

A. It comes down to whether or not the use is problematic. If a person were to consume alcohol, as many parents do, that in of itself is not part of the problem. Marijuana, I've not read any literature that suggests that using marijuana is congruent with being a good parent.

[45] Regarding Ms. P.'s completion of services, Mr. Bryson testified, in his opinion, Ms. P. did not believe she needed services, but felt she had to complete the programs to have her children returned.

[46] Mr. Bryson testified that, in his opinion, there was not a "secure bond" between Ms. P and the youngest child, K.P., but with the two older children there was a "secure" attachment.

[47] Mr. Bryson concluded his evidence by recommending that the children remain in the care of the Agency. Mr. Bryson was of the opinion Ms. P. was not committed to the return of her children.

[48] In this regard, Mr. Bryson testified, in his opinion, it would be in the best interests of the children to retain access with Ms. P. as the children enjoyed contact with their mother. Mr. Bryson was of the opinion that denying access would be "detrimental" to the children.

**Mr. P.'s Report**

[49] Mr. P.'s report is dated December 10, 2010 and marked Exhibit #2. At Page 47, Mr. Bryson states:

> "Indicative of his minimization of the seriousness of his psychoactive abuse, he denies his use of alcohol or prescription medication is problematic."

[50] Mr. Bryson concluded with the following recommendations for Mr. P. at Page 48:

**RECOMMENDATIONS:**

1. It is recommended that the dependent children: A.P; G.P., remain in the care of the Applicant.
2. It is recommended that Mr. P. have supervised visits with his dependent children.
3. It is recommended that Mr. P. remain abstinent from alcohol and any psychoactive substance, such as marijuana and any other street drug, in addition to any medication that is not prescribed to him. This abstinence is to be for a minimum of 24 hours prior to any contact with his children.
4. It is recommended that Mr. P. continue to complete random urine screens.
5. It is recommended that should Mr. P. miss any urine screens, that they be interpreted as a positive result for psychoactive substances.
6. It is recommended that should Mr. P. arbitrarily stop participating in visits with his children, that the visits not be reinstated. It is important that his children have consistent, dependable relationships and routine in their lives.
7. It is recommended that Mr. P. attend an in-patient addiction treatment program, such as *, to assist him develop means of coping with stress without the use of psychoactive substances.
8. It is recommended that Mr. P. attend Alcoholics Anonymous or Narcotics Anonymous (if available) twice a week for a minimum of six months.
9. It is recommended that Mr. P. attend addiction counselling with a NADACA worker or therapist through Addiction Services.

10. It is recommended that Mr. P. attend a physician regarding his reported back and shoulder pain. Rather than using the prescription medications of others, he should be assessed to determine which medication is appropriate for him.
11. It is recommended that Mr. P. receive pain management counselling from a psychologist recognized by the Worker's Compensation Board of Nova Scotia.

[51] Regarding Mr.P., Mr. Bryson testified that his tests established that there was a high probability of "substance dependence disorder." Mr. P. acknowledged his past and present use of alcohol, but simply does not believe he has a problem with alcohol.

[52] Similarly Mr. P. acknowledged using prescription medication which was not prescribed for him, but again does not view that to be problematic despite his understanding that he was required to have "clean urine results" in order to have access with his children.

[53] In addition, Mr. P. has a history of using marijuana which he does not recognize as problematic and which did show up in his hair and urine testing.

[54] Regarding Mr. P.'s ability to care for his children, Mr. Bryson testified:

> A. ...Very significant. He expresses a strong desire to care for his children but his behaviour did not evidence significant efforts to make that happen. Ah, there was one....for example, he mentioned how he was frequently * and when he returned * he did not contact the applicant to arrange access with the children. It was his view that it was their responsibility to contact him and to arrange access.

Mr. Bryson concluded:

> A. I thought, behaviourly, his commitment suggested that he was making insignificant...or...insufficient efforts to be able to have the children returned to his care and to provide consistent and appropriate care of his children.

[55] Mr. Bryson acknowledged that Mr. P. had some positive attributes with respect to his present obligations and care of his children:

> A. Yes, certainly, when I observed him with his children he was child focused, absolutely.
>
> Q. So did it appear that he would have a close bond with his children?
>
> A. Um, no I wasn't sure I would classify it as a close bond; there is a bond, yes.

[56] Mr. Bryson confirmed his opinion that the children are best left in the care of the Agency and should not be returned to the care of Mr. P.

**RESPONDENT -MOTHER - MS. P.**

[57] Ms. P. testified she has addressed her previous domestic violence issues and has no such issue with her present partner of 2 ½ years, J.C.

[58] Ms. P. denied having an alcohol and/or marijuana problem and further denied current use of either substance.

[59] Ms. P. testified she provided Bayshore three urine samples after the June 14, 2011 meeting with Malcolm Campbell and cannot explain why test results were not provided to the Court.

[60] Ms.P. testified since June 14, 2011, she made numerous attempts to contact Malcolm Campbell regarding reinstating access but she was never able to contact him. She stated:

> "...I left a bunch of messages though."

[61] Ms. P. references her August 30, 2011 conversation with Malcolm Campbell as follows:

> "All he said was that there was, um, no testing done; that was...there was no visiting done until that was done. And that's all he...that's all he really said. He didn't say nothing more than that."

[62] After this meeting, Ms. P. stated she agreed to provide further samples to BayShore but no one came to harvest the samples from her. Ms. P. was residing with Mrs. S.C. at this time.

[63] Ms. P. testified about her love for her children and her strong desire to have them placed back in her care.

[64] Her partner J.C. is very supportive of the return of the children to her care. Their plan is to live in [*editorial note- identifying information removed*].

Ms .P. testified:

> "He strongly agrees with it. That we could move along in life and be a family."

[65] Ms. P. testified she has plans to return to university and pursue a career in *.

[66] Ms. P. was asked:

> Q. Do you feel that there would be a risk to the children if they were returned to your care at this point in time?
>
> A. No.

A. ....I'm a good parent. I know I am. And I'd just love my kids back...and they need me....

[67] Under cross examination, Ms. P. was referred to her positive test results reported in May 2011:

Q. ....So, your evidence is that BayShore nurses were coming to your address in * for the screening?

A. Yes.

Q. Until when?

A. April.

Q. Okay, and what happened then?

A. They just didn't show up.

Q. At your new place in...on *?

A. Yeah.

Q. Now, are you aware that positive test results were received around that time, in May of 2011?

A. No.

> Q. Do you remember discussing with Malcolm that you had a couple of weeks of positive tests in January and February of 2011?
>
> A. Yes.
>
> Q. And, what was your explanation for those positive tests?
>
> A. Um, well I didn't say anything to him about them. I just ...just just slipped and...
>
> A. Just that one time.

[68] Ms. P. further testified that a positive test received on January 2, 2011 was the result of a "slip" during the New Year's season.

[69] Ms. P. also agreed that she had positive tests in June/July 2010 as a result of smoking marijuana with her sister, at which time she was pregnant with her daughter, A.C.:

> Q. Was that a slip?
>
> A. Yes.

[70] Mr. Crosby further questioned Ms. P. regarding the difficulty with the providing of samples to Bayshore:

Q. And was it your request that the Bayshore nurses would go to apartment number four on * so that you could give them samples?

A. Yes.

Q. Now Mrs. S.C. tells us that you walk up to her place every morning and get there by 7:00 o'clock. How long a walk is that?

A. Thirty minutes.

Q. Okay, so you would leave your house about 6:30 in the morning?

A. Sometimes, yeah.

Q. And you'd stay there until late in the day?

A. Yes.

Q. Now I guess my question is, how would the Bayshore nurse be able to get a sample from you if you were not there?

A. ....when I was trying to contact Malcolm...the message...one of the messages were that I'd left or that I'd be in *.

Q. And are you aware that the Agency has never received any reports from Bayshore for any tests since February?

A. I have...they haven't mailed me anything....

Q. Now, on June 14th, do you remember discussing with Malcolm Campbell you giving a hair test?

A. No.

Q. Do you remember talking to Malcolm Campbell about that on August 30th when he returned your call?

A. He mentioned it.

Q. And he mentioned the fact that we were not get...the nurses weren't being able to get in touch with you?

A. He said that there was no testing done. He didn't say that they were not contacting me or anything.

**RESPONDENT FATHER - MR. P.**

[71] Mr. P. filed his plan of care which is marked as Exhibit #7. It states as follows:

> "Mr. P. would like the opportunity to parent his two children. If he had custody, he would follow any directions of MMFS or the Court with respect to allowing Ms. P. access to the children."

[72] Mr. P. works in the * 3-6 months, on and off, during the year. Mr. P. has not visited or seen his children since March 2011. Mr. P. acknowledges the concerns regarding his drinking, but discounts them by saying:

> "I am not an alcoholic or a problem drinker"

[73] Mr. P. does not believe that his drinking would get in the way of parenting. Mr. P. acknowledged his drug use, including the use of other's prescription pain medications. He does not see this as being problematic or interfering with his parenting abilities. He acknowledges his last random sample taken in April 2011 was positive.

[74] As a final option, Mr. P. supports the plan of care offered by Ms. P. He offered his plan as an alternative to permanent care.

[75] Mr. P. expressed concerns about his children being in Foster Care, in particular, his two children being placed outside the community of * ; albeit with a First Nations foster mother who is fluent in the language.

[76] Mr. P. testified he made efforts to contact Malcolm Campbell after their meeting on June 14, 2011. He would call and leave messages, but the calls were not returned.

**MRS. S.C. (MOTHER OF MS. P.'S PARTNER J.C.)**

[77] Mrs. S.C. testified on behalf of Ms. P. Her son, J.C., is now in a relationship with Ms. P. Mrs. S.C. supports and approves of the relationship. When S.C. first met with Ms. P. she described her as a "hurting person" but today she can laugh and smile.

[78] Mrs. S.C. has absolutely no concern about Ms. P. being around her children or grandchildren, including her baby granddaughter who is the daughter of her son J.C. and Ms. P. Mrs. S.C. has no concerns regarding Ms. P.'s alcohol and/or marijuana use. As a recovering alcoholic herself, Mrs. S.C. testified:

> "I can spot an alcoholic or user. In my opinion she is not using."

[79] Mrs. S.C. supports Ms. P.'s plan and believes Ms. P. can parent independently. She stated:

> "She acts like a mother."

[80] During cross examination, Mrs. S.C. acknowledged she was not aware of Mr. Bryson's reports; not aware of Ms. P.'s admitted marijuana use; not aware that Ms. P. tested positive for marijuana; not aware Mr. Bryson recommended Ms.P. seek help to make her more assertive; and not aware of the reasons why Ms. P. was denied access to her children.

## AGENCY SUBMISSIONS

[81] **Counsel for the Agency Submits:**

**RE: MR. P.**

- That the children are still in need of protective services.

- That an Order for Permanent Care with no provision for access is the appropriate remedy and in the best interests of the children.

- That Mr. P. has not accepted or completed remedial services.

- That Mr. P. continues to use alcohol and to abuse prescription medication.

- That it has been several months since Mr. P. has seen his children.

- That his two children are in a long term foster care placement who have expressed an interest in adopting them.

- That the off reserve placement for these two children adequately addressed the issue of culture.

**RE: MS. P.**

- That Ms. P. continues to use substances despite the negative consequences of losing access to her children.

- That Ms.P. has tested positive for substance abuse in February 2011.

- That Ms. P. has not provided any additional samples for testing purposes.

- That Bayshore nurses were unable to contact Ms. P. for provision of samples.

- That Ms. P. was quite aware of the expectations placed upon her in terms of drug and/or alcohol testing.

- That the Agency has not been provided the results of any tests taken after June 14, 2011 as alleged by Ms. P.

- That there is no evidence to support that Ms. P. did provide samples after February 2011.

- That Ms. P. has not completed the remedial services recommended by the Agency.

- That Ms. P. has not demonstrated the necessary commitment required to warrant the return of her children.

- That commitment can be demonstrated by a consistent and regular accessing of remedial services and a consistent access regime, neither of which exists in this instance.

- That the Respondents have not adequately addressed the risks to their children.

- That the Court should accept the expert opinion and recommendations of Mr. Bryson regarding placement of the children.

- That the only viable option for the Court is to order permanent care and the Agency has discharged the burden of proof in this regard.

- That the Agency's plan of care proposes that the children be adopted and that it would not be in their best interests for an order of access to be granted.

## RESPONDENT - MS. P. SUBMISSIONS

**[82] Counsel for Ms. P. submits:**

- That the Agency acknowledges that concerns surrounding domestic violence have been successfully addressed by Ms. P.

- That the fact domestic violence is no longer a concern points to Ms. P.'s success in completion of remedial services in this regard.

- That the fact a protection concern was raised and addressed by Ms. P. demonstrates a commitment to her children.

- That the Court must assess risk at the present time and the evidence does not support a finding that Ms.P. has a substance abuse problem currently.

- That the evidence is that Ms. P. is an occasional user of alcohol and/or marijuana, but she has not used either substance in several months.

- That to simply rely on the DSM-4 criteria to establish that Ms. P. has a substance problem is not a sufficient basis to establish same.

- That there is no anecdotal evidence to establish Ms. P. has a substance abuse problem.

- That the fact that Ms. P. tested positive for marijuana and/or alcohol is not indicative of a substance abuse disorder.

- That Mr. Bryson's opinion as to what is or what is not a substance abuse problem was sufficiently challenged on cross examination so as to affect Mr. Bryson's credibility in this regard.

- That the issue of substance abuse as being a protection concern became a “red herring” as it was never a protection concern.

- That if Ms. P. had a substance abuse disorder it would be evident in her presentation.

- That the fact that the Agency permits Ms. P. to interact with her youngest daughter in the care of Mrs. S.C. further identifies the weakness of the Agency’s position.

- That there is no evidence to suggest that Ms. P. acted inappropriately when exercising access with her children.

- That if Ms. P. did not complete remedial services, the Agency is to blame for not providing the necessary supports to Ms. P., for example, housing.

- That the fact Ms. P. has not seen the children in recent months is not of her doing and the inaction of the Agency has hampered Ms. P.’s ability to gain access to her children.

- That Ms. P. is a young, articulate mother who has had sufficient insight into her difficulties to permit the safe return of the children to her care.

- Ms. P.’s plan to pursue her relationship with her partner J.C. , in *, is a good one and in the best interests of the children.

- That the children are no longer in need of protective services which mandates the Court to dismiss the Agency’s application for permanent care.

**RESPONDENT - MR. P. SUBMISSION**

**[83] Counsel for Mr. P. submits:**

- That there is no indication that Mr. P. physically harmed the children.

- That although Mr. P. does not see his history of alcohol and or drug use as problematic, he does have insight into the problems.

- That Mr. P. felt frustrated by the Agency in terms of gaining access to his children.

- That Mr. P. cooperated with hair and urine testing.

- That Mr. P. feels the best interests of the children are best served by living with him in a First Nations environment in *.

- That in the event, the Court does not agree with his plan of care he fully supports the return of the children to Ms. P.

**BURDEN OF PROOF:**

[84] A proceeding pursuant to the *Child and Family Services Act* is a civil proceeding **N.S. (MCS) v D.J.M.,** [2002] N.S.J. No. 368 (NSCA).

[85] The burden of proof is on a balance of probabilities which is not heightened or raised because of the nature of the proceeding. **F.H. v. McDougall [2008], 3 S.C.R. 41**, The Supreme Court of Canada held at paragraphs 40; 45; and 46:

> 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.

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

[87] **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 C.M,** [1994] S.C.J. No. 37 (SCC), where the Court held that at a status review hearing it is not the Court's function to retry the 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 a follows at paragraphs 35; 36; and 37:

> 35 "It is clear that it is not the function of the status review hearing to retry the 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 and the child has been taken into protection by the respondent society. The question to be evaluated by courts on status review is whether there 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 simply be a rubber stamp of the original decision. Equal competition between parents and the Children's Aid Society is not supported by the 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 restrictive and disruptive manner, while at the same time recognizing the paramount objective of protecting the best interests of children, leads me to believe that consideration for the integrity of the family unit and the continuing need of protection of a child must be undertaken.

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

## **LEGISLATION**

[88] 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;

[89] 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**(2) In all proceedings and matters pursuant to this *Act*, the paramount consideration is the best interests of the child.

[90] 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]

[91] Section 22(1) of the *Children and Family Services Act* states:

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

[92] 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 adequately.]

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

## ANALYSIS AND DECISION

### ISSUE 1:

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

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

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

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

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

[98] 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] N.S.J. No. 52(NSCA) at paragraph 20:

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

[99] 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. C.M.** (SCC) supra).

[100] 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.

[101] I have scrutinized the evidence with care and I am satisfied that the evidence of the Agency is sufficiently clear, convincing, and cogent to satisfy the balance of probabilities test. The contention that the Respondents pose a substantial risk or real chance of danger to the children has been proven on a balance of probabilities.

[102] I find the order requested by the Agency is the appropriate one having considered the totality of the evidence. I agree with and accept the Agency's submissions. The children continue to be in need of protective services. It is in the best interests of the children that they be placed in the permanent care of the Agency pursuant to S. 42 (1) (f) and S. 47 of the *Act*. I cannot return them to either of their parents.

[103] I reject the plan of care put forth by Mr .P. It in no way addresses the long term needs of these children and I find the children would be placed at substantive risk or harm if returned to his care, primarily because he completely lacks insight into his ongoing problems with alcohol and drugs.

[104] Ms. P. lacks similar insight into her substance abuse issues and thus she is not capable of properly caring for and parenting her children at this time. I reject counsel's submission that she does not have a substance abuse disorder.

[105] I draw the above conclusion based upon the following reasons:

(a) The children require a stable environment, which in addition to being loved and nurtured will require dedication and devotion to maintain their ongoing health, safety, and happiness. Neither respondent is capable of doing so at this time.

(b) The respondents actions speak loud and clear about their lack of commitment to these children. Their inability or refusal to recognize and address their respective addiction problems causes the court great concern in terms of their ability to care for their children. That is not to say the respondents do not

love their children, they simply do not have the necessary parenting skills to properly care for them. I accept Mr. Bryson's opinion that both respondents refuse to acknowledge their respective substance abuse disorder; and, as a consequence, it is not safe to place the children with either of them.

(c) Neither respondent has successfully completed the services needed to either reduce or eliminate the risk to their children. The repeated "slips" by Ms. P. are concerning; the results of positive testing for both respondents is also a grave concern for the court.

(d) The respondents have not cooperated in providing "clean test results" from which the court can draw only one conclusion and that is that they continue to use and/or abuse the drugs and alcohol they had committed to abstain from. The court cannot subject the children to this real danger that is apparent on the evidence.

(e) I do not find Ms. P.'s evidence regarding the provision of samples to be credible. She made it difficult, if not impossible, for Agency and Bayshore staff to locate and/or contact her; from which the court can and does draw a negative inference about her required abstinence from drugs and alcohol.

(f) Both plans put forth by the respondents are speculative, uncertain, and lack clarity. Thus the court is not satisfied that either of the plans are sufficiently permanent, and stable enough to be in the children's best interests.

[106] The court thus concludes that neither respondent is capable of undertaking the demanding role of parenting. It is not safe to return the children to either of their care. I find the circumstances justifying this order, in each instance, are unlikely to change within a reasonable, foreseeable time. The permanent care order is therefore granted.

[107] Care and Custody of the children shall thus be placed with the Agency in accordance with S. 47 which 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."

**ISSUE #2**

**SHOULD ACCESS BE GRANTED?**

[108] 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.

[109] 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 **<u>Children's Aid Society of Cape Breton-Victoria v. A.M.</u>** [2005] N.S.J., No. 132 (NSCA) 58, Justice Cromwell noted that the access decision contemplated in S. 47(2) of the *Act* is a "delicate exercise which required the judge to weigh the various components of the best interests of the children". 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."

[110] 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.J., No. 474 (NSCA) 72, (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. 35.
>
> 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 represents a clear legislative choice to which the judiciary must defer."

[111] The respondents seek access to their children. They rely upon the best interests of the children and the bond that exists between them. Mr. Bryson supports the parents receiving access and provided the opinion not to do so may be "detrimental" to the children.

[112] 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.

[113] Justice Bateman of the Nova Scotia Court of Appeal commented upon the meaning of "special circumstances" in **A.J.G. v. Children's Aid Society of Pictou County** [2007] N.S.J., No. 284 (NSCA) 78 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))."

[114] 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."

[115] 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.

[116] 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."

[117] The Agency has confirmed its plan to seek a permanent placement for G.P.(age 7); A.P. (age 5); K.J. (age 3); through the process of adoption.

At page 5 of the Agency Plan of Care it states:

7 (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 children will remain in the care of the Agency and continue to be placed in agency approved foster homes within the First Nations Community. Schooling and assistance with skills development will also be addressed by the agency and counselling for the two older children will continue as required.
>
> 7 (c) **Access, if any, proposed for the child and any terms and conditions to be included in such access arrangements.**
>
> No access is proposed to allow for the adoption of the children by their current caregivers.

[118] 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 best interests of the children. The position taken by Mr. Bryson does not assist the court in displacing its obligation under Law in this regard.

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

**AGENCY FUNCTION**

[120] There was some suggestion in the evidence that the Agency did not fully support and/or assist the respondents in engaging remedial services. I find both respondents were given every opportunity to seek out such services, however, I also conclude that the Agency was not as proactive as they could have been in providing some additional support and assistance in this regard.

[121] The reality is the Agency is dealing with parents who have identified parenting deficiencies. These deficiencies often do and can affect a parent's ability to communicate with the Agency and thoroughly understand the reasons why their children were taken away from them. The relationship can, therefore, become strained.

[122] The Agency needs to be more sensitive to the parents and their circumstances and more vigorously pursue their clients when regular and necessary communication becomes stalemated. Playing phone tag and leaving messages

which reportedly are not received and/or returned does not assist the Agency in meeting its mandate under the *Act* in the Court's view. I would encourage the Agency to review its communication policies in this regard and utilize the statutory time limits to the potential benefit, not detriment, of parents.

[123] Similarly, I see merit in the concern expressed by Mr. Stanwick regarding the Agency's refusal to assist Ms. P. with the housing issues. To suggest, as Mr. Campbell did, that "it was not their mandate" is not acceptable to the Court in the context of S. 13(2) (b) which states:

> (2) Services to promote the integrity of the family include, but are not limited to, services provided by the agency or provided by others with the assistance of the agency for the following purposes:
>
> (b) improving the family's housing situation.

[124] I raise these issues to gently remind the Agency of its role and mandate pursuant to s. 13 (1) which is to take reasonable measures to provide services to families and children that promote the integrity of the family.

[125] As stated by this Court in **Minister of Community Services v. J.D. & J.H.**, [2011], N.S.J. 171 (NSSC) 113, at para 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.
>
> 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 intended 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."

## CONCLUSION:

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

[127] Ms. P. and Mr. P. 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.

[128] 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.