SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia (Community Services) v. R.M.S., 2012 NSSC 80

Date: 20120216
Docket: 71304
Registry: Sydney

Between:

Minister of Community Services

Applicant

v.

R.S., J.B.

Respondents

DECISION

Editorial Notice

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

Judge: The Honourable Justice Kenneth C. Haley.

Heard: July 23, 2010, August 10, 2011, September 14, 2010, September 20, 2010, September 29, 2010, October 8, 2010, December 20, 2010, January 5, 2011, March 2, 2011, March 28, 2011, March 29, 2011, April 8, 2011, May10,2011, May 24, 2011, June 1, 2011, October 24, 2011, October 31, 2011, November 30, 2011, December 5, 2011, December 6, 2011, December 7, 2011, January 20, 2012, January 23, 2012, January 30, 2012, in Sydney, Nova Scotia

Counsel: Mr. Adam Neal, Counsel for the Applicant
Mr. Alfred Dinaut, Counsel for the Respondent, Ms. S.
Mr. B., Self Represented

By the Court:

[1] This is the Application of the Minister of Community Services, hereinafter called "The Applicant" seeking an order pursuant to Section 42 (1) (f) of the *Children and Family Services Act*, that the child, J.A.B. born July *, 2010, is in need of protective services and should be placed in the permanent care and custody of the Applicant with no provision for access.

[2] The Respondents are the biological parents of the child, J.A.B. both of whom oppose this Application. Each Respondent has put forward separate and distinct plans to have the child placed in their respective care.

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

> -July * 2010, the child, J.A.B., was apprehended at birth by the Applicant at the Cape Breton Regional Hospital;
>
> -This Court had earlier granted an Order dated April 29, 2010 awarding permanent care to the Applicant for the Respondent's two older children, aged 12 and 2;
>
> - The case refence for same is**NovaScotia (CommunityServices) v R.M.S. and J.B.**, 2010 NSSC 177. It is to be noted the provision

for access in this decision was later terminated by court order dated July 6, 2011;

- July 23, 2010 an interim order pursuant to Section 39 of the *Act* was granted placing the child J.A.B. in the interim temporary care and custody of the Applicant until August 10, 2010;

- August 10, 2010 the interim hearing was completed with matter being adjourned to October 5, 2010 for protection hearing;

- October 8, 2010 the Protection Hearing was conducted with the Respondents consenting to a protection finding pursuant to Section 22 (2) (b) & (g) of the *Children and Family Services Act.* The Child , J.A.B., thus remained in the temporary care of the Applicant with supervised access afforded to the Respondents;

-January 5, 2011 a Disposition Hearing was conducted. The status quo continued with consent of the parties. The matter was adjourned to March 28, 2011 at which time a five day contested "Permanent Care" hearing was scheduled;

- March 28, 2011 the Respondents advised the Court they had fired their respective counsel and requested an adjournment. The Court ordered the status quo to continue and granted the adjournment which was not consented to by the Applicant. The matter was thus adjourned for hearing to June 7, 2011 with pre-trial dates established to monitor the hiring of new counsel by the Respondents;

- June 7, it was confirmed that Ms. S. had obtained new counsel and that Mr. B. would represent himself the for the balance of the proceeding. The Court was further advised that counsel and Mr. B. had agreed to further adjourn the contested hearing to December 5, 6, 7 and 8, 2011;

[4] On December 5, 2011 the Applicant called the following witnesses, namely:

(1) Suzanne Campbell - temporary care worker

(2) Paul Moore - social worker

(3) Cst. Brandon O'Donnell - police officer

(4) Cst. Sonya Dicks - police officer

(5) Marie O'Keefe - access facilitator

(6) Colleen Petite - access facilitator

[5] On December 6, 2011, the Applicant called the following witnesses, namely:

(7) Isabelle White, neo -natal nurse;

(8) Arlene White - access facilitator

[6] On December 7, 2011, the applicant call the following witness, namely:

(9) Wendy Clarke- hospital records;

(10) Keith MacDonald - Methadon Maintenance Program Coordinator

[7] The matter was then adjourned to January 20 and 23, 2012 for completion of the evidence. The statutory deadline for completion, being January 12, 2012, was thus exceeded. All parties consented to going past the deadline in the best interests of the child;

[8] On January 20, 2012 the following witnesses were called namely:

(10) Keith MacDonald- Methadone Maintenance Program Coordinator

(11) Sami F. Jamokha - Chemist;

(12) Sherry Johnston - long term protection worker;

(13) Keith O'Flattery - Social Worker

[9] With the conclusion of the Applicant's case the matter was adjourned to January 23, 2012 at which time the following witnesses were called, namely:

(14) R.M.S. - Respondent;

(15) J.B. - Respondent

[10] -During the proceeding the Court received into evidence the following Exhibits:

A1 - Occurrence Report

A2 - Tab 1 - Case Notes of Marie O'Keefe

A3 - Tab 2 - Case Notes of Colleen Petite

A4 - Access Notes - Arlene White

A5 - Book of Exhibits - Tab 2 - File of Addiction Services

A6 - C.V. of Keith MacDonald

A7 - Global Recovery Book of Applicant's Exhibits re Ms. S.

A8 - Global Recovery Progress Notes

A9 - Global Recovery Book of Applicant's Exhibits re Mr. B.

A10 - Reference sheet - Global Recovery

A11 - Global Psychiatric re Ms. S. (See A7)

A12 - Global Psychiatric re Mr. B.- (See A9)

A13 - Litigation Package - C.V.

R14 - Plan of Care re Ms. S.

R15 - Certificate of Parenting Courses

R16 - Plan of Care - Mr. B.

[11] Final submissions were made to the Court on January 30, 2012 at which time the Court reserved its decision.

[12] 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.

[13] 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.

[14] 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."

APPLICANT'S EVIDENCE

[15] At the January 5, 2011 Disposition Hearing the Applicant filed its plan of care dated December 14, 2010. The Applicant seeks permanent care of the child J.A.B. with no provision for access for the purpose of adoption. The child was apprehended at birth at which time J.A.B. tested positive for benzodiazepine and opiates which was medically established to have been caused by the mother's drug addiction to same. The child was hospitalized for 37 days and was later released to the temporary care of the Applicant.

[16] The Applicant's concerns are summarized as follows at paragraph 6(a) of it's Plan of Care:

> "The Department will be seeking Permanent Care and Custody of J.B. as Ms. S. and Mr. B. Have not been able to reduce the risk to the child. Although Ms. S. and Mr. B. are engaged in the Methadone Maintenance Program, they have not actively engaged in Addictions Services to address addiction concerns. There has been many concerns with Ms. S's ability to stay awake during the access visits. It is extremely difficult to effect the necessary changes that allow a couple to enhance their parenting to the level of adequacy when the parents persistently deny and/or minimize the extent of their problems. There is a long history with both parents. Mr. B. is currently remanded and Ms. S. has not been able to consistently stay awake (as observed by numerous people) in the short time that she has had access with her infant child (and access with the older children). If Ms. S. can not be counted on to be awake during daylight hours, returning an

> infant child to her care is inviting risk and ignoring his most basic needs -his safety."

[17] Additionally the Applicant is concerned about the behaviours exhibited by the Respondents, during access visits, which has lead to its conclusion that it would be unsafe to leave the child unsupervised in the care of either of the Respondents.

[18] According to the evidence of Access Facilitators, Marie O'Keefe; Colleen Petite and Arlene White there were many access visits between August 24, 2010 and August 22, 2011 where Ms. S. often appeared to be falling asleep, sometimes while holding the child.

[19] The Access Facilitators reported Ms. S. 's appearance of being tired; sweaty; having red and glossy eyes; often associated with slurred speech; on more than 50 percent of the visits.

[20] Similar symptoms were observed by Neo Natal Nurse Isabelle White between July * and August *, 2010 when J.A.B. was a patient at the Cape Breton Regional Hospital. Ms. White testified she was concerned about Ms. S. health.

[21] The Access Facilitator never stopped a visit, but would nonetheless remain in the room as they did not feel it was safe to leave J.A.B. alone with either or both of the Respondents during an access visit.

[22] The Access Facilitators confirmed that both Respondents were affectionate with the child and appeared genuinely concerned for his welfare.

[23] The Access Facilitator also confirmed that Ms. S. stated she was tired and not sleeping due to the stress of not having her child in her care along with the effect of the medication she was prescribed.

[24] It should be noted Mr. B. did not attend the majority of the access visits as he was incarcerated from February 2011 through to November 2011.

[25] It was nonetheless reported Mr. B. also demonstrated signs of fatigue and/or impairment on August 10 and 31, 2010 and in particular on October 13, 2010 Mr. B. was very belligerent and cursed at access facilitator, Marie O'Keefe, when the visit was cancelled due to their late arrival.

[26] An access visit, as earlier noted, occurred on June 10, 2011 which was supervised by Access Facilitator Arlene White. Ms. White testified receiving a pen from Ms. S.' older daughter S. , age 12. The pen appeared to the witness to have a "white powdery substance"on and inside the pen. According to the evidence which is in conflict, the pen was then given to either Michelle Swan or Kevin O'Flattery and then given to Sherry Johnston, Protection Worker which has raised concerns about the chain of continuity in the handling of the pen ultimately sent away to be analysed. The Court will further address the issue of continuity later in this decision.

[27] The pen was sent away for analysis, via courier to Maxxam Analytics Inc. in Mississauga, Ontario which determined the white powder substance from the pen to be "Codeine"which is an opiate and drug of choice for Ms. S.

[28] Mr. Sami Jamokha was called as an expert witness in this regard. Mr. Jamokha was qualified by the Court to provide expert testimony in the area of "the process of analysis and testing of drug substances and outcomes".

[29] Exhibit No. A13 identified as “Litigation Data Package - Explained” includes the Curricular Vitae of Mr. Jamokha which speaks to the witnesses’ qualifications.

[30] Mr. Jamokha described the testing process which included chain of continuity of the sample received from the Applicant. He described how the testing instrument was calibrated and further testified that tests confirmed that the testing instrument was operating properly and not contaminated. He described the testing process, which included finger printing of the codeine ion. After injecting the unknown sample into the instrument the test results showed the presence of codeine at the 99 percentile, upon which the witness stipulated that 80% was an acceptable fit according to industry standard. This result was subsequently confirmed by a control process to ensure the accuracy of the test.

[31] Mr. Jamokha confirmed the opinion he provided in writing by letter addressed to the Applicant, dated August 22, 2011 (which is included in Exhibit No A13) that the sample provided to his laboratory #10650540 (blue pen) “screened positive for opiates and confirmed positive for codeine” according to its unique spectra or fingerprint.

[32] Mr. Jamokha confirmed on cross - examination that his results, reference only the presence of the drug in the pen and he could not testify to the issue of quantity.

[33] Evidence was also heard regarding the Respondents' past criminal activity. In particular Cst. Brandon O'Donnell testified to the arrest of Ms. S. at the Cape Breton Regional Hospital on August 7, 2010 at which time Ms. S. was alleged to have shop-lifted $111.00 of ornaments from the gift shop.

[34] It is unclear whether or not charges were laid or not, but the matter did not proceed to prosecution with Ms. S. agreeing to apologize to the store owner and undertaking not to re-visit the premises.

[35] Subsequently Ms. S. was arrested for impaired driving by Cst. Sonya Dicks on November 14, 2010. At this time Ms. S. was reported to be intoxicated by drugs and exhibited signs of blood shot eyes; slurred speech and acting out in a bizarre fashion to the extent that she offered to sell drugs to the officer during the arrest process. As stated by Cst. Dicks who has been a police officer since 2006:

"I have never witnessed this behaviour before"

Ms. S. is awaiting trial on this charge on April 15, 2012.

[36] Mr. B. was a passenger in the vehicle on November 14, 2010 and fled the scene after providing false identification. Shortly after Cst. O'Donnell responded to Membertou Gas Bar where Mr. B. was alleged to have committed an assault and stealing a vehicle which Mr. B. later returned stating he thought the vehicle was his.

[37] Cst. O'Donnell subsequently arrested Mr. B. at his and Ms. S. residence at * in Sydney. Mr. B. was reported to be aggressive toward police and under the influence of something, but not alcohol.

[38] As a result of this incident Mr. B. was ultimately incarcerated from February 2011 to November 2011 which included approximately one month for breach of his initial release conditions.

[39] Mr. Keith MacDonald was qualified by the Court to give expert evidence in the area of identification of the signs; effects and side effects of the use and/or misuse of illicit and prescribed medication. In addition Mr. MacDonald was qualified to provide expert opinion regarding the Methadone Maintenance Program.

[40] Currently Mr. MacDonald is the Program Co-ordinator with Global Psychiatric Research Inc. and both Respondents were clients in the Methadone Maintenance Program.

[41] In general terms Mr. MacDonald testified methadone is used to treat drug dependency. The intent of the program is to suppress the craving for opiates and wean the subject off the drug to which he or she has become addicted.

[42] The Program follows a “Harm Reduction Model” which thus permits some opiate use that is controlled by pharmacy prescriptions. Over time the opiate and methadone prescriptions are reduced with the goal to eliminate the need for drugs by the client.

[43] As a result, when the client tests positive for the prescribed drugs there is a lessened concern since it is expected that there will be drugs in the clients' system. The test procedure , however, does not measure quantity taken, thus there is no way to determine whether or not the client has misused or taken more than the prescribed amount.

[44] One method of determining misuse is by way of observing the symptomology of the client. For example, one of the most common side effects of methadone is call the "methadone sweats". As a general rule methadone does not mix well with benzodiazepine which is used in treatment as an anti-anxiety agent. If misused in combination with methadone the following symptoms would be expected, namely:

1. Intoxicated like symptoms;
2. Memory loss;
3. Appearance of being drunk;
4. Slurred speech;
5. A feeling of being drunk and
6. Walk and gate would be adversely affected.

[45] Exhibit No. A7 /11 references the Methadone Maintenance Program information for Respondent Ms. S. In particular Exhibit No. 7/11 reports random urine test results for this Respondent from September 2010 - February 2011. Exhibit No. A8 references test results for December 1, 2011. In Ms. S., case she was prescribed benzodiazepine and methadone, so test results showing the presence of same would not be alarming. Further, presence of opiates is considered usual in the early stages of testing with the Harm Reduction Model. As of October 11, 2010 Ms. S. was reported to be stabilized and that she was no longer being prescribed opiates.

[46] Random Urine Record Sheet for Ms. S. and marked as Exhibits A7/11, A8 are attached as Exhibits B and C to this decision. Similar records for Mr. B which were marked as Exhibit A9/12 is attached as Schedule D. Exhibit No. 10 explains the drug abbreviations referenced in the Random Urine Records and is attached hereto as Schedule A.

[47] Mr. MacDonald testified that some of the test results varied from the expected such as the October 11, 2010 test detected in addition to the prescribed drugs, presence of non prescribed oxycodone and cannabis. December 13, and 20,

2010 detected the additional presence of non-prescribed cannabis. The February test results, detected the presence of Benzodiazepine but this drug was last prescribed to Ms. S. on December 14, 2010 according to the evidence.

[48] Regarding the presence of cannabis in Ms. S.' system Mr. MacDonald testified that according to the Methadone Maintenance Program Standards this was acceptable and therefore the positive test results were compliant and not considered to be "dirty urine". Mr. MacDonald testified regarding the presence of THC (cannabis) as follows:

> ...It was no concern to us;
>
> ...R. was progressing well;
>
> ...She was a pleasant surprise.

[49] According to Mr. MacDonald THC (cannabis) can cause the following symptoms namely:

> Happiness; buzzed; affects judgment ; red eyes, acting out of character; intoxicating effect (i.e.) "baked"

[50] Mr. MacDonald further stated that opiates were Ms. S.' drug of choice to which she was addicted. In commenting upon her positive progress, Mr. MacDonald testified in his experience there is a "high relapse rate" with opiates.

[51] With regard to Mr. B, Methadone Maintenance Records, noted in Exhibit No. 9/12, Mr. MacDonald testified that Mr. B. left the program due to his incarceration in February 2011, and that he had tested positive for non prescribed THC or cannabis on December 27, 2010 and January 3, 2011.

[52] The above noted Methadone Maintenance Records regarding Mr. B. referenced as Exhibit No. 9/12 are attached as Schedule D.

[53] Sherry Johnston, long term Protection Worker, testified that the decision to seek permanent care of J.A.B. was made on December 3, 2010 because of the past historical involvement of the Respondents with the Minister and that J.A.B. was born with a maternal addiction to opiates caused by the mother's drug use.

[54] Ms. Johnston testified in her opinion that the deficient parenting abilities of both Respondents was unlikely to change during the legislative time lines and that risk of harm to the child still remained a primary concern to the Applicant.

[55] Ms. S. had not actively engaged in services, although same were made available to her and Mr. B. had been incarcerated for the majority of the time during which services would normally have been available to him.

[56] Ms. Johnston confirmed the concerns of the access facilitators and when considering the totality of the Respondents' conduct including past and current drug use, alleged and proven criminal behaviour; reports of being fatigued and/or impaired at access visits; failure to acknowledge drug use as an issue and failure to undergo hair follicle testing, that it was in the best interests of the child J.A.B. to remain in the care of the Applicant with a plan to adopt by the current foster family.

RESPONDENT'S EVIDENCE

[57] Ms. S. case plan and Mr. B.'s case plan are contained in Exhibit No. 14 and 16 respectively. Both Respondents acknowledged and admitted to their respective drug addictions, but each Respondent testified they were now clean and drug free to the extent that there would be no risk in returning J.A.B. to either of them.

[58] Ms. S. states she wants to be free from her opiate addiction so she can be a better person and mother. She testified she has changed her life around and sees things very differently now.

[59] Ms. S. now has new friends, is healthier and stays away from bad people and drugs. She is ready to be a mother again in her opinion.

[60] Ms. S. attributes all the symptoms described by access facilitators and others to be a direct result of the Methadone Maintenance Harm Reduction Model and denies that she misused drugs in any way as alleged by the Applicant. Ms. S. states all such symptoms are now gone and are a thing of the past.

[61] Ms. S. denied any knowledge of the "pen incident" and testified she had no idea how the pen got in her purse. Ms. S. does not understand why the Applicant "made such a big deal" out of this.

[62] Ms. S. advised she had family to support her if required with the care of J.A.B., however the Court did not hear evidence from Ms. S's mother and two brothers.

[63] Ms. S. testified she had no memory of the impaired driving incident on November 14, 2010 and offered no excuses for stealing from the hospital gift shop, stipulating that she apologised to the owner for her behaviour.

[64] Ms. S. acknowledged she was addicted to opiates (percecets) but has now rid herself of the addiction and her child J.A.B. should be returned to her care. She states at page 2 of her plan of care as follows:

> ROLE MODEL
>
> I am * years old and in good health. I am serious regarding my full recovery from drug addiction by being very involved in programs and services as offered through Addiction Services. My addictions counsellor is Andre Campbell who I

> see on a regular basis and I am enrolled in a program from November 21 to 29, 2011 which involves full days and is a support group for women who have had addictions. I am seeking the services and will be attending with a family counsellor who will help me deal with family stress and I am currently in Dr. Ali's methadone program. My current focus is on staying drug free. I was in recovery as early as 2006 but had a slip and had to re-engage in all services. As my recovery progresses, I continue to be in a position to parent J. and other than the difficulty of past drug addiction, I raise no other concerns as a parent and would be an excellent role model for my son.

[65] Ms. S. states she is willing to continue with remedial services as offered by the Minister but has also acknowledged it has been difficult to regularly engage in such services. Ms. S. did not call any additional evidence in support of her plan of care.

[66] Mr. B. acknowledged he was addicted to drugs but says:

> "I am not that person anymore."

[67] Mr. B. states he offered to be tested for drugs by the Applicant, but the Applicant refused because his incarceration would have made the test results a measure of nothing as he would be expected to be drug free while in custody. At paragraph two of Mr. B.'s plan of care he states as follows:

> "I do recognize that I have been incarcerated for eight and a half months and have missed many firsts in my son's life. I am also on House Arrest until April of 2012 but I see this as a way to spend time building a healthy relationship with him. There are many more "firsts" for him like learning to ride a bike, first day of school, first Christmas concert, first fishing trip, etc. to which I feel is my responsibility as his biological father to experience with him."

> "I am fully aware of the substance addiction that I had and have been clean for the last eight and a half months which includes being Methadone free. I have taken parenting classes from Lisa Carr at the family resource centre which I have signed a release form for Children's Aid Society to check if they wish. I have also offered to Sherry Johnson (CAS) any testing they wish to do on me to ensure that I remain substance free."

[68] Mr. B. reunited with his former partner, Ms. M.. and he states he can provide J.A.B. a stable home environment for his son with family supports in place.

[69] The Court did not hear any additional evidence in support of Mr. B's plan of care.

APPLICANT SUBMISSIONS

[70] The Applicant submits that it has discharged the burden of proof as defined by the Supreme Court of Canada in **F.H. v. MacDougall** (2008) 3SCR41.

[71] That the child, J.A.B. should be placed in the Permanent Care of the Applicant since the child remains a child in need of protective services and there is substantial risk of harm to the child if returned to either of the Respondents.

[72] That the evidence of the Access Facilitators, Protection Workers and Nurse White is consistent with the signs of impairment as described by expert Keith MacDonald , which thus supports the conclusion that Ms. S. was misusing both prescription and non prescription drugs during access and hospital visits.

[73] That it is reasonable for the court to conclude that Ms. S. symptoms of fatigue/or impairment were not the result of the prescribed use of drugs and that her evidence to the contrary in this regard should be rejected.

[74] That the evidence about the “white powder substance” found in Ms. S.’s pen at an access visit held on June 10, 2011, is of relevance with regard to the misuse of drugs by Ms. S. and should be admitted whether or not the court finds there was a break or gap in the chain of continuity.

[75] That the white powdery substance was determined to be codeine/opiate which was or is Ms. S.'s drug of choice for which she had no prescription as per the Methadone Maintenance Program guidelines.

[76] That expert evidence from Mr. Keith MacDonald establishes that codeine when reduced to a powder form can produce a "quick high" when inhaled or snorted.

[77] That when the pen was discovered in her purse Ms. S. questioned the access worker why it was such a "big deal" which supports the Applicant's contention that Ms. S. lacks insight into her drug addiction.

[78] That the evidence surrounding Ms. S.'s arrest in November, 2010 for impaired driving coupled with the bizarre behaviour exhibited by her during the arrest demonstrates, that Ms. S. cannot properly and safely care for her child, and especially so since Ms. S. has no independent recollection of the incident.

[79] That the continued pattern of drug misuse by Ms. S. should be a concern to the court which is most recently evidenced by the positive urine test for marihuana use on December 1, 2011.

[80] That when cross examined about the marihuana use Ms. S. conceded that she was “around marijuana a lot” and that she had a “little puff” which she was surprised produced a positive test result.

[81] That Ms. S.’s Plan of Care is misleading, misguided and does not provide for what is in the best interest of J.A.B..

[82] That the evidence supports that Mr. B., as well, was showing signs of impairment while attending access visits.

[83] That Mr. B. admitted to drug use and misuse and that he was impaired when the driving incident of November 14 , 2010 occurred.

[84] That Mr. B. was incarcerated from February 2011 to November 2011 during which time he had no access with J.A.B..

[85] That Mr. B. did not engage in services to satisfactorily address his identified parenting deficiencies and that the course he took while incarcerated does suffice in that regard.

[86] That Mr. B. did not engage in addiction services while incarcerated nor did he continue with the Methadone Maintenance Program.

[87] That the two month time period since Mr. B.'s release in November, 2011 does not afford a sufficient length of time to establish a sense of confidence in Mr. B.'s ability to remain drug free and remain free of criminal activity.

[88] That Mr. B.'s Plan of Care lacks any real substance in terms of long term planning for J.A.B. and it is not in the child's best interest.

[89] That the Applicant's Plan of Care addresses the relevant criteria listed in s. 3(2) of the *Children and Family Services Act.*

[90] That the Applicant's Plan of Care offers J.A.B. continuity of the family in that he will be placed and adopted by his current foster parents who also intend to adopt J.A.B.'s two older biological sisters.

[91] That J.A.B. has a secure attachment and bond with his foster family, and based upon the evidence, it would not be in J.A.B.'s best interest for the Respondents to be granted access, which would impede the possibility of a permanent placement through adoption.

COUNSEL FOR THE RESPONDENT, MS. S. SUBMITS:

[92] That Ms. S. was acting appropriately as a mother during access visits in identifying concerns she had about J.A.B.'s health and general care.

[93] That generally speaking the access visits were successful and that even with the expressed concerns about Ms. S.'s appearance of being tired or impaired the visits were permitted to continue, except for the events of June 10, 2011.

[94] That Ms. S. commenced the Methadone Maintenance Program in September 2010 and was required to go through a period of adjustment in order to overcome her addiction.

[95] That there have been no repeat incidents of theft or impaired driving after November 2010 which would suggest that Ms. S. has changed her lifestyle for the good and such behaviour is a thing of the past.

[96] That during the access Ms. S. cooperated at every turn in order that access would continue with her child.

[97] That Ms. S. was always compliant with access facilitators and acted in the best interest of J.A.B..

[98] That the June 10, 2011 pen incident evidence should not be admitted into evidence or alternatively if admitted little or no weight should be assigned to same by the court.

[99] That Ms. S. performed well in the Methadone Maintenance Program and was compliant with the program requirements according to Mr. Keith MacDonald.

[100] That the positive test by Ms. S. for Marijuana should not be alarming in that the Methadone Maintenance Program adopts the Harm Reduction Model and Mr. Keith MacDonald testified that marijuana is not a substance that has the same huge implications that opiate abuse would have.

[101] That Ms. S. used marijuana to assist with eating difficulties she had as a result of the prescribed methadone use and she has no problem with the long term use of marijuana.

[102] That the symptoms of fatigue or impairment exhibited by Ms. S. during access visits were the result of taking properly prescribed drugs through the Methadone Maintenance Program and not the result of misuse of other non-prescription substances as alleged by the Applicant.

[103] That Ms. S. is succeeding in the Methadone Maintenance Program and her addiction to opiates is now a thing of the past.

[104] That Ms. S. has moved past her drug addiction and relationship with Mr. B..

[105] That Ms. S. is now healthy, drug free and focussed on being a good mother with the ability to parent her child in a safe and risk free environment.

[106] That the Applicant's application should be dismissed in the best interests of J.A.B.

MR. B. SUBMITS ON HIS OWN BEHALF:

[107] That throughout this entire proceeding his son remained his main focus.

[108] That he can provide a home for his son which is a clean and safe environment.

[109] That he has accomplished a lot in coming off methadone on his own and remaining clean and substance free since February 2011.

[110] That he had taken a parenting course while in incarceration.

[111] That he lives in a stable, happy environment with his former girlfriend, Ms. M. and their 12 year old daughter.

[112] That he is no longer associates with people that can be a negative influence on him.

[113] That he is not the same person he was while with Ms. S. and he does not want to become that person again.

[114] That he can properly and safely parent his son.

[115] That his son is no longer in need of protection.

[116] That the Applicant's Application should be dismissed in the best interest of J.A.B..

BURDEN OF PROOF

[117] A proceeding pursuant to the *Child and Family Services Act* is a civil proceeding **NS.(MCS)v DJM [2002] N.S.J. No368 (NSCA)**.

[118] 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 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.
>
> And further at paragraph 45 and 46.
>
> 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.

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

TEST ON STATUTORY REVIEW

[120] 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

[121] 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;

[122] 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.

[123] 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]

[124] 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.]

[125] 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 EVIDENCE OF THE "BLUE PEN" INCIDENT BE ADMITTED INTO EVIDENCE?

[126] Access Facilitator, Arlene White, testified that on June 10, 2011 she took possession of a "blue pen" from Ms. S.' eldest daughter during an access visit.

[127] The pen had in and/or on it a "white powdery substance" which has since been established to be codeine, according to the evidence of Mr. Sami Jamohka.

[128] Ms. White testified she gave the pen to one Michelle Swan, who in turn reportedly passed the pen along to another senior person employed with the Minister of Community Services.

[129] The final witness called by the Applicant, namely Kevin O'Flattery, testified he was the senior official who received the pen from Arlene White after which he testified he provided same to the Protection Worker Sherry Johnston.

[130] Ms. Johnston described the process the Applicant followed to courier the pen to Maxxim Labs Inc where the pen sample was analysed.

[131] Continuity procedures used by the Maxxim Lab Inc were of highest standards.

[132] There is however a conflict in the evidence between Arlene White and Kevin O'Flattery regarding the initial handling of the pen and the question has been raised whether or not Michelle Swan was involved in the chain of continuity. She was not called to testify by Applicant.

[133] Counsel for Ms. S. has raised an objection to the admission of this evidence and has requested the Court to rule the pen evidence as inadmissible or in the alternative to give the evidence little or no weight.

[134] Counsel for Ms. S. submits as follows:

> In the present case, the real evidence (pen) must be relevant and admissible. Relevance is linked to authenticity. Relevance is established only if it is the same item as taken by the access worker. When forensic tests are done on the item, their validity is dependant on preserving the integrity of the exhibit - showing it was not tampered with or contaminated. The Applicant obliged foundation and receive the item in evidence. The Applicant must prove continuity in that the exhibit is accounted for from pick up to presentation in court. The Court rules on the admissibility of the exhibit. The judge must be satisfied their is evidence to support the conclusion that the evidence is what the party claims. The trier of fact decides as to authenticity and what weight to attach the evidence.
>
> It is respectfully submitted that authenticity is called into question since there is a break in the chain of custody among the employees of the Minister. There is also, no evidence the item was bagged, tagged, identified by workers or initialled when in and out of the possession of various workers. Nor was the item produced as evidence at the trial. The conclusion of the Respondent is that little or no weight be attached by the trier of the fact to the evidence when considering the same in this decision.

[135] The Applicant submits that there was no break in the chain of continuity based upon the evidence of Mr. O'Flattery suggesting Ms. White's memory was not clear at to who she gave the pen to.

[136] Alternatively the Applicant submits should the Court find there was a break or gap in the chain of continuity, that it is not fatal to the admission of the evidence. The Applicant states as follows:

> In the case of R. V. MacPherson 2005 CarswellBC 610, Owen-Flood J., stated the following with respect to the importance of continuity of evidence in Criminal matters and whether or not it would effect the admissibility of that evidence;

> "16 There were a number of problems relating to the continuity of the evidence in this case. Unfortunately, Cst. Banky, the exhibits officers assigned to this case, died unexpectedly in October 2003. Because Cst. Banky could not testify at trial, there is a break in the continuity of the evidence. No alternate evidence as to the chain of custody of the real evidence was proferred by the Crown.
> 17 The extent to which the Crown proves the continuity of real evidence in a narcotics case, and whether or not breaks in continuity makes evidence inadmissible are questions of fact for the trier of fact to decide. Breaks in the chain of continuity reduce the weight which can be given to the proferred evidence: R. V Andrade (1985), 18 C.C.C. (3d) 41 (Ont. C.A.).
> 18 In R. v. Larsen, 2001 BCSC 597 (B.C.S.C.) Aff'd on other grounds, 2003 BCCA 18 (B.C.C.A.), Romilly J. held as follows:
>
> "It is important to appreciate what the Crown must prove in a narcotis-related case. In essence, the Crown must show beyond a reasonable doubt that the material seized from an accused was a prohibited substance. To that end, the Crown must prove that the substance dealt with by, or in the possession of, the accused is the same substance that is alleged in the information or indictment (and prohibited by law). Undoubtedly, then continuity of possession of the substance from the accused to the law enforcement officer to the analyst is crucial. However, Canadian case law makes it clear that proof of continuity is not a legal requirement and that gaps in continuity are not fatal to the Crown's case unless they raise a reasonable doubt about the exhibit's integrity."

[137] The Court is of the view that it need not determine the issue of whether or not there was a break in the chain of continuity. Such an omission, if it occurred, does not affect the admission of the pen evidence. It simply goes to what weight, if any, the Court should give to the evidence in reaching its decision.

[138] Justice D. P. S. Farrar of the Nova Scotia Court of Appeal stated in **R. v Murphy** 2011 NSCA 54 at paragraph 45:

> The relationship between continuity and admissibility was addressed by this Court recently in R. V. West 2010 NSCA 16 at paragraph 130 where it states:
>
> > "Generally, the continuity of an exhibit goes to weight, not to admissibility....

[139] When considering the whole of the evidence the June 10, 2011 pen incident is but one factor the Applicant relies upon in support of its submission that Ms. S. has not yet successfully addressed her opiate addition. There are other reported incidents of alleged drug misuse by Ms. S. to which the Court has been referred to in evidence.

[140] There is no evidence that Ms. S. was under the influence of codeine at the access visit of June 10, 2011. The Applicant's concern is that she was in possession of her drug of choice and that the drug was not properly prescribed to her through Methadon Maintenance Program.

[141] Whether or not the handling of the pen as an Exhibit may have caused a gap in the chain of continuity, the Court, nonetheless disagrees with the Respondent's submission that such conduct, if it occurred, should affect the admission of such evidence. The Court, is of the view that the admission of this evidence is not, in of itself, determinative of the ultimate issue before the Court. It

is but one piece of evidence for the Court to consider and weigh along with other evidence when considering the alleged misuse of drugs by Ms. S. and her ability to parent.

[142] In reaching this conclusion the Court is satisfied even if there was a break in the chain of continuity of the pen sample there is no evidence to support the contention that any such omission affected the integrity of the sample sent away for analysis and the ultimate results.

[143] Therefore the Court is satisfied upon a balance of probabilities that the pen evidence and the expert opinion associated with it in identifying the white powdery substance to be codeine is admissible and properly before the Court as evidence. The Court will assign this evidence the appropriate weight, if any, it deserves.

ISSUE 2:

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

[144] 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.

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

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

[147] 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 child to either of the Respondents.

[148] 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."

[149] 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).

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

[151] I have scrutinized the evidence with care and I am satisfied that the evidence of the Applicant is sufficiently clear, convincing, and cogent to satisfy the balance of probabilities test. The contention that the Respondents pose a substantial risk of

harm or real chance of danger to their child has been proven on a balance of probabilities.

[152] I find the order requested by the Applicant is the appropriate one having considered the totality of the evidence. I agree with and accept the Applicant's submissions. The child J.A.B. continues to be in need of protective services. It is in the best interests of the child that he be placed in the permanent care of the Applicant pursuant to S. 42 (1) (f) and S. 47 of the *Act*. I cannot return J.A.B. to either of his parents.

[153] I reject the plan put forth by Ms. S. It in no way addresses the long term needs of the child and I find the child, J.A.B., would be placed at substantial risk of harm if returned to his mother's care, primarily due to ongoing substance abuse issues which in the Court's view have not yet been completely resolved.

[154] Similarly Mr. B. has not established he can provide a long term stable environment for his child at this time. His present circumstances are new and the long term stability of same is speculative. His plan is also rejected.

[155] I recognize that both Respondents have made significant strides in addressing their respective addictions, and for that they must be commended. However their parental deficiencies are, to date, not completely addressed and there is not sufficient time available pursuant to the legislation to properly remedy same through the provision of remedial services. The Court lacks confidence that the Respondents can and will remain drug free, in spite of their sworn evidence to the contrary.

[156] Ms. S. has stated in her plan of care that "her current focus is staying drug free", but she nonetheless tested positive for marijuana on December 1, 2011. The December 2011 test result is clear, convincing and cogent evidence that Ms. S.'s focus is <u>not</u> staying drug free. I reject the Respondent's submission to the contary.

[157] There is also the matter of Ms. S. having tested positive for Benzodiazepine in February, 2011. The evidence is this drug was no longer being prescribed to her through the Methadone Maintenance Program as of December 14, 2010. This is another example of Ms. S. inability to stay the course in addressing her drug addiction which continues to place the child at risk.

[158] The Court notes that Mr. Keith MacDonald considered Ms. S. to be a "pleasant surprise" and compliant with the Methadone Maintenance Program in spite of the positive marijuana findings. I cannot agree.

[159] The Court fails to see how such an opinion assists Ms. S. in the child protection context. The continued use of an illegal substance remains a major concern to the Court when assessing risk of harm to an infant child.

[160] It is apparent to the Court that Ms. S. still continues to struggle with the misuse of drugs, in spite of the positive steps she has taken in addressing her primary addiction to opiates.

[161] Similarly Mr. B. has just recently been released from jail which is a controlled environment. To suggest, as he does, that he is now drug free and ready to be a father strikes the Court as being honest, but nonetheless naive in these circumstances. Mr. B. requires more time to establish a pattern of being clean and drug free while living in a normal, often stressful, family environment before the

Court would have any confidence in entrusting him with the important role of child care. That is not to say Mr. B. is not trying, he simply is not ready.

[162] J.A.B. is entitled to be in a stable, long term, and permanent environment. Based upon my assessment of the evidence that is best achieved by allowing him to remain with his current foster parents who intend to adopt him along with his two older biological sisters.

[163] This is the environment which best meets the requirement of the *Children and Family Services Act* and is clearly in J.A.B.'s best interest to be placed and remain there.

[164] In reaching this conclusion, I am nonetheless aware that both Ms. S. And Mr. B. have made some positive changes in their lives. In spite of the progress I find, in particular, that Ms. S.'s use of an illegal substance on December 1, 2011, just four days prior to the commencement of this proceeding, demonstrates a total lack of insight into her drug addiction. The commitment necessary to remain drug free, in the child's best interests, does not exist. The risk of relapse in general terms remains high. It is impossible for the Court to return the child to Ms. S.

[165] Similarly Mr. B.'s changed behaviour is laudable, and no doubt sincere, but unfortunately not sufficiently established for the Court to entrust to him the care of an infant child at this stage of the proceedings.

[166] The child J.A.B. requires a stable environment which in addition to being loved and nurtured will require dedication and devotion to maintain his ongoing health, safety and happiness. Neither Respondent is capable of doing so at this time.

[167] The Respondents have developed some insight into their respective addictions only recently. Their inability or refusal to recognize and address their respective addiction problems, when provided an earlier opportunity to do so by the Applicant, causes the Court great concern in terms of their respective ability to care for their child. This is not to say the Respondents do not love their child, they simply do not have the necessary parenting skills to properly care for him.

[168] Neither Respondent has successfully completed the services needed to reduce or eliminate the risk to their child. Whether or not the Applicant may carry some

responsibility in this regard in this regard in terms of being more proactive and/or sensitive to the Respondent's needs does not reduce the aspect of risk to the child.

[169] Both plans put forth by the Respondents are speculative, uncertain and lack clarity. The Court is thus satisfied that neither of the plans are sufficiently permanent and stable enough to be in the child's best interests.

[170] The Court thus concludes that neither Respondent is capable of undertaking the demanding role of parenting. It is not safe to return the child to either of their care. I find the circumstances justifying this order are unlikely to change within a reasonable, foreseeable time. The permanent care order is therefore granted.

[171] 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 #3

SHOULD ACCESS BE GRANTED?

[172] 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.

[173] 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.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."

[174] 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."

[175] The Respondents seek access to their child. They rely upon the best interests of the child and the love they have for their child which is no longer impeded by their respective drug addictions. The Applicant is opposed to this position and relies upon the decision **in Children and Family Services of Colchester County v KT**, supra, in support.

[176] 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))."

[177] 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."

[178] Justice Fichaud in **Nova Scotia (Community Services) v T.H.** , 2010 NSCA 63 also comments at paragraph 46 that after a permanent care order has been issued, there is a de-emphasis on family contact and instead priority is assigned to long term stable placement.

[179] Justice Oland in **Mi'kmaw Family and Children's Services v L.(B),** 2011 NSCA 104 nonetheless reminds us as follows at paragraph 42:

> ....Section 47 (2) does not impose a blanket prohibition against access. Rather, a Judge must consider factors such as the likelihood of impairment of opportunities for permanent placement and whether there are special circumstances which would justify making an access order.

[180] The obligation to act in J.A.B. best interests is one which I take seriously. I will do all within my power to ensure that his best interests are met.
The interests of the Applicant and the Respondents are secondary to the best interests of the child.

[181] 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."

[182] The Applicant has confirmed its plan to seek permanent placement for J.A.B. through the process of adoption with no provision for access. In my view the awarding of access to the Respondents would impair the contemplated long term permanent placement and thus by virtue of section 47 (2) I find that access is not in the best interests of the child. J.A.B. is entitled to continuity and stability in his life and the re-introduction of his biological parents into his life at this time is not in his best interests.

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

CONCLUSION:

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

[185] Ms. S. and Mr. B. are not up to the task of parenting and I forsee the continued involvement of the Applicant should the child be returned to either of them.

[186] **Nova Scotia (Community Services) v R.M.S.**, 2010 NSSC 177 involved these same two Respondents in relation to two older children who were placed in permanent care by this Court. The following commentary at paragraph 94 is equally applicable to the case at bar:

> ...3. The Respondents do not understand the significant risks associated with substance abuse and parenting. Because of this lack of understanding both Respondents continue to place the children at risk.

> 4. Neither Respondent has completed successfully the services needed to either conquer addictions or establish that there is no longer any addiction concerns.
>
> 5. The unresolved addiction concerns can lead to poor parental decision making in the future. Until these issues are resolved, the children will remain at risk, and by that I mean significant risk that is apparent on the evidence.

[187] The Court has an obligation to ensure this child's best interests are protected and that is best achieved by placing him in the permanent care of the Applicant with no provision for access.

Order Accordingly,

_____

Justice

APPENDIX A, B, C, D.

APPENDIX "A"

Reference sheet for Global Recovery Random Urine Sheet Record

AMP = Amphetamine

BAR= Barbiturate

BZO = Benzodiazepine

COC = Cocaine

MET= Methamphetamine

MTD= Methadone

OPI = Opiate

OXY - Oxycodone

PCP = Phenylcyclidine

THC = Cannabis

TEMP = Temperature

APPENDIX "B"

PLEASE NOTE FOR LEGIBILITY PURPOSES THIS HAS BEEN REPRODUCED

Global Recovery: Opiate Substitution Programs
Global Recovery Random Urine Sheet Record

DATE	CLIENT	AMP	BAR	BZO	COC	MET	MTD	OPI	OXY	PCP	THC	TEMP	STAFF INITIAL
20 SEP 2010	1285	0	0	0	0	0	X	X	0	0	0	90	SS
28 SEP 2010	1285	0	0	X	0	0	X	X	0	0	0	90	SS
04 OCT 2010	1285	0	0	X	0	0	X	X	0	0	0	90	SS
11 OCT 2010	1285	0	0	X	0	0	X	X	X	0	X	OK	BMD
18 OCT 2010	1285	0	0	0	0	0	X	0	0	0	0	90	SS
25 OCT 2010	1285	0	0	X	0	0	X	0	0	0	0	90	SS
01 NOV 2010	1285	0	0	X	0	0	X	0	0	0	0	90	SS
22 NOV 2010	1285	0	0	X	0	0	X	0	0	0	0	90	SS
29 NOV 2010	1285	0	0	0	0	0	X	0	0	0	0	90	SS

CONFIDENTIAL Client Name R.M.S. **x - detected** **0 - none**
APPENDIX "B" (continued)
PLEASE NOTE FOR LEGIBILITY PURPOSES THIS HAS BEEN REPRODUCED

Global Recovery: Opiate Substitution Programs

Global Recovery Random Urine Sheet Record

DATE	CLIENT	AMP	BAR	BZO	COC	MET	MTD	OPI	OXY	PCP	THC	TEMP	STAFF INITIAL
13 DEC 2010	1285	0	0	X	0	0	X	0	0	0	X	90	SS
20 DEC 2010	1285	0	0	0	0	0	X	0	0	0	X	90	SS
27 DEC 2010	1285	0	0	0	0	0	X	0	0	0	0	90	SS
03 JAN 2011	1285	0	0	0	0	0	X	0	0	0	0	OK	BMD
FEB 2011	1285	0	0	X	0	0	X	0	0	0	X	OK	SS

CONFIDENTIAL Client Name S, R.M. **x - detected** **0 - none**

PLEASE NOTE FOR LEGIBILITY PURPOSES THIS HAS BEEN REPRODUCED
APPENDIX “C”

OPIATE SUBSTITUTION PROGRAMS - DR. J. E. ALI
URINE DRUG SCREEN TESTING RESULTS

DATE	CLIENT #	COC	AMP	MANP	THC	OPI	PCP	BAR	BZO	MTD	MDMA	PPX	OXY	BUP	ADUL	TEMP	STAFF
01 DEC 2011	12	0	0	0	X	0	0	0	X	X	0	0	0	O	OR	OR	KMD

CLIENT NAME: R. M. S. X - Detected 0 - None

APPENDIX "D"
PLEASE NOTE FOR LEGIBILITY PURPOSES THIS HAS BEEN REPRODUCED

Global Recovery: Opiate Substitution Programs

Global Recovery Random Urine Sheet Record

DATE	CLIENT	AMP	BAR	BZO	COC	MET	MTD	OPI	OXY	PCP	THC	TEMP	STAFF INITIAL
23 SEP 2010	1337	0	0	X	0	0	X	X	0	0	0	90	SS
01 NOV 2010	1337	0	0	0	0	0	0	0	0	0	0	90	SS
19 DEC 2010	1337	0	0	0	0	0	0	X	0	0	0	OK	
40531	1337	0	0	X	0	0	X	0	0	0		OK	
40538	1337	0	0	0	0	0	X	0	0	0	X	OK	
40545	1337	0	0	0	0	0	X	0	0	0	X	OK	BMD

CONFIDENTIAL Client Name **J. B.** **x - detected** **0 - none**