S.F.H. No. C010683

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

BETWEEN:

MINISTER OF COMMUNITY SERVICES

APPLICANT

- and -

P.M.D. and P.C.

RESPONDENTS

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on June 11, 2008.

DECISION

CITE AS: 2002-NSSF - 038

HEARD: **Before the Honourable Associate Chief Justice Robert F. Ferguson, at Halifax, Nova Scotia on September 3, 4, 5 and 6, 2002**

DECISION: **September 18, 2002**

COUNSEL: **May Knox, counsel for the Applicant**
Lola Gilmer, counsel for the Respondent, P.M.D.

Linda Tippett-Leary, counsel for the Respondent, P.C.

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT S. 94(1) OF THE ***CHILDREN AND FAMILY SERVICES ACT***, S.N.S. 1990, CHAPTER 5 APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION. SECTION 94(1) PROVIDES:

> "**94(1)** NO PERSON SHALL PUBLISH OR MAKE PUBLIC INFORMATION THAT HAS THE EFFECT OF IDENTIFYING A CHILD WHO IS A WITNESS AT OR A PARTICIPANT IN A HEARING OR THE SUBJECT OF A PROCEEDING PURSUANT TO THIS **ACT**, OR A PARENT OR GUARDIAN, A FOSTER PARENT OR A RELATIVE OF THE CHILD."

FERGUSON, A.C.J.

B.M.D.O. and A.D.D.O. were born [in 2001]. Their parents are P.M.D. and P.C. (the Respondents). The children were taken into care by the Minister of Community Services (Agency) on March 20, 2001. The Agency is seeking an order that the children be placed in their permanent care and custody with a view to an adoption.

In March of 2002, the Agency made a similar application which resulted in the children remaining in the temporary care of the Agency and the parents exercising supervised access with the twins. In coming to this conclusion, the Court stated in its decision at page 13:

> AIt is submitted, on P.M.D.=s behalf, that she is the mother of the children and, together with P.C., has concern and love for them; that she has, in fact, made some positive changes in her life since becoming aware of her pregnancy; that the children are, to quote the Agency, Avery adoptable@ and will remain so for a considerable period of time; that they are currently in a home where they may well remain after adoption; that, given the children=s ages, it would be contrary to their best interests to cut off an opportunity for them to be raised by their parents when the governing legislation allows for the continued involvement by the parents until September, 2002.
>
> I find, in this instance, it would be in the children=s interest to continue the current disposition order. A few short years ago, before becoming involved with cocaine, P.M.D. presented as a acceptable and functioning parent. This is not her situation at the moment. Her prognosis of recovery, to the extent it would be in the children=s interest to live with her, is marginal. It should be noted, especially by P.M.D., that the Agency did not take the stand that past use of cocaine automatically prevents a parent from caring for their children. Their initial position was to provide P.M.D. with the opportunity to have her children returned to her. They have since come to the conclusion the children=s interest

> dictate otherwise. I have decided to extend the Agency=s original position beyond what they consider appropriate.
>
> To be realistic, P.M.D. has a severe task to accomplish in a limited period of time. Given the evidence before the court, the task is clearly hers and not that of the Agency. A pre-trial should be held in the near future to discuss what the parties perceive to be the duties and obligations of each other as this application progresses in the children=s interests.@

An Order followed this decision noting the children were in need of protective services within the meaning of s. 22(2)(k) of the *Children and Family Services Act*. Section 22(2)(k) of the *Act* states:

> 22 (2) A child is in need of protective services where
>
> **(k)** the child has been abandoned, the childs only parent or guardian has died or is unavailable to exercise custodial rights over the child and has not made adequate provisions for the childs care and custody, or the child is in the care of an agency or another person and the parent or guardian of the child refuses or is unable or unwilling to resume the childs care and custody;@

The Order stated, in part:

> AIT IS HEREBY ORDERED
>
> 1. Pursuant to Section 42(1)(d) of the *Children and Family Services Act*, the children B.M.D.O., [born in 2001], and A.D.D.O., [born in 2001], shall continue to remain in the temporary care and custody of the Applicant, the Minister of Community Services;
>
> 2. Pursuant to Section 44(1) of the *Children and Family Services Act*, the terms and conditions of this Order is as follows:

(a) the Respondents, P.M.D. and P.C., shall continue to have supervised access with the children, as arranged by an Agent of the Applicant, the Minister of Community Services, upon reasonable terms and conditions;

(b) The Respondent, P.M.D., shall continue to submit to random urine drug testing in accordance with the collection protocol for forensic urine drug testing attached hereto as Schedule >A= and forming part of this Order;

(c) The Respondent, P.M.D., shall continue to be referred to Drug Dependency Services for the preparation of an addiction assessment and recommendations as to treatment, as well as for treatment consistent with these recommendations. The Respondent, P.M.D., shall continue to attend as and when necessary for the purpose of such assessment and treatment and shall cooperate and comply with all reasonable requests, inquiries, directions and recommendations of the attending clinicians. Drug Dependency Services shall file a report with this Honourable Court in relation to this assessment and treatment. The costs associated with such services, if not paid for from any other source, shall form part of and be paid out of the costs of the maintenance of a child in care;

(d) The Respondents, P.M.D. and P.C., shall continue to cooperate and comply with all reasonable requests, inquiries, directions and recommendations of the Applicant, the Minister of Community Services, his servants or agents;

(e) The Applicant, the Minister of Community Services, may provide such other supportive or rehabilitative services to the Respondents, P.M.D. and P.C., as may be agreed upon between the Minister of Community Services

> and the Respondents, P.M.D. and P.C.. The cost associated with such supportive or rehabilitative services shall form part of and be paid out of the costs of the maintenance of a child in care;
>
> (f) The Applicant, the Minister of Community Services, may provide such other supportive or rehabilitative services to the children, B.M.D.O. and A.D.D.O., as the Minister of Community Services determines are in their best interests. The cost associated with such supportive or rehabilitative services shall form part of and be paid out of the costs of the maintenance of a child in care;@

In compliance with the Court=s direction, a pre-trial hearing was held on March 20, 2002. The Court records indicate that the parties, present with their counsel, were in agreement with the comments in a letter of the Agency=s counsel dated March 18, 2002, with the exception that access would take place not twice but three times per week. The letter states:

> APursuant to the above-noted proceeding under the *Children and Family Services Act*, I confirm that this matter has been set on your docket for a pre-trial conference pursuant to the decision of the Honourable Associate Chief Justice Robert F. Ferguson of March 1, 2002. The purpose of the pre-trial conference is to discuss the parties= duties and obligations as this application progresses.
>
> I note that the final disposition of this matter must be made before September 7, 2002. It is the position of the Minister of Community Services that a permanent care and custody hearing should immediately be scheduled prior to the September 7, 2002, disposition deadline. The Minister of Community Services has ordered a transcript of the permanent care and custody hearing which took place on January 28, 29, 30, February 1, and 7, 2002. The Minister of Community Services

intends to admit the transcript as evidence in the future trial. This should limit the need for evidence from February 1, 2002, onward only. It is anticipated that 3 days will be required for both the Applicant and Respondent to present their cases.

Until a permanent care and custody hearing takes place, the Minister of Community Services position is as follows:

3. The Minister of Community Services will continue to offer supervised access to the children two times per week to both P.M.D. and P.C.. The visits shall continue to be l 2 hours in duration.

4. P.M.D. must continue to contact the Agency prior to the scheduled access visit to confirm that she will be attending.

5. P.M.D. must attend her scheduled access visits.

6. The Minister of Community Services continues to expect P.M.D. to continue to submit to random urine drug testing.

7. P.M.D. must make herself available for the ComCare collection visits.

8. If P.M.D. is unable to attend an access visit or a ComCare visit, she must be able to verify her absence (ie. Doctor=s note).

9. The Minister of Community Services will not support the use of catheterization to obtain urine samples from P.M.D.. The Agency understands that in any event, P.M.D. has not found a physician who would support the use of regular catheterization to obtain urine samples. If a supportive physician is found, the Minister of Community Services must be provided with a Collection Protocol Procedure that preserves the chain of evidence and is approved by the Toxicology Lab of the QEII Health Sciences Centre. It is the Agency=s understanding that if a supportive physician is found, the physician=s consent will be required for every catheterized collection and that a registered nurse must perform the procedure.

10. The Minister of Community Services would agree to random blood testing if the Agency could be provided with a Collection Protocol Procedure that preserves the chain of evidence and is approved by the Toxicology Lab of the QEII

> Health Services Centre. It is the Agency=s understanding that a physician=s consent will be required for every blood collection.
>
> 11. The Minister of Community Services expects P.M.D. to continue to receive counseling from a therapist at Drug Dependency Services. If Laura Cormier is not available to provide those counseling services, the Minister of Community Services requires that she attend therapy with another counselor.
>
> 12. The Minister of Community Services requires proof of P.M.D.=s attendance at the Drug Dependency Services programs (ie dated and signed program form).
>
> 13. The Minister of Community Services requires that P.M.D. will refrain absolutely from the use of non-prescriptive drugs.@

The twins who, at birth, tested positive for cocaine, were [...] days old when taken into care by the Agency. Apart from a few hours in the care of their mother on the day of the apprehension, they had spent their entire lives in the hospital. The day the children left the hospital, the Agency became aware that P.M.D. had tested positive for cocaine on March 22 and 23, 2001. A risk management was held and the children retrieved from their mother.

Three months later (June 15, 2001), at a Aprotection@ hearing, the parents consented to an Order which stated, in part:

> AThe children B.M.D.O., born [in 2001], and A.D.D.O., born [in 2001], are in need of protective services pursuant to section 22(2)(k) of the *Children and Family Services Act* reserving to the Applicant, the Minister of Community Services, the right to lead evidence and seek a finding with respect to allegations under Section 22(2) paragraphs (a), (b), (g) and

> (ja) and reserving the right to the Respondents, P.M.D. and P.C. to cross-examine the affidavit evidence and all other evidence on file herein.@

Six months after the apprehension (September 7, 2001), the Agency made it known that, at the forthcoming Adisposition@ hearing, they would be seeking an Order of permanent care with no access being available to the parents. The parents, on this occasion, indicated their agreement to a finding and resulting Order that the children were in need of protective services and should remain in the care of the Agency subject to their having supervised access. This pre-trial conference resulted in a consented-to Disposition Order which provided the children remain in the care of the Agency with supervised access to their parents.

One year after the children were initially taken into care (March 1, 2002), a hearing took place resulting in the current Order that governs the relationship between the Agency, the children and the parents. On that occasion, the Court concluded but for the fact it was in the twins= best interest to allow the parents further time to present an acceptable plan of care, that an Order should go forward placing the children in the permanent care of the Agency.

A further pre-trial conference took place on August 8, 2002. On that occasion, the Agency continued to stipulate that they were seeking an Order the children would

be placed in their permanent care. The parents continued in their opposition to such a finding.

All decisions emanating from the *Children and Family Services Act*, particularly ones made at the disposition stage, require a consideration of the whole of the evidence and the applicability of the provisions of the *Act*.

Without restricting the foregoing, I have considered, in addition to the preamble, the following sections of the *Act*:

> "**Purpose**
> 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.
>
> **Paramount consideration**
> (2) In all proceedings and matters pursuant to this **Act**, the paramount consideration is the best interests of the child.
>
> **Best interests of child**
> 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.

Disposition order

42 (1) At the conclusion of the disposition hearing, the court shall make one of the following orders, in the child's best interests:

(a) dismiss the matter;

(b) the child shall remain in or be returned to the care and custody of a parent or guardian, subject to the supervision of the agency, for a specified period, in accordance with Section 43;

(c) the child shall remain in or be placed in the care and custody of a person other than a parent or

guardian, with the consent of that other person, subject to the supervision of the agency, for a specified period, in accordance with Section 43;

(d) the child shall be placed in the temporary care and custody of the agency for a specified period, in accordance with Sections 44 and 45;

(e) the child shall be placed in the temporary care and custody of the agency pursuant to clause (d) for a specified period and then be returned to a parent or guardian or other person pursuant to clauses (b) or (c) for a specified period, in accordance with Sections 43 to 45;

(f) the child shall be placed in the permanent care and custody of the agency, in accordance with Section 47.

Restriction on removal of child

(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.

Placement considerations

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

Limitation on clause (1)(f)

(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."

The burden of proof in this proceeding is that of the Applicant. It is a civil burden of proof but also a burden that must have regard for the seriousness of the consequences of the required decision [**Children's Aid Society of Halifax v. Lake**, (1981) 45 N.S.R. (2d), 361 (N.S.C.A.) and **J.L. v. Children's Aid Society of Halifax**, (1985) 44 R.F.L. (2d) 437 (N.S.C.A.)]. It is accepted it would be difficult to render a more serious decision than one in which a child may be separated, temporarily or permanently, from a parent.

Section 42(1), as earlier indicated, provides this court with six alternatives ranging from a dismissal of the application and the return of the child to the parent to a placement of the child in permanent care in control of the agency with no provision for access to the parent.

It would be improper, at this time, to resort to the previous conclusions and findings made on March 1, 2002. The Court is required to make a finding based on the evidence presented at this hearing.

It should be noted that, at this hearing and that of March 1, 2002, P.C. did not present an individual plan for the care of his children. He is supportive to the returning of the children to their mother. He and P.M.D. are not living together but he visits her

home on a daily basis and would be available as support for her personally and to help her care for the children.

The Agency submits that P.M.D. does not present a plan of care for her children that is any different from the one presented in March of this year when the Court concluded the children should not be returned to her; a conclusion the Agency stresses was acknowledged by P.M.D. as being appropriate. They insist the evidence clearly establishes that P.M.D. has failed to engage in any meaningful drug rehabilitation program and, further, has failed to provide them with an opportunity to perform the previously agreed to drug testing.

P.M.D. submits she has made valiant efforts to comply with the drug testing without success. Further, that two of the professionals she had engaged in therapy have, through injury or illness, been unavailable to her for a long period of time. She states that, for close to a year, there is no evidence from which one can conclude she continues to use cocaine; that she remains in her current apartment and has not returned to a life of prostitution or crime. Further, that, if the children were returned to her, the Agency has the statutory authority to monitor her parenting without the aid of a Court Order.

P.M.D. is an acknowledged cocaine addict. She, for a considerable time before the birth of her twins, had a lifestyle involving the daily use of cocaine and the resorting

to prostitution and theft to support this habit. She lived in questionable residences unsuitable for children. This existence only changed when she allowed herself to become a hospital patient for the birth of the children. Even as a patient, she left the hospital on occasion to use cocaine doing so the day before the children were born. It was against this background and the discovery of two recent positive drug tests that the Agency made the decision to place the children in care.

The Agency did not apprehend the children based on any harm P.M.D. had inflicted on her children. They did so based on their belief that, given her use of cocaine and her lifestyle history while using cocaine, she could not make adequate plans for the children. One year after the Agency made such a decision, the Court came to a similar conclusion. The legislation and case law on this point is quite clear. A Court is not required to wait until there is proof of actual harm to children to find that they should be removed from their parents= care.

P.M.D. has been aware, at least since March of 2001, that the Agency, to consider a return of the children to her care, required assurance that she was not using cocaine and engaging in a meaningful drug treatment program. She consented to a Court Order that she submit to random urine drug testing and be involved with Drug Dependency Services.

Children whose parent has a drug addiction are not automatically in the need of protective services. The most obvious example is a situation where the children are not residing with, or subject to, the care and control of the addicted parent. Another such example would be where the addicted parent had sufficient funds, resources and personnel to provide for the safety and appropriate care of the children in spite of such addiction. P.M.D. does not fit in either of these scenarios. She does not have the funds, resources or personnel to provide a plan of care for the children that would insulate them from her lifestyle and eminent danger while she, as an acknowledged addict, is using cocaine. P.M.D.=s plan of providing for her children does include love and concern for the twins. It includes the love and concern and involvement of the children=s father. It includes an acceptable residence. It includes a period of time when she has not resorted to a lifestyle of prostitution and crime. However, all of the aforementioned components were, to some degree, in place on March 2, 2002, when the Court concluded, and she acknowledged, the children should not be returned to her.

The Agency has attempted to obtain urine samples from P.M.D. for over a year. They, with her concurrence, attended three days per week at a prescribed time in the early mornings. P.M.D. was available but unable to provide a sample. They, with her concurrence, attempted three days per week at a prescribed time in the afternoon. She was available but unable to provide a sample. They, with her concurrence,

attempted, on a random basis, one day per week to arrive at her home at 4:00 p.m. prepared to wait three hours to obtain such a sample. Since the adoption of this schedule, those seeking the sample have been unable to gain entry to P.M.D.=s apartment building. They informed P.M.D. they were open to her providing an acceptable sample in any manner she could arrange. Such arrangements were not made. P.M.D. had provided such urine samples while in the hospital and there had been positive tests. Prior to the three-hour visit arrangement, those responsible for such testing were able to gain entry into her apartment by using the buzzer at the main entry of her apartment building. On Initiating the three-hour visit regime, there was no response when using the same buzzer. On one such occasion, the collector was able to get to her apartment door and still there was no response from P.M.D.. P.M.D. did not present any medical evidence as to why she was unable to provide such a sample.

The Agency concludes that P.M.D. is deliberately avoiding providing a sample. They further conclude her reason for failing to provide such a sample is that she continues to use cocaine. These are reasonable conclusions for a child protection agency in these circumstances.

Laura Cormier is a clinical therapist with Drug Dependency Services. She testified as to the services offered by her organization which included:

a) Individual counseling;

b) Core - an educational support group;

c) Detox Unit - available on an in/out-patient basis;

d) A Methadone Program;

e) Matrix - a program available solely to women;

f) Acupuncture - a program Ms. Cormier described as an Aadjunct@ to the other programs.

P.M.D. has attended some counseling sessions with Ms. Cormier and another counselor. Ms. Cormier and the other counselor have been unavailable for some time due to injury and/or illness. P.M.D., of late, has made fairly extensive use of the acupuncture program. P.M.D. indicates she did not become involved in the Core Program because her past involvement with prostitution made her very uncomfortable in discussing her addiction in the presence of men. She further stated she did not become involved in the Matrix Program because she was uncomfortable in discussing her problems in any group setting.

The Agency concludes that P.M.D. has avoided becoming engaged in a meaningful drug recovery program. This is a reasonable conclusion for a child protection agency in these circumstances.

In the parents= final submissions, they reiterate that the burden of proof in this application is that of the Agency. They stress the lack of drug testing is not proof that P.M.D. continues to use cocaine and, in fact, there is other evidence regarding her lifestyle that should lead the Court to a conclusion that she is no longer actively involved with the drug. There is no doubt that the burden of this application is with the Agency as the Applicant. However, the following should be noted: P.M.D. acknowledges she is addicted to cocaine. She acknowledged, at the hearing of March 2, 2002, that she had finally come to the conclusion that she was unable to deal with this problem on a personal basis and would require outside help. She further acknowledged, as late as March of 2002, that she was not in a position to make adequate provision for the children=s care and custody but that she wished the Court to provide her with sufficient time to make such adequate provision.

While the burden of proof remains with the Agency throughout this application, it is appropriate to assume P.M.D. has accepted a responsibility to present evidence that would be supportive of a conclusion to have the twins placed in her care. This assumption in this set of circumstances does not amount to switching the burden of proof from the Agency to P.M.D..

I find, at this time, the children are in the care of an Agency and that their mother is unable to resume the children=s care and control. I find the children to be in need of

protective services pursuant to section 22(2)(k) of the *Act*. I also find the circumstances that justify this conclusion are unlikely to change within a reasonable foreseeable period of time. Having come to these conclusions, the only option available to me at this time is to place the children in the permanent care and custody of the Agency. I find such a disposition to be appropriate.

I have come to these conclusions after a consideration of all the evidence which led me to the following conclusions:

1. P.M.D. is addicted to cocaine;
2. While using cocaine, P.M.D. is unable to make adequate provisions for the children=s care and control;
3. P.M.D., by her own admission, is unable to cope with the addiction without outside help and guidance;
4. Given the passage of at least a year, P.M.D. has failed to become involved in a meaningful drug rehabilitation program; such programs having been available to her;
5. P.M.D. has not provided the Court with any evidence from which it could conclude that, if she continues as an active cocaine addict, she has a child care support system in place that would make adequate provision for the children in spite of her addiction;

6. There is evidence from which the Court could conclude she continues in the use of cocaine and that such continued use would place the children at risk.

Section 47(2) of the *Act* states that the Court shall not conclude in an Order of permanent care a provision for access to a parent unless one of four conditions are met. The evidence does not support a finding that there should be access in this instance. It is, however, imperative that the current access between the twins and their parents be reduced and concluded in a manner that best provides for the interests of both the children and their parents.

J.