IN THE SUPREME COURT OF NOVA SCOTIA
Citation: E.S. v. Children's Aid Society of Cape Breton-Victoria, 2005 NSSC 172

Date: 20050622
Docket: S.N. No. 19697
Registry: Sydney

Between:

E. S. and M. S.

Applicant

v.

Children's Aid Society of Cape Breton-Victoria

Respondent

Publishers of this case please take note that s.94(1) of the *Children and Family Services Act* applies and may require editing of this judgment or its heading before publication.

Section 94(1) provides:

> **"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"**

Editorial Notice

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

Judge: The Honourable Justice Arthur J. LeBlanc

Heard: June 9, 2005, in Sydney, Nova Scotia

Counsel: M. Frances Roach MacDonald , for the applicant
Robert M. Crosby, Q.C., for the respondent

By the Court:

INTRODUCTION

[1] Mr. and Mrs. S. have applied for leave to terminate an order for permanent care and custody respecting their three children: D.H., born August [...], 1998; S.

B.C.H., born November [...], 1999 (who is referred to as R.); and E.C. S., born March [...], 2001. The decision of MacLellan J. to grant an order for permanent care and custody pursuant to the *Children and Family Services Act* (CFSA) was affirmed by the Court of Appeal in October 2004 (see [2004] N.S.J. No. 398).

[2] The application for leave is dated December 2004. It was adjourned several times. In April 2005, the applicants filed an application to terminate the order for permanent care. Prior to January 31, 2005 prospective adoptive parents for R. and E.C.S. gave notices of proposed adoption.

[3] At the hearing the Agency suggested that the court lacked jurisdiction to hear the application to terminate in respect of R. and E.C.S., because notices of proposed adoption had been given. Counsel for the applicants indicated that they intended to proceed with the application for leave rather than the application to terminate. The Agency opposed the leave application on the basis that the applicants had not made sufficient progress sufficient progress to justify granting leave to apply to terminate the Permanent Care and Custody Order.

EVIDENCE

[4] The applicants provided several affidavits, whose content I will discuss below.

Affidavit of E.S. and M. S., dated December 20, 2004

[5] Mr. and Mrs. S. state that since the permanent care order was made they have taken "parenting courses" as well as marriage counselling and parenting counselling, and are living together as husband and wife again after a temporary separation "at the suggestion of the agency." They state that they have a better understanding of how to cope with day-to-day parenting problems and that they are living in a "clean safe home ... with appropriate accommodations for the children." They also say they have reflected on how to raise and care for their children, and that it was necessary for them to make changes in order to better understand their parenting role. Finally, they state that they can present evidence to establish that there have been material changes in their lives since the Order for Permanent Care and Custody was made.

Supplemental Affidavit of M. S., dated February 27, 2005

[6] Mrs. S. states that she had unresolved anger but that she "didn't fully realize it until my children became involved with the agency." She states that she was a foster child in the care of the Agency, and that she was "essentially on my own from the time I was 13 years old." She had given birth to two children (one of whom died in infancy) when she was 17 years of age, and the third, E.C.S., was born with a form of cancer when she was 20 years old. She was "completely

overwhelmed" and blamed her husband for her difficulties. Matters got worse when the Agency undertook a Protection Application. She and her husband fired their lawyers and turned to "a lay person who 'helps' people who are involved with the agency." Throughout the proceedings including the Appeal, she claims she was badly advised by this person, who she says suggested that the Agency was violating their rights. Consequently, she felt victimized by the Agency and "could not get past my anger to deal in a rational manner with anyone." It was only after the appeal decision had that she felt that she had reacted quite incorrectly and that this layperson did not know how to deal with the problem and neither did she and her husband. Mrs. S. says she takes full responsibility for her conduct. She maintains that at the time, she did not know any better, and at "no time did (particularly me) we understand nor were we advised that we had a corresponding responsibility to co-operate for the benefit of ourselves and especially for the benefit of our children."

[7] Mrs. S. says she has been diagnosed with a bipolar disorder and obsessive compulsive disorder. She is under the care of Dr. Scott Milligan, a psychiatrist at the Cape Breton Regional Hospital. She maintains that she "feels like a new person since the medication has taken effect." She suggests that she would not have been influenced by the lay person, but for the chemical imbalance.

[8] Mrs. S. also states that she and her husband have worked at their marriage. She says they "love each other and are getting along like we have never gotten

along before." She maintains that they are ready to undertake formal marriage counselling in order to further develop their skills for problem solving and maintaining tolerance even when they disagree.

[9] Mrs. S. states that her medical condition caused her great difficulty in staying focussed, and "now that my brain is stabilized I feel that I can successfully parent and that I can benefit from courses and training." To that end, she has enrolled in parenting courses at the Family Resource Centre. She states that she also intends to upgrade her education. Mrs. S. claims that both she and husband are "totally committed to breaking the cycle of bad parenting, foster care and social assistance and raising our children to have respect for others and for authority...."

[10] Mrs. S. states that she and her husband have made significant improvement in the cleanliness of their home.

[11] Although they are concerned about disturbing the children, Mrs. S. and her husband are anxious to speak with them. She states that they are "prepared to co-operate in any way possible with the agency to have them returned" or even "to have access to them."

Supplemental Affidavit of E.S., dated February 27, 2005

[12] Mr. S. states that during the course of the proceedings, he felt that he was unable to take a different position than that of his wife despite the fact that he thought she was being misdirected by the lay person. However, he deferred to his wife because she had prior dealings with the Agency. He feels that she was unable to do any better because of her medical condition and unresolved conflicts. He states that he feels much stronger than before, and has a vision for the children and for the entire family that he believes Mrs. S. shares. He states that he and his wife "fully understand and appreciate how counter-productive are anger, rage and all negative emotions, not only towards the Agency but to anyone."

[13] Mr. S. states that he completed a "35 session Anger Management Course through Family Services of Eastern Nova Scotia with Sr. Gwendolyn O'Neill." He was initially sceptical about the program but now says it was "the best thing I ever did in my life."

[14] Mr. S. says he is in the process of arranging marriage counselling through Family Services. He and Mrs. S. had initiated marriage counselling with Sister O'Neil, but she was no longer available. Mr. S. states that he and his wife "love each other and are getting along better than we ever have."

[15] He states that their residence is clean and organized. He says his wife has consistent energy since going on medication and keeps the house spotless, and "I make sure I help her." They also intend to start attending church services to make it a part of their life.

[16] Mr. S. says he wants his children to become strong and decent citizens and "I know that starts with me." He states that he is prepared to cooperate with the Agency "in becoming a competent and effective parent."

Affidavit of M. S., dated May 16, 2005

[17] Mrs. S. states that she and her husband intended to have the application for leave heard on February 9, 2005, and their new counsel was retained the day before. The hearing was adjourned to February 28. On that date, Robertson J. granted an adjournment to allow them more time for preparation. They subsequently filed the two supplemental affidavits described above.

[18] On March 7, 2005, Mrs. S. states, they received two Notices of Proposed Adoption from the Agency. They oppose the adoption of the two children.

[19] Mrs. S. states that she has taken parenting courses and that she has learned much from them, due in large measure to her medication. She attributes her

attitudinal change and more mature approach to problem-solving to the medication and her psychotherapy with Dr. Milligan. Mrs. S. also states that she and her husband have enrolled in counselling with Family Services of Eastern Nova Scotia and that they "intend to participate fully in every program available to us." She also maintains that she and Mr. S. have been working at improving their marriage and that their relationship has "never been better." She maintains that the children's best interests in the long term would be better served if they were in their parents' care.

Affidavit of E.S., dated May 16, 2005

[20] Mr. S. states that there has been extreme change in his wife since she has been under the care of Dr. Milligan: "She is able to remain calm. Her energy level has increased in a consistent and stable matter. She keeps our home spotlessly clean.... She no longer reacts to situations in a negative manner. She is working diligently to become a better person and parent.... I too am involved in this endeavour." He confirms that they have enrolled in counselling with Family Services of Eastern Nova Scotia and that they "intend to pursue any and all resources to better equip us to become effective parents in the long term." He states that they will co-operate with the Agency "in any and every way" in order to have their children returned or to be "allowed to see our children and interact with them." He maintains that the long-term best interests of the children would be met in their parents' care.

[21] The Agency provided an affidavit of Mairi MacLean, a supervisor with the Agency.

Affidavit of Mairi MacLean, dated February 9, 2005

[22] Ms. MacLean states that Mr. S. is not the biological father of D.H., and that Mrs. S. "has indicated at times that E.S. is, and at other times is not, the biological father of ... S.B.C.H. ...."

[23] Ms. MacLean states that the arguments made by E.S. and M.S. before the Court of Appeal only related to matters of process, not to substantive issues. She maintains that no new evidence of parenting courses, marriage counselling or parenting counselling was presented to the Court of Appeal when the appeal was heard on October 15, 2004, and that no evidence has been presented to the court or to the Agency since that date.

[24] Ms. MacLean refers to the Parental Capacity and Psychological Assessment completed by Michael Bryson, dated August 27, 2003. The assessor wrote:

> Mr. S. and Mrs. S. are currently unable to provide the stability, consistency or appropriate parenting that their children require. If they could provide such stability, it would only likely occur *after a significant period of individual and couple therapy, modelling of skills, and intensive intervention*. Neither parent values the services

> offered by the Applicant. While other parenting services are available through programs such as The Cape Breton Family Place Resource Centre, it is unlikely that these services will benefit them sufficiently. *Mrs. S. has already completed nine such programs and her parenting is abysmal.* [Emphasis added by Ms. MacLean.]

[25] Ms. MacLean also refers to the Parental Capacity Assessment by Rule and Associates, dated May 26, 2004:

> Although it is evident ... that the S.'s have made some positive changes, it is not significant enough to make a meaningful difference and result in improved parenting that would enhance the children's lives. The prognosis may have been improved if the S.'s demonstrated any level of cooperation with the agency. However, there is a great deal of evidence that suggests that this is impractical to expect.
>
> In response to the assessor's query regarding what she felt need to change in order for things to be better for her family, Ms. S. reported, "I gotta get rid of CAS. We're not violent with our kids and we're not verbally abusive with our kids. I mean, you seen it yourself. I bathe my kids. I am always looking out for their best interest. I don't care what the agency has to say, it's not the agency I'm looking out for it's my kids and besides that I wouldn't change nothing about them." She continued, "I don't think E.S. needs to make any changes. With me I just gotta be me. I just gotta learn everything I can and take it day by day and it not I'll be jumping the gun and I can't afford to do that. Like at one point in time I used to say this is going to happen tomorrow and that is going to happen tomorrow and I'm gonna make sure of it. Now I don't do that. Now I just live day by day, minute by minute." These statements suggest that Ms. S. does not perceive that she or Mr. S. need to make any changes. If they don't perceive that they play a part in the difficulties, they will not be motivated to make any change.
>
> Mr. S. is not motivated in terms of working with the agency. He stated, "We made the deal with CAS on the twenty sixth of September that it was a temporary care order the kids would be returned. They agreed to it. Maureen MacLean the supervisor and

> Carrie Evely agreed to it verbally, but when we walked into court five days later, they apprehended my children because I didn't demand Carrie Evely bring me in that little piece of paper to sign my John Henry for temporary care." He reported that, "Now when we put in our lawsuit, they have sent back their defence plan and it is our strict responsibility to prove beyond a shadow of a doubt that they did what they did. They have supplied every piece of it themselves. They have dug their own grave. They have piled the dirt up and pulled it on themselves. Honestly and truthfully I have told every one of them; family court is one thing, you might be able to pull it off. The whole system could be one big corrupt thing on this island. I ain't gonna say it is and I ain't gonna say it isn't, but in my opinion, one hand is washing the others back." His discussion regarding the lawsuit against the agency suggests that it is impractical to expect that he and Ms. S. can work in a cooperative manner with the agency. It appears that their preoccupation regarding their perception of the agency's treatment of them supercedes their ability to recognize the cost of the ongoing conflict to the children. They do not appear to have the insight or ability to place the children's needs before their own.

[26] Ms. MacLean says the applicants have not "presented any evidence ... that any efforts, successful or otherwise, have been made in the areas of mental health, anger management and impulse control."

[27] Ms. MacLean states that the Agency has attempted to place all of the children in one home for adoption. This appears to be impossible and as a result, they have placed each child to be adopted by different adoptive parents, "with ongoing, informal contact between the children." She states that arrangements for the placement of E.C.S. and S.B.C.H., including contact with the prospective adoptive homes and the preparation of the necessary paperwork, continued during

the month of December 2004, and that notices of proposed adoption were signed and filed prior to January 31, 2005.

EVIDENCE OF DR. SCOTT MILLIGAN

[28] Dr. Scott Milligan is a clinical psychiatrist at the Cape Breton Regional Hospital. He was qualified to give expert opinion evidence in the field of General Psychiatry. He testified that he started seeing Mrs. S. in 2004 and continues to do so. He sees her approximately every four weeks for half-hour meetings, primarily for medication management.

[29] Dr. Milligan said Mrs. S. suffers from a bipolar disorder. He described this disorder by referring to the DSM 4. Basically, this is a disorder of depression and mania. He agreed that there are different degrees of the disorder. Some cases are more extreme than others. He said Mrs. S. reported a decrease of sleep, increase in sex drive, racing thoughts and increased energy. While she was in his presence, she was upbeat and appropriate. He took her history, as well as collateral information from third parties, in forming the diagnosis. He testified as to the types of medication he had prescribed for her. Dr. Milligan stated that he spoke to Mrs. S.'s husband, her mother-in-law, and her foster mother. They reported that she was calmer and not as loud, and less argumentative, than before she started on medication.

[30] Dr. Milligan said Mrs. S. also suffers from an obsessive compulsive disorder. He described this as a form of anxiety disorder. It becomes worse under stress. He described this disorder as having a strong biological basis, but also a psychological component. He had not performed any objective "hard wire"-type testing on Mrs. S..

[31] Dr. Milligan did not know how these conditions impact on Mrs. S.'s ability to raise children, because he would have to see the interaction between parent and child. This is not his area of expertise and did not perform any parental assessment. He agreed that mental disorders can affect a person's ability to make decisions. However, his treatment of Mrs. S., satisfied him that she presents in a careful and thoughtful manner. He said her life history was his main concern, and that she appears to be improving.

[32] On cross-examination, Dr. Milligan was provided with copies of the parenting assessment prepared by Dr. Landry and Dr. Bryson, dated April 25, 2005.

[33] Dr. Milligan said he has been treating Mrs. S. since June 2004. She has missed three out of 13 appointments. He is not providing her with psychotherapy, but said this would be available, in the public or private setting.

[34] Dr. Milligan stated that Mrs. S.'s symptoms are subject to self-report and objectively he does not see the symptoms. He agreed that these conditions can arise over time. For example, an obsessive-compulsive disorder can begin suddenly after an illness. In his initial assessment, he did not diagnose all the symptoms that she reported in October 2004. However, he said, it is sometimes the case that some report symptoms later than the first interview.

[35] On one occasion Dr. Milligan noted that the medication was not noticeable in Mrs. S.'s blood test. It is possible that she was not taking her medication. He brought it to her attention and the test was re-done. On the retest the medication was detectable.

Cross examination of Mrs. S.

[36] On cross-examination Mrs. S. stated that there was an error in her initial affidavit. She had not participated in the marriage counselling and parenting counselling as it suggested. However, she claimed, with her medication she is able to parent the children. She claimed she has certain skills, such as playing musical instruments. She is also a nature lover and is involved in the program known as Day Camp Canada. She has other hobbies, such as knitting and crocheting, that she believes would be helpful in raising children. She has been involved in sports teams, as well as the Terry Fox run, the Salvation Army program at Christmas and

other charity events, such as Red Cross and working with senior citizens. She has been a member of the cheerleading squad at school and is involved in Karate.

[37] Mrs. S. stated that she is now calmer and can compromise with others. She is less adversarial. She believes she can cooperate with the Agency. Before going on medication, she was fighting an old war, blaming the Agency for her past. She said anger caused the difficulties she is now facing. She said she had taken nine parenting courses before this application was filed and was prepared to take more parenting courses. She said she is a thinking more clearly, and has a better understanding, because she is continuing to try to improve. She understands that the Agency has concerns because in the past she lashed out and was unwilling to cooperate. She is prepared to work to alleviate their concern and to become a better parent.

[38] Mrs. S. said she wants to learn how to communicate better with children. Before, she was not listening to the children's views at all. She has learned to make eye contact and to use such techniques as "time out" and "grounding". She has learned about nutrition and how to differentiate between daytime and nighttime, and that bedtime is a time for rest.

[39] Initially, Mrs. S. said, she sought the assistance of the Agency to come in and help. However, this turned to anger. The children at the time were doing things she was unable to control. She did not realize the severity of the difficulties

she had. She realizes that hygiene was an important issue before Justice MacLellan. She said the house is now very clean. She is much more consistent in maintaining a clean house, and her husband is helping. She said the photographs attached to her affidavit provide an accurate representation of the manner in which he is maintaining the home.

[40] When she was having the difficulties in the past, she said, she wanted to end it all. She didn't even feel as if she wanted to get out of bed. Now, she has the potential to get it right. This came together for her shortly after she lost visitation rights with the children. Although she prevented her children from having a normal life, she said she has made significant changes.

[41] Mrs. S. claims that she can deal with the oldest child, who suffers from Attention Deficit Hyperactivity Disorder. If she could not, she said she would then resort to professional guidance and assistance.

[42] She said April 29, 2004 was the last time she saw her children. She has seen them since, on the street or the mall, but has not want to contact them or talk to them because she is under an order that she does not have access. She said she does not expect the Agency to return the children immediately. However, she would like to have a phone call. She is agreeable to having access on weekends only to start and to allow the children to be with the foster parents. She claims that

she would like to speak to the children to see them or hold them. She said the children have been at multiple foster homes, except the daughter, who has been only in one.

[43] Mrs. S. said that before she began taking medication, she and Mr. S. had marital difficulties. However, the relationship is now stable. They have learned to communicate. They have common goals in dealing with the children. Her plans are to include the children in skating, and other family activity, including travelling. Her plans also include college education.

[44] Mrs. S. said she is seeing James Gouthro with Family Services of Eastern Nova Scotia to improve on the communication problems. She said her husband's anger is under control. Although he may get upset at things, he has much more control than he did in the past. She said the marriage would be positively affected by the return of the children.

[45] She claims she is physically healthy and is not as downcast and anxious as before. She is sleeping properly. In cross examination, she agreed that Dr. Milligan had not done any psychotherapy. She thought she was receiving such treatment. She said she is anxious to undertake such a program. She claims that Dr. Milligan gives her advice without telling her. She agrees to continue with the medication, so long as these are prescribed by her doctor. She plans to continue

her visits with Dr. Milligan because she believes the medications have had a positive impact on her anger and mood.

[46] While hearings were underway before Justice MacLellan, she was asked to attend for marriage counselling and she had stopped. Her husband's counselling between 2002 in 2004 with Sr. O'Neil, but it is more likely it terminated in October 2003.

[47] This application was filed in December 2004, and it was prepared by the layperson, Mr. O'Neil. She claims that paragraph 5 of the original affidavit is wrong. The sessions of counselling occurred two years ago and she had taken parenting courses in 2005. As to paragraph 3, she admitted that she had not taken any courses between the date of the appeal and December 2004. She had taken marriage courses since 1999. She also agreed that some of the information contained in paragraph 3 and 4 of the first Affidavit was incorrect. Mrs. S. agrees that she walked out of the courtroom and dismissed her lawyer during the earlier proceeding. She also agreed that he made an inappropriate allegation of improper touching. This required Agency involvement.

Cross-examination of Mr. S.

[48] E.S. stated that the statements contained in paragraphs three and five of the original Affidavit are incorrect.

[49] He stated that the positions that they adopted during the hearings and appeal are serious mistakes and that they have learned from them. In not stepping in on time, he allowed matters to escalate with the Agency. In fact, he had supported her aggression against the Agency in order to avoid an outburst with her.

[50] Mr. S. said he took 34 anger management courses. He said he was trying to control his wife, rather than discussing things with her and accepting that on occasion she was wrong without trying to convince her that she should change her mind. He is aware that certain events trigger his temper but has found means to control it. When they have serious disagreements he does not argue with her and they agree to disagree. He said his respect for his wife has gone up 90%. He said that as a result of the diagnosis and treatment of Mrs. S. by Dr. Milligan, their relationship has much improved. It is now a joy to be with her. He is presently in marriage counselling and has found that to be very positive to improve their communication. To date, he has only had one counselling session.

[51] Mr. S. said he is in good physical condition, and he is mentally stable. The marriage is very strong. Before he and Mrs. S. were avoiding each other and did not appreciate the impact this was having on their children. He hopes to be a family person and he claims his wife is a different person.

[52] Mr. S. referred to a number of photographs of this residence and said it is much cleaner than before. Mrs. S.'s energy has increased. It is now easy for him to assist her in keeping it clean. Previously, he complained because he was doing a lot of the work on his own; now it is more 50/50.

[53] He agreed that the children have problems. But with the assistance of the Agency he believes that they can meet these challenges. He admits they emotionally damaged the children and that he had struck one of them and was not allowed to live in the home. He acknowledges that this was a serious mistake. He also agreed that they made a false allegation against the foster parent for R. He claimed he was not out to hurt anyone, but only wanted to have his children back.

[54] He feels that with parenting courses he can be a good father. He said that in the past, he had no eye contact with the children. Now he is prepared to use adult communication techniques and skills and to employ a lower tone of voice. He has seen the children on the street or on the mall, but has not spoken with them. He is concerned about the fact that they could be separated when they are adopted and the family unit will be destroyed. He is prepared to abide by the direction of the Agency or the Court.

[55] He agreed that at the time they filed the application to leave, there had been no major changes except that Mrs. S. was doing much better than prior to the

hearing and during the hearing. He finished his anger management courses in October 2003 and this, combined with his wife's treatment, has helped them greatly. He has switched over to Jim Gouthro and finished these courses in December 2004. He took parenting courses in 2002 and 2003, but none since. He claimed that there have been six or more sessions of marriage counselling.

[56] Mr. S. said he and his wife are both knowledgeable of musical instruments and play several of them. He is involved in outdoor activities and he believes that this would benefit the children. He enjoys working in the woods. He also enjoys fishing, hunting, baseball and tennis. He would also enjoy family skating.

Cross examination of Mairi MacLean

[57] Ms. MacLean supervises this file because it was a difficult one. In this case, there were threats made against a worker. Ms. MacLean said E.C.S. and R. were in adoptive placements. The plan for D.H. was on hold pending the outcome of this application.

[58] Ms. MacLean agreed that there were some changes and that many are positive, according to the psychiatric report and testimony. She agreed in that in certain circumstances, the *CFSA* mandate is to reunite the family. However, the overall objective of the statute is to protect the children from harm. Ms. MacLean

said the children were at risk when they were with their parents. In June 2004 there were not sufficient changes made. There were two parental assessments, both of which recommended permanent care.

[59] After a permanent care order is made, then the focus of the Agency shifts to advance the children's interest.

[60] As there is in no-access provision in the final order, she could not report on how the children are doing. However, she said there are no problems with any of the families.

[61] She noted that there had been one session of marriage counselling. However, upon review of the report of Dr. Landry or Dr. Bryson, both claim that Mrs. S. required intensive therapy by a counsellor. She agreed that Mrs. S. was on medication at the time these reports were prepared, but said it is possible that she was not getting the right medication.

ISSUE

[62] The issue is whether there is sufficient evidence to grant leave to the applicants to go to apply for termination of the Permanent Care Order.

ANALYSIS

Statutory provisions

[63] This application is governed by section 48 of the *Children and Family Services Act*, particularly ss. (6).

> **Termination of permanent care and custody order**
>
> 48 (1) An order for permanent care and custody terminates when
>
> (a) the child reaches nineteen years of age, unless, because the child is pursuing an education program or because the child is under a disability, the court orders that the agencies permanent care and custody be extended until the child reaches twenty-one years of age;
>
> (b) the child is adopted;
>
> (c) the child marries; or
>
> (d) the court terminates the order for permanent care and custody pursuant to this Section.
>
> **Age of Majority Act**
>
> (2) In subsection (1), "twenty-one years of age" means twenty-one years of age notwithstanding the Age of Majority Act.
>
> **Application to vary or terminate order**
>
> (3) A party to a proceeding may apply to terminate an order for permanent care and custody or to vary access under such an order, in accordance with this Section, including the child where the child is sixteen years of age or more at the time of application for termination or variation of access.

Restriction on application for order

(4) Where the child has been placed and is residing in the home of a person who has given notice of proposed adoption by filing the notice with the Minister, no application to terminate an order for permanent care and custody may be made during the continuance of the adoption placement until

(a) the application for adoption is made and the application is dismissed, discontinued or unduly delayed; or

(b) there is an undue delay in the making of an application for adoption.

Application by agency

(5) Subject to subsection (4), the agency may apply at any time to terminate an order for permanent care and custody.

Restriction on right to apply

(6) Notwithstanding subsection (3), a party, other than the agency, may not apply to terminate an order for permanent care and custody

(a) within thirty days of the making of the order for permanent care and custody;

(b) while the order for permanent care and custody is being appealed pursuant to Section 49;

(c) except with leave of the court, within

(i) five months after the expiry of the time referred to in clause (a),

(ii) six months after the date of the dismissal or discontinuance of a previous application by a party, other than the agency, to terminate an order for permanent care and custody, or

(iii) six months after the date of the final disposition or discontinuance of an appeal of an order for permanent care and custody or of a dismissal of an application to terminate an order for permanent care and custody pursuant to subsection (8),

whichever is the later; or

(d) except with leave of the court, after two years from

(i) the expiry of the time referred to in clause (a), or

(ii) the date of the final disposition or discontinuance of an appeal of an order for permanent care and custody pursuant to Section 49,

whichever is the later.

Powers of court on application to vary access

(7) On the hearing of an application to vary access under an order for permanent care and custody, the court may, in the child's best interests, confirm, vary or terminate the access.

On application to terminate care and custody

(8) On the hearing of an application to terminate an order for permanent care and custody, the court may

(a) dismiss the application;

(b) adjourn the hearing of the application for a period not to exceed ninety days and refer the child, parent or guardian or other person seeking care and custody of the child for psychiatric, medical or other examination or assessment;

(c) adjourn the hearing of the application for a period not to exceed six months and place the child in the care and custody of a parent or guardian, subject to the supervision of the agency;

(d) adjourn the hearing of the application for a period not to exceed six months and place the child 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; or

(e) terminate the order for permanent care and custody and order the return of the child to the care and custody of a parent or guardian or other person.

Application of certain provisions

(9) Where the court makes a supervision order pursuant to clause ©) or (d) of subsection (8), subsections (1), (2) and (3) of Section 43 and subsection (1) of Section 46 apply.

Matters to be considered

(10) Before making an order pursuant to subsection (8), the court shall consider

(a) whether the circumstances have changed since the making of the order for permanent care and custody; and

(b) the child's best interests.

Report to Minister

(11) Where

(a) a child is and has been throughout the immediately preceding year in the permanent care and custody of an agency;

(b) no application to terminate or to vary access to the child has been heard during that time; and

(c) subsection (4) does not apply,

the agency shall at least once during each calendar year thereafter submit a written report to the Minister in the form prescribed by the regulations concerning the circumstances of the child and the agencies plan for the child's care and placement and the Minister shall review the report and make such further inquiries as are considered necessary. 1990, c. 5, s. 48; 1996, c. 10, s. 7.

Procedural issues

[64] As I am proceeding on the basis of the application for leave, I am not considering the application to terminate. Therefore, I believe I have jurisdiction to

entertain this application in respect of all three children, not only D. This is so despite the fact that notices of proposed adoption were filed in late January 2005 for the other two children, at least two months after the application for leave was filed.

[65] The Agency properly points out that there are restrictions on the right to apply to terminate, and that in the case of an application for leave, it can only be done with leave if the application is filed within six months of the date of final disposition of an appeal of an order for permanent care and custody. The Agency states that an application for leave to terminate is neither conceptually nor legally equivalent to an application to terminate and does not have the effect of placing "termination" substantially in issue before the court. If this were otherwise, the Agency argues, the intention of s. 48(6) would be muted because "a parent could keep the agency and its plans on a permanent hold simply by continuously applying for leave."

[66] I am of the view that once an application for leave is properly before the court, and steps are taken to place of the children in an adoptive home and to provide a notice of adoption pursuant to the provisions of the statute, it is nevertheless appropriate to deal fully with the application for leave. This application cannot be arrested simply because in the meantime the Agency has taken steps to have the children adopted. Admittedly, there is a restriction on making an application to terminate a permanent care order once the notice of

intended adoption has been served. This is provided in s. 48(4) of the Act. I also do not agree with the submission of the Agency that the application for leave somehow lose its status simply because more than six months has elapsed. The intention of the Legislature was to allow a restricted opportunity for parents or legal guardians to seek termination of a permanent care order if this attempt was made within six months of the permanent care order. That is why the Legislature did not permit applications to terminate within the six-month period without leave of the court. However, once the application for leave is sought, I am satisfied that there is a corresponding duty on the part of the Agency to suspend the filing of the notice of proposed adoption and the adoption process. Professor Thompson states at page 254 of his *Annotated Children and Family Services Act* (1991):

> ... It can properly be argued that an adoption notice should not be filed until the disposition of the leave application ... but once leave has been denied, it is up to the applicant party to seek a stay pursuant to Section 49 (2) or (3) pending any appeal of the denial, in order to forestall any continuation of the adoption process. By this means, it should be possible for the courts to address the merits and demands of individual cases, with the onus squarely placed upon the appropriate party in such situations.

[67] The Agency acknowledges that in *C.A.S. of Cape Breton-Victoria v. G.L.* [2004], N.S.J. No 289 (S.C.) Wilson J. heard an application for leave despite the fact the Agency had given notice of proposed adoption. The Agency claims that s. 48(4) overrides any application for leave. Therefore, the Agency contends, an application for leave does not preclude the filing of a valid notice of proposed adoption, because if it did it would have the effect of stalling permanent planning for the children. I adopt the position of Justice Wilson in *G.L.* The application to

leave can be heard despite the fact that the Agency has given notice of the proposed adoption of two of the children.

[68] I must also decide whether I should consider evidence which was not included in the original affidavit in support of the application for leave. This evidence was in the form of supplementary evidence and *viva voce* evidence. The applicants did not make any reference in the original documents supporting the application to the fact that Ms. S. had been diagnosed with a bipolar disorder and an obsessive-compulsive disorder after the permanent care order was made (but before the application was filed). I am aware that counsel for the applicants was only retained sometime after the initial application for leave was filed. Counsel for the applicants maintains that I should exercise the Court's inherent jurisdiction and include all of the evidence which is before the court. I infer that the position of the Agency is that I should refer to the affidavit of the applicants in support of the application for leave, but not to any subsequent affidavits or evidence which was not specifically identified or referred to in subsequent evidence or affidavits.

[69] In *C.A.S. of Cape Breton-Victoria v. G.L.* [2004], N.S.J. No 289 (S.C.), Wilson J. did not determine, as a threshold question, whether it would be appropriate to consider evidence that had become available only after the application for leave was filed. He denied the application because there was insufficient evidence to show a material change in circumstance since the date of the permanent care order.

[70] In view of the fact that the applicants only retained their counsel after the original application was filed, as well as the nature of the issue at stake, I am satisfied that the best interests of the children require that I consider all of the relevant evidence before me, not only the evidence that was provided with the original application.

Arguments on the substantive issue

[71] As a preliminary, I note that the best interests of the child are the ultimate consideration on an application such as this. In this respect, I note s. 3(2) of the *Children and Family Services Act*:

> (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.

[72] The test on a leave application was set out in *Children's Aid Society of Cape Breton v. L.M.* [1999] N.S.J. No. 236, where the Court of Appeal referred to the statement of Judge Levy in *D.L.G. v. Family and Children's Services of Kings County* (1994), 136 N.S.R. (2d) 131 (F.C.):

> 71 As to the burden on the applicant, Judge Levy said at p. 134:
>
> ... , the applicant for leave must, in my opinion, present ostensibly credible and weighty evidence that those deficiencies in the parent or her circumstances that led to the care and custody order being

> granted have improved, or are being convincingly and meaningfully addressed with a realistic expectation of success in the reasonably foreseeable future.
>
> 72 And further:
>
> The applicant for leave does not have to prove that the children should be returned forthwith. What must be established however, is that there is sufficient evidence to warrant holding a hearing and of having any agency plans, put on hold; some reasonable prospect of success. The parent's rights and her evidence are to be weighed against whatever negative consequences there might be from holding a hearing, and the decision, as with all decisions under the Act, is to be made in the best interests of the children.

[73] Ms. MacDonald refers to the scheme of the *Children and Family Services Act*, which is to support the integrity of the family and maintain family relationships unless it is not in the best interests of the child. She cites *Children's Aid Society of Halifax v. L.P.* (1994), 139 N.S.R. (2d) 241, where Daly J. stated:

> 9 The scheme of the CFSA is to support family relationships but when those relationships are not in the best interests of the child, it is to provide permanent alternate relationships. The scheme also provides for the family relationships to be maintained even under permanent alternate relationships, if it is best for the child. In fact, termination of a permanent care and custody order is permitted. Clearly, permanent does not mean that there should be no further parent-child contact. The scheme is thwarted if the parent is able to obtain access only at the time the permanent care and custody order is made. How is a parent to successfully recover custody of the child, if there are no opportunities for a continuing relationship. Surely, the legislators could not have shut this door and hence subverted the scheme of the CFSA. Section 47(2) provides conditions when the permanent order may provide for an ongoing parent-child relationship, a policy that did not exist in the repealed Children's Services Act. Access is permitted if a permanent family placement is no planned or is not possible and

> access would not impair future opportunities for a permanent placement - s. 47(2)(a). Or, the child has been or will be placed with a person who does not wish to adopt the child - s. 47(2)©). Or, if the child is 12 years or older and wishes to maintain contact with a person eligible to have access - s. 47(2)(b). Or, for some other special circumstance that justify access - s. 47(2)(d). There may be circumstances unknown at the time of, but that arise after, a permanent care and custody order is made, that shows access would be in the best interests of the child. The legislators could not have intended to deny a child that opportunity.
>
> 10 Finally, the term permanent is misleading in this context. The CFSA permits an agency to have guardianship responsibility for the child. A permanent order does not mean final. It is subject to variation by termination and like its counterpart, a permanent custody order under custody law, the issue of custody remains an open issue when the best interests of the child are the issue. A permanent care and custody order only places an obligation on an agency to provide for the care, in its broadest sense, of a child including long term care through an adoption by an adoptive family.

[74] Ms. MacDonald, on behalf of the applicants, argues that, although this case dealt with an application for access, the same approach should be followed in the case of an application for leave or an application to terminate.

[75] Ms. MacDonald claims that as a result of the diagnosis by Dr. Milligan, and the medication he prescribed, Mrs. S. is a different person. This is borne out by the evidence of Mr. S.. She is now capable of dealing with unpleasant issues from her childhood and controlling her emotions, and is working diligently to become a responsible, proactive adult. Considerable progress has been made to having a clean home and both she and her husband had been working on their marriage

with great success. Rather than blame others for the loss of their children, they take full responsibility for their role in the loss.

[76] The applicant notes that Justice MacLellan found that Mrs. S. had so much anger towards the Agency that she could not focus on the changes necessary to improve her domestic and parenting skills. With the benefit of medication, counselling and parenting courses, she says that she is now capable of being a much better parent. Because of her undiagnosed medical condition, she claims that she felt inadequate. She felt betrayed by the assessment of Michael Bryson. She felt betrayed or persecuted when the children were apprehended by the Agency. As to the anger management courses, Mr. S. stated that he did not benefit from them at the time because he was deferring to his wife's wishes. Although there may be a need for the Agency to supervise the children's return to the applicants, they argue that this is preferable to a foster or adoptive home, particularly where the children will be separated despite the best intentions of Justice MacLellan to see them adopted as one unit. The applicants also maintain that there should be a pause because the children are being adopted by individuals who are not scrutinized by the court.

[77] Admittedly, Mr. S. did strike one child on one occasion and was barred from the family home; however, the applicants say, this was not repeated, and he took full responsibility. While Mr. Bryson noted that Mrs. S. had difficulty with D. and

that she was rough with him during the interview, Mr. Landry said neither of the applicants were likely to abuse the children intentionally or physically.

[78] The parties agree on the test to be applied on a leave application. The evidence must give credible reason to believe that the parents are in a better position to deal reasonably with their children or have a realistic chance of doing so in the reasonably foreseeable future. The Agency contends the parents were dysfunctional as a family unit with devastating consequences to the children, particularly the two older children. The assessors who gave evidence, Bryson and Rule, concluded that the children were so severely compromised that it would take better than average parents to parent them effectively. The Agency points out that the Permanent Care Order was made because of poor hygiene, poor nutrition, lack of supervision, domestic disputes, the exposure of the children to the parents' behaviour, overall poor parenting, physical risk to the children because of inappropriate discipline, Mrs. S.'s explosive temperament and emotional health, Mr. S.'s anger, lack of insight, desire or inability to improve by the parents, undermining by the parents of the foster care arrangement of R., inability to control themselves during access or exercise access meaningfully, and an all-consuming anger and preoccupation with the Agency.

[79] As to the evidence, the Agency claims that even if the applicants have experienced an "Epiphany" and have stopped blaming the Agency, they not yet made any changes in order to understand their parenting roles.

[80] The Agency argues that the applicant's evidence is not credible because they continue to blame someone else for their conduct, such as the lay person who gave them advice. Furthermore, although Dr. Milligan has diagnosed Mrs. S. with bipolar disorder and obsessive compulsive disorder, he is unable to offer any opinion whether or not she is fit to raise children. He has not witnessed Mrs. S. attempt to parent children because it is outside his field of expertise. Furthermore, they only undertook parenting and marriage counselling in February and March 2005, not earlier, as claimed in their original affidavit of December 2004. The Agency claims that there is nothing in the affidavits filed to date, or any other evidence, that demonstrates any real appreciation by either parent of the severity of the problems of their children manifested as a result of poor parenting and the domestic chaos to which they were exposed, nor do they speak of how they intend to cope with very challenging children. They point to the fact that Mrs. S. had taken nine parenting courses during the protection proceedings, with no improvement. The agency also takes issue with Mrs. S.'s statement that they are "not bad people – we did not abuse our children. We were victims of stress overload and in my case it had a medical component and obviously a detrimental effect on the children." The agency maintains that this hardly represents insight into the nature and source of their prior conduct and the need for protection of the children, and says this is simply minimizing behaviour and an attempt to evade responsibility.

[81] In *L.M.* the Court of Appeal applied the reasoning of Judge Levy in *D.L.G.* to the effect that the applicant must present "ostensibly credible and weighty evidence that those deficiencies in the parent or her circumstances that led to the care and custody order being granted have improved, or are being convincingly and meaningfully addressed with a realistic expectation of success in reasonably foreseeable future." It was not necessary to prove that the children should be returned forthwith, but there should be sufficient evidence to justify holding a hearing and placing any agency plans on hold. There must be "some reasonable prospect of success. The parent's rights and her evidence are to be weighed against whatever negative consequences there might be from holding a hearing, and the decision, as with all decisions under the Act, is to be made in the best interests of the children." It is clear that any decision to grant leave must only be made in the context of what is in the best interests of the children.

[82] In her oral decision on the application for permanent care and custody, Justice MacLellan stated:

> [30] The presenting problems ... were the lack of hygiene, lack of structure, inappropriate discipline, domestic disputes, inability to provide proper nutrition, parental difficulties in managing anger, lack of supervision. It is noteworthy that during the short time that the children were returned to the S.s for the unsupervised visits that did take place in December, 2002, that the children's aggressive behaviours were reactivated and that they once again began hoarding food in their rooms.
>
> [31] The presenting problem, in my view, is anger and poor parenting in practically every aspect. At the conclusion of the evidence, it would appear that the presenting problems were altered very little by interventions. Mr. S. has shown that he can improve his parenting practices at times but he can't sustain to the change. Mrs. S. made virtually no progress.

[32] The assessors indicate that the prognosis for both parties is guarded. The energies the S.s may have used to effect change was directed instead at the Applicant. The S.s are unable to: (1) acknowledge problem areas; and (2) to appreciate that these problem areas affect their children. Their ability to acknowledge these two problems is non existent. Mrs. S.'s anger is so apparent on video #6 and in Mr. Bryson's *viva voce* evidence where rough handling of one child happened in his presence. Mrs. S.'s anger has been well chronicled as she has left the Court room here in an angry manner and it has been chronicled by both Mairi MacLean and Brenda MacInnis who cite numerous examples of extreme anger by both parents in front of the children. Also the request last year for an early return of the children back to foster care is a clear example of absence of commitment. The accusation against the foster family in relation to R. shows a wish to upset the placement in order to further their case against Children's Aid as opposed to the welfare of an already compromised child.

* * *

[34] I note the Bryson report was available in the summer of 2003 had a number of recommendations for them, a number at which were not acted upon. So self-direction or self-help, even with the support of the Agency, was not something that the S.s could see as assisting them. The S.s couldn't see these services assisting them because fundamentally they don't see that there is a problem. When asked by one of the assessors what Mrs. S. had to work on, she said getting rid of Children's Aid. Mr. S. made some concessions to anger but basically felt that he could get the job done without further interventions. I note that they took a number of courses. I think Mrs. S. may have taken up to nine parenting courses but it seems that they took very little from the courses. At the end of the day and I have had this file from inception, I could not understand if they were unwilling or unable to change, but they simply didn't change in very chronic areas. It appears that their energy used to get rid of the Children's Aid Society has consumed any ability to effect the necessary parenting changes and correct chronic problems. Now the result of the S.'s care, their resistance to change is that the children have been in different homes, not their own home, for one year and nine months. E.C.S. is three years and three months old and has been in foster care for one year and nine months. These children, especially the two older, are seriously compromised as pointed out by the assessments. One of the foster placements where the two oldest children were placed they had to be separated because two of them were so challenged that the foster parents, although they tried, they couldn't deal with R. and D.H. at the same time.

[35] I had an opportunity to review exhibit # 6, the video, to view the effect of the mother's anger on the children. As I have indicated already, they went from rambunctious play, and they certainly are rambunctious, to destructive play within less than a moment. The children have been exposed to physical risk as chronicled, that is, R. burning herself in the presence of her parents; D.H. dangerously climbing a high chair, wandering without supervision across the road and up the street; corporal correction by both parents; numerous disputes and domestic upsets between both parents in front of the children; and the removal of R. from the foster home where she was content; having her examined by doctors and social workers for no valid reason whatsoever. The children have been put at risk by their parents and if returned would remain at rest with the harmful effects intensified by the passage of time.

[36] As stated, the evidence in my view is clear and overwhelming that the S.s have not been able to parent and are unlikely to change in the foreseeable future. As I have indicated, whether they are unwilling or unable to change. Mr. S. is articulate. His cross examination of Mr. Bryson was able, but the all consuming direction is to continue the poor relationship with the Agency. The S.'s aim is to continue the conflict as opposed to working on meaningful efforts to secure the return of their three children

[37] I find that all less than intrusive steps have been taken and were not accepted or were not successful. Right up to March, 2004 when another avenue under Section 21 was tried, it was rejected days after the Plan was put into place. Representation was eliminated and the Respondents sought help from an untrained third party and so the Plan put under s. 21 was not able to develop. The S.s have refused to accept reasonable access requests by the Applicant and will be unlikely to continue to work with the applicant in the future.

* * *

[39] I believe the children are attached to their parents, from the evidence and the video, however I cannot conclude that the S.s will allow the children to stabilize in foster care. We already have a very apparent example of how they would not let R. thrive in foster care. So for all the reasons that I have given, and it is with regret, I adopt the Plan of the Agency in its entirety. I find it is in the best interests of the children to have them placed in permanent care for adoption. Given the history of the parents, I cannot see how access can take place. It's really a sad situation

> where you have three little people who are compromised in their development, have a bond with their parents, but the parents have made it such that they can't continue to see the children so the children are being hurt again.... I will order permanent care without access as it is not in the children's best interests for them to continue with access. It is in their best interests that they be adopted. I find all the formalities both directive and mandatory under the Act have been met, under the Agency's obligation, for service, the least intrusive avenues, the foreseeable future test, the best interest test have all been satisfied.

[83] In *G.L.* Justice Wilson determined that there was insufficient evidence offered by the applicant to support a reasonable prospect of success in a hearing. Similarly, in *D. L.G.*, Judge Levy noted that an application to terminate causes delay and uncertainty in the agency's plan for children, and such uncertainty and delay might compromise the best interests of the children. However, the *CFSA* has established a mechanism whereby, during the six-month period after an order is made, an application to terminate can only go ahead provided the court grants leave. Judge Levy based his decision on the evidence of the mother and the position taken by the father:

> 13 What was missing from the mother's application for leave in this case was any evidence to which one could point and get any real sense that things were different even if her evidence was unchallenged by the Agency.
>
> 14 The applicant for leave does not have to prove that the children should be returned forthwith. What must be established however, is that there is sufficient evidence to warrant holding a hearing and of having any agency plans, put on hold; some reasonable prospect of success. The parent's rights and her evidence are to be weighed against whatever negative consequences there might be from holding a hearing, and the decision, as with all decisions under the Act, is to be made in the best interests of the children.

> 15 For reasons elaborated more specifically in the oral decision, I did not get the impression that the shortcomings of the mother identified by Judge Legere were resolved, or that resolution is in sight. I had exhaustively reviewed Judge Legere's decision and the evidence before her before this hearing. At its highest the evidence before me gave me no particular sense that there was any basis to be optimistic about any meaningful changes being under way. In essence her position, and evidence before me, was not materially different than that which was known by Judge Legere. I must say also, that I was discomforted that her evidence in her affidavit about her turbulent relationship with the children's father turned out, once again, to have been less than frank. Judge Legere had cause to question her credibility. So did I.

[84] It is apparent that the judge could not find any evidence to which one could point to get a real sense that things were different, even if the mother's evidence was unchallenged. He did not get the impression that the shortcomings identified by the Judge were resolved or that resolution was in sight. He had no sense, he said, of optimism about any meaningful changes. She still had a relationship with the children's father and she had been less than forthright. The trial judge had cause to question her credibility, and so did he. There are no further details of the nature of the evidence which was brought forward.

[85] In *G.L.*, Justice Wilson found that although the applicant claimed that she could show a substantial change in her circumstances, and that she had made many changes in her life, she had not satisfied the burden for the court to grant leave. After reviewing the evidence before him on the application, including the applicant's own evidence and psychiatric evidence, he stated, in conclusion:

20 Since the Permanent Care and Custody Order was issued, G.L. has managed to function well and is progressing in therapy very well. In the opinion of Dr. Mian she currently is not suffering from any mental infirmity that would negatively impact upon her ability to provide appropriate care for her daughter.

21 *G.L.* has spent the time since the Permanent Care Order was issued volunteering with Loaves and Fishes, attending an adult learning center, completing a Christopher Leadership course, applying and being accepted into a program at the community college. She continues to take her prescription medication on a regular basis.

22 *G.L.* is to be commended for the progress and gain she has made in her personal functioning.

23 The findings of the court at the permanent care hearing indicated extensive personality and psychological deficiencies which negatively impacted on *G.L.*'s ability to care for her child. Dr. Landry recommended psychotherapy to deal not only with mental health issues but *G.L.'s* maladaptive interpersonal relationships including anger and hostility and consultations with a psychologist regarding the psychological aspects of chronic pain. Dr. Mian agreed with Dr. Landry's recommendations. Dr.Mian also noted at that hearing that *G.L.* suffered from psychological difficulties including borderline personality disorder and post traumatic stress disorders which could not be cured but managed. Dr. Mian did not give an opinion on *G.L.'s* capacity or her ability to parent, only that currently she did not suffer from any mental infirmity (such as depression or anxiety) which would negatively impact on her ability to care for her child.

24 *G.L.* did not adduce any evidence regarding treatment for the psychological difficulties reported by Dr. Landry. *G.L.* indicated she was seeing Dr. Mian every two or three months regarding her prescription needs and Ms. MacIsaac regarding supportive counselling throughout the court process which will end in August.

25 I find that *G.L.* has not presented sufficient evidence to indicate that the deficiencies in her circumstances and her parenting abilities that lead to the care and custody order being granted have improved or are being convincingly and meaningfully

> address with a realistic expectation of success in the reasonably foreseeable future.
>
> 26 I have considered the best interest of the child as required by the statute. The child has been in the care of the agency for almost three years. She will soon be five years of age. It is important that there be a permanent plan put in place for her well being and development. At the same time the negative consequences that might flow from holding a hearing are to be weighed against *G.L.'s* evidence if there is some reasonable prospect of success. I find that the applicant, *G.L.* has not brought forward sufficient evidence which would indicate some reasonable prospect of success if a hearing was held.

[86] Consequently, Justice Wilson found that there was insufficient evidence to indicate that the deficiencies in her circumstances and parenting abilities that led to the care and custody order be granted had improved or were being convincingly and meaningfully addressed with a realistic expectation of success in the reasonably foreseeable future.

[87] In the present case, I find that some of the factors relied upon by Justice MacLellan when she made the order for permanent care and custody are being addressed by the applicants, although they have not been fully dealt with. The essential question is whether this limited progress gives hope that the parents can achieve an acceptable standard of parenting by the date of a future hearing to terminate, such that it would then be in the best interests of the children to terminate the order.

[88] The main achievements of the applicants so far appear to be the apparent improvement in the parents' relationship; the courses of counselling and parenting instruction they have embarked upon, as well as Mrs. S. expressed willingness to undertake psychotherapy; Mrs. S.'s diagnoses and medication. I am not convinced that there must be major progress in each discreet area of deficiency identified by Justice MacLellan in order to find that reasonable efforts are under way.

[89] Justice MacLellan's decision indicates that a good deal of the difficulty caused by the parents related to their hostility towards the Agency, leading to bitter accusations and feelings of victimization. The applicants now express their willingness to co-operate with the Agency in any way in order to facilitate the return of, or access to, the children. They also claim they have scrupulously abided by the terms of the permanent care order.

[90] It is also clear that Mrs. S., at the time of the permanent care hearing, showed no interest in improving her own, or the children's, circumstances. The apparent changes in Mrs. S.'s outlook since the permanent care order was made are described above.

[91] The Agency claims that the applicants have not taken responsibility for their conduct and have blamed the lay person who assisted them during the proceeding. While I agree that they believe they were misled by this third party, I am satisfied

that they have taken responsibility upon themselves for following his advice, and that they regret doing so.

[92] There must, of course, be cogent reasons to underly granting of leave, given the interests at stake. Overshadowing all other considerations under the *CFSA,* of course, is the best interests of the children. Certainly it can be argued that the best interests of the children are best served, in these circumstances, by expediting their adoptions. I also note that it appears that the children will be placed separately for adoption.

[93] The principal changes revealed by the evidence are the diagnosis and medication of Mrs. S., and her willingness to move on to psychotherapy; the marriage and parental counselling the parties have undertaken; the parties changed attitude regarding co-operation with the agency, their observance of the terms of the permanent care order, and their acceptance of responsibility for the course of conduct suggested by their third-party advisor; the parties' efforts to address their marital difficulties; and the improvements in housekeeping in the parties' home.

[94] While these signs of improvement do not necessarily all bear on the applicants' ability to parent, they do signify a degree of progress. Are these all signs of immediate success? The short answer is no. However, I consider these to be significant building blocks on which to anchor intense parental counselling and,

if necessary, extensive marriage counselling. I am mindful that I am dealing with a threshold issue: should the applicants be permitted to apply to terminate the permanent care order. My findings relate only to the leave application, not to the result of any eventual termination application. Whether the parents will indeed succeed in establishing that the order should actually be terminated is not for me to decide at this stage.

[95] On the threshold issue of whether the parents should be granted leave to apply to terminate the permanent care and custody order, I am satisfied that the best interests of the children will be best served by allowing the parents' application.

[96] I have not addressed the issue of access in this decision. I am not willing to order access at this time, on the evidence before me. To establish whether access with the parents would be in the children's best interests requires further evidence.

[97] The applicants' counsel shall prepare the Order accordingly. I refer counsel to Civil Procedure Rule 69. In view of the nature of the issues and the best interests of the children, I urge counsel to see that this matter proceeds as quickly as possible.

J.