FAMILY COURT OF NOVA SCOTIA

Citation: Nova Scotia (*Community Services) v. S.J.R.*, 2014 NSFC 20

Date: 2014-12-3
Docket: FK CFSA 084672
Registry: Kentville

BETWEEN:

MINISTER OF COMMUNITY SERVICES

APPLICANT
(referred to herein as "the Applicant")

And

S.J.R. and J.A.

RESPONDENTS
(referred to herein as "the Respondents")

And

D.C.

THIRD PARTY
(referred to herein as "third party")

DECISION

Editorial Notice: electronic	Identifying information has been removed from this version of the judgment.
Judge:	The Honourable Judge Marci Lin Melvin
Held:	September 3, 16 and 22, 2014 at Kentville, Nova Scotia
Written Submissions:	Applicant's submission received October 24, 2014 J.A.'s submission received November 18, 2014 S.J.R.'s submissions received November 17, 2014 D.C.'s submission received November 6, 2014
Oral Decision:	December 3, 2014
Counsel:	Elizabeth A. Whelton Q.C., counsel for the Applicant Timothy Peacock, counsel for J.A. Oliver Janson, counsel for S.J.R. Donald Urquhart, counsel for D.C.

BY THE COURT:

Introduction

[1] The Applicant seeks an Order at Disposition for the permanent care and custody of the four children of the Respondents. The children are aged three to ten. The Respondents seek to have the matter dismissed and the children returned. Pursuant to the legislation, those are the only options available to the court.

[2] This matter was commenced by protection application on February 1, 2013. It has been adjourned for numerous reasons – new counsel, lack of disclosure, appropriate documents not being filed on a timely basis, to name a few - on the consent of the parties, considering the mandate of the *Children and Family Services Act*, R.S.N.S. ch. 5, (hereinafter referred to as '*the Act*') and the best interests of the children.

[3] There has been involvement by the Applicant with the Respondents dating back to 2009. Historically, and with this Application, the issues centered on domestic violence and the myriad of concerns pertaining thereto. J.A. was charged with assault in February 2012, the eldest child reporting J.A. grabbed S.J.R. by the neck. J.A. was placed under a no contact order and S.J.R. reported the relationship was over. Less than a month later, S.J.R. reported the incident was isolated and was the only incident of physical violence that had ever occurred between them. Child protection authorities advised that they were not to be together in the presence of the children. On April 6, 2012 child protection authorities and police attended at S.J.R.'s home in response to reports of J.A. being present contrary to the criminal undertaking. This was denied. J.A. was found in a locked bedroom.

[4] A further incident on January 7, 2013, involved police attending S.J.R. residence to find J.A. intoxicated and angry, S.J.R. advising on the previous night J.A. had assaulted her by grabbing her neck and arms, picking up a knife, threatening to cut her into pieces, and had pulled the phone from the wall so that she could not call 911. The eldest child, then eight years old, said her parents like to fight and hit each other sometimes. J.A. maintained it is not one-sided and S.J.R. lies.

[5] The interim orders returned the children to the care of S.J.R., one condition being she not have contact with J.A. in the presence of the children. When concerns arose that they were violating the order, the parents denied it; however, when social workers and police attended at the home on March 31, 2013, despite S.J.R.'s protestations that J.A. was not in the house, he was located lying on the floor between the wall and the bed in the master bedroom, while a child slept in the bed. S.J.R. chose not to take the children to a shelter and chose to remain with J.A. while the children were taken. The eldest child spoke of witnessing her parents yelling and striking the children and each other.

[6] At the protection stage, on the consent of the parties, the children were found to be in need of protective services, pursuant to ss. 22 (2) (b), (g) and (i) of the *Act*.

[7] A variation order returned the children to S.J.R. on June 11, 2013, with terms including that the parents attend counseling (individual or couple), and specifically J.A. complete the Positive Relationship Program, S.J.R. attend at Chrysalis House to develop a safety plan, and counseling would be provided to the two eldest children.

[8] Various difficulties arose concerning these conditions: the parents were forced to move to another jurisdiction as a result of housing difficulties, the children were not registered in the new school, the parents had argued at a local bar with J.A. being taken into custody and placed in cells overnight on two occasions, and then in October 2013, the Applicant was advised the Respondent parents wanted their matter dismissed and would no longer participate in services. So on October 8, 2013, the children were once again taken into care. In March 2014, the Applicant's plan was to return the children to S.J.R. under a supervision order. The Respondents are impoverished and have little access to funds over and above income assistance and the child tax credit when the children are in their care. The plan to return the children changed when J.A. became confrontational with the Applicant workers - over financial difficulties pertaining to an apartment rental - and the Applicant decided in early April 2014 to seek permanent care of the four children. This hearing commenced on June 25, 2014, on a *pro forma* basis.

[9] In the twenty months since the time of the Application, the children have resided under a supervision order with Respondent S.J.R. (February 7, 2013); with third party, D.C. (March 31, 2013); in foster care (April 2, 2013); with family friends in a third party placement (April 10, 2013); with the Respondents (June 11, 2013); in foster care (October 8, 2013); continuing in foster care but on an "extended visit" with third party, D.C. (December 17, 2013); formally in the care of third party, D.C. (February 5, 2014); and, in foster care (July 18, 2014). Since the last period of foster care all of the children are not together. The children have been subjected to at least eight moves since this matter began.

Issue

[10] Should the children be placed in the permanent care of the Applicant or returned to their parents?

Evidence

Evidence of the Applicant
[11] Numerous witnesses testified on behalf of the Applicant. They include the following:

(a) Experts

Sheila Bower Jacquard

[12] Ms. Bower Jacquard is registered psychologist, and qualified as an expert witness on the consent of counsel as an individual/couples counselor with respect to issues of domestic violence. Her evidence is in the beginning J.A. had difficulty engaging, perhaps not understanding why he needed to be there. She counseled him regarding understanding domestic violence and worked on relationship skills. Initially he externalized the difficulties, but as he started going more regularly – sometimes attending the appointment at 7 am – he changed his point of view that both parties would take responsibility and wanting to make things different. At times he felt fairly discouraged recognizing he was the problem and S.J.R. *"… is a good mom*."

[13] She said he was always quite respectful with her and found it harder to use the same skills with the social workers that he did with her. She confirmed that in March 2014 both parties were of the understanding that if S.J.R. got her own place and J.A. wasn't allowed in her presence with the children, the Applicant would return the children. By the time they met on April 7, 2014, subsequent to J.A.'s outburst to agency workers, they were "…feeling the agency had changed their position." J.A. advised he had gone on medication to calm him.

[14] He told her: "… he wouldn't be with [S.J.R.] and he wouldn't break those rules that he had learned the lesson and how hard it was to be separated from the children."

[15] Although she thought the counseling had helped J.A. somewhat, she did not have enough information so she could not say if the risk was low enough for the two parties to be together in the presence of the children.

[16] On cross-examination the witness confirmed although J.A. could not articulate as to how things had changed, he could recognize when things were escalating and what the triggers were, testifying: "… so he's taking some responsibility for the fact that he was going to make these changes regardless." And up until June, he was "… better equipped to recognize and report that he's not engaging in those behaviors." When the parties were in couples counseling, she notes S.J.R. said they cannot go back to engaging in abusive behaviors whether the children are at home or not.

Susan Squires

[17] Ms. Squires is a psychologist and was qualified as an expert witness on consent in the fields of individual/couples/relationship counseling. She did some testing with S.J.R. and counseled her with respect to domestic violence. S.J.R. was involved in the positive relationship program. Although S.J.R. was by times emotional in her sessions and was suffering from separation from her children, she had insight into how domestic violence impacted the children. She testified that when she case-conferenced with agent Vanessa MacDonald in March 2014, the agent was positive about the children moving back in with S.J.R., and looking at providing financial assistance for that to happen. Subsequent to the Applicant's decision not to return the children, the parties were quite frustrated, but by April 15th, when they met, even though their parenting time visits had been suspended, they "…were very calm… and expressed themselves well."

[18] And although the final session in August was "… a bit of a step backwards" in her opinion, the progress the parties made "… wasn't all negated by the final session."

Deborah Pick

[19] Ms. Pick is a psychologist qualified as an expert in psychological assessments on the consent of the parties, having done an assessment on J.A. She testified that the assessment is over a year old and the validity of psychometric data diminishes over time but "… it is a slice in time." She referred to J.A. as an intelligent man who communicates well. She said at the time of the assessment given his unique set of risk factors for the risk of spousal assault, that extensive monitoring was recommended. She also testified she was not aware of him being a direct risk to the children.

(b) Employees of the Applicant (not agents)

Carolyn Price Weiland

[20] Ms. Weiland is a family support worker for the Applicant. She observed strength in their parenting, the main issue being the relationship and its resulting impact on the children who were aware of the tension in the home. Her evidence is S.J.R. has very positive interaction with the children, her parenting skills are well adapted to the children's needs, she is able to provide adequate care for the children, she is able to read their cues, she demonstrates understanding her children and their development, and there was love and affection between the children and their mother (S.J.R.). The witness said S.J.R. has numerous strengths although she tends to minimize certain situations. She said generally she had no concerns about S.J.R.'s ability to parent the children by herself. She did have concerns that S.J.R. might not be able to stay away from J.A.

[21] Ms. Weiland's evidence was she had not seen any actions by J.A. towards the children that would cause her concern, although she did have concerns about his temper.

[22] In March 2014 she met with S.J.R. to develop a "quasi budget" to see if she could afford an apartment. She said S.J.R. "…was adamant she would be able to manage with the child tax… when she has the children back…it would be very tight and … you would really need to manage your money well." After speaking with her supervisor they agreed to top up rent by $200.00. She was present at the risk case management meeting in April 2014 where it was decided the plan should change to permanent care. She recalled speaking with S.J.R. at one point "…and she felt the department had over reacted."

Ellen Reid

[23] Ms. Reid is a Supervisor of Child Protection Team and was called in rebuttal by the Applicant, as she had been the case work supervisor in this jurisdiction until August 2014. She confirmed on March 10, 2014 she had a telephone conversation with S.J.R. on March 18, 2014, agreeing to provide S.J.R. an additional $200.00 towards her rent.

(c) Agents

[24] The turnover of agents in this matter is reflected below:

February 1, 2013
Jennifer Davidson

Ms. Davison did not testify but her affidavit was filed with the Protection Application and Notice of Hearing and she identifies herself as the intake caseworker.

April to July 2013
Annette Davidson

Ms. Davidson, is a child protection worker for the Applicant in this jurisdiction, and testified that her involvement in this matter since the spring of 2013 has been "…very peripheral." She was the worker on the file from April to July 2013. During that time she observed S.J.R. with the children "…and she was definitely very affectionate."

April to December 2013
Twila Burton

Ms. Burton is a long-term protection worker, employed by the Applicant in this jurisdiction. Her most recent involvement with this case was August 22, 2014, when she was told she was taking over the file. She had previously been involved as a long-term worker from April to December 2013.

December 12, 2013 until April 14, 2014
Vanessa MacDonald

Ms. MacDonald was an agent for the Applicant in this jurisdiction, having had carriage of the file for S.J.R. and J.A. from December 12, 2013 until April 8, 2014. She testified the case plan at the end of March 2014 was to reunite the children with S.J.R. – with J.A. not being in the presence of S.J.R. and the children - in a new apartment, and that the children would attend counseling, medical appointments and daycare, even though this plan had been in place before and failed. She maintains the Applicant was willing to give S.J.R. $200.00 to assist with rent. The decision to reunite S.J.R. with the children was based on the progress the parties had made in counseling and the access notes, and they had been consistent with their visits.

In mid-April the Applicant changed its plan, seeking permanent care of the four children, because of "… crisis with respect to housing and ongoing concerns, and … follow through of services." The housing "crisis" concerned how the apartment could be financed, both the damage deposit and the monthly rent. She had conversations with J.A. as to the limited amount the Applicant was willing to give S.J.R. She testified she thought S.J.R. could not afford the $1,000.00 a month rent without her child tax credit or J.A. residing there also, but did not express this to S.J.R. On redirect she referenced the

meeting on March 28, 2014 with respect to the $200.00 the Applicant was willing to pay, and J.A.'s clear frustration and reaction to it not being enough.

The Applicant's evidence is that J.A. told the child protection worker she could "fuck" herself, they would fight for the children, the worker would never be welcome in their home, they would not participate in services, would not agree to live without S.J.R. and the children together, and were taking the agency to court.

March to July 2014
Blair Wilson

Mr. Wilson was employed with the Applicant and had carriage of this file from March until July 2014. Mr. Wilson did not see S.J.R. interact with the children, had little to no face-to-face contact with J.A., could not recall how many he did or did not have with face-to-face contact with S.J.R., spoke with S.J.R. only briefly on the telephone regarding purchase orders and confirmed that much of his affidavit was a summation of agency records. The court finds much of his evidence unconstructive towards the Respondents as he viewed their actions in a predominantly negative light. He testified S.J.R. seemed overwhelmed in trying to make the financial arrangement work so the children could be returned to her care. After reviewing the file and convening a case conference he (and the others on the 'team') changed the plan of care in April 2014 to one of permanent care.

July 16, 2014 to August 22, 2014
Corey Rafuse

Mr. Rafuse confirmed S.J.R. had been in a car accident, and as a result of a letter from her doctor dated August 12, 2014, riding the bus to access visits was painful, so taxi fare was arranged for the access visits to the children in […]. He also confirmed the missed access visits during the time he was involved on the file.

August 22, 2014 to present
Twila Burton

(d) Additional witness

Kenneth Kothlow

[25] Mr. Kothlow is an Income Assistance worker, who was called as a rebuttal witness for the Applicant. One of his clients is S.J.R. On February 26, 2014, S.J.R. was issued a cheque for $1,040.00. He explained this as being money for two adults and the shelter amount. At the end of March she was issued a cheques for $515.00. On April 1, 2014 an additional cheque was issued in the amount of $525.00, his evidence being

S.J.R. had called to say J.A. was moving in as she could not afford the rent on her own. Thereafter, the parties ended up boarding with J.A.'s mother and the rate was then reduced to $712.00 a month changing again in September as S.J.R. confirmed she and J.A. were renting a place but she had not signed the lease as she was not there at the time it was signed.

[26] On cross-examination, Mr. Kothlow was aware the Applicant was going to top up the payment by $200.00. It was suggested to him, given the content of the file notes that J.A. was only added in April to "bridge the gap" until S.J.R. could get her child tax credit back, to allow her to afford the apartment for herself and the children.

[27] Having considered Mr. Kothlow's testimony, it is apparent to the Court at this particular time that the parties were trying to come up with some creative financing for people living in poverty so they could have a chance to care for their children.

Evidence of Respondent, D.C.

[28] Third Party, D.C., gave evidence out of order on the consent of the parties. As her counsel argued, she took a very minimal role in the hearing.

[29] It was clear that D.C. and her daughter, S.J.R., have had their difficulties. D.C. had care of the children until July 11, 2014. Her evidence is she loves her daughter and sees her as a good mother, and would like the children to be with S.J.R. She testified that J.A. "… has come a long way."

Evidence of Respondent, J.A.

[30] J.A. supports the plan of care of S.J.R. that she will have care and custody of the children, and he will not be in the presence of S.J.R. and the children.

Relationship with S.J.R. Physically and Verbally Conflictual

[31] During cross-examination, J.A. agreed that his relationship with SJ.R was verbally and physically "conflictual", the last time being physical in January 2013. He testified the two times he was found at S.J.R.'s house (in 2012 and 2013) with the children present was Easter and he wanted to see his children at Easter. He testified he would not breach an order under the *MCA* giving S.J.R. primary care of the children because:

> "Cause, I uh didn't really understand you know how much power these people have and how uh the kids would suffer. But now I do, so I definitely wouldn't make them – put them in a position to get taken away again."

J.A. Believes he is Better Able to Handle Conflict

[32] He testified he believes he is better able to handle conflict in his relationship with S.J.R. because of the therapy he has had and knowing his conduct has a direct

consequence in causing his children to suffer. His evidence is the therapy has helped him but thinks there is more work to do, as he did not take it seriously at first, not realizing the damage his non-cooperation would cause his children. At the time of his testimony he was awaiting sentencing and his pre-sentence report was filed as an exhibit. He was hoping to get anger management counseling as a result of a probation order. He testified he is one hundred percent disassociated from his peer group, which may have influenced him inappropriately, and is presently on anti-depressant medication. He said:

> "It zombafies me… it's like a zombie. It helps, like I just don't – seeing the kids suffer really gets to me."

Supervised Parenting Time

[33] He is willing to have supervised parenting time under an *MCA* order.

March 2014

[34] When cross-examined by Applicant counsel J.A. maintained he never stated they "didn't have the same fucked up values as you" to Carolyn Price Weiland as it was not in his vocabulary. He explained he did not tell the workers he would not be participating in services any more, he was talking about watching videos on child abuse because that was not the issue. He said things escalated a little, but since all of the therapy he had, things would not get to that point.

S.J.R. Lies

[35] He testified he knows she lies, but lies knowingly.

J.A. Confirmed Incidents regarding October 2013 Apprehension

[36] He testified, when questioned:

> Q. Then, it goes on to say that when J.A. heard that the children were going to be apprehended, he flew into a rage. J.A. ripped the blinds off the front door and screamed at the window that someone was going to have to kill him in order to take the children. S.J.R. tried telling J.A. to unlock the door but he would not listen. He ran up the stairs in the living room and ripped the drapes off the front window. He yelled out the window screaming profanities at the FCS workers and RCMP members and said someone was going to die. J.A. came back to the front door and barricaded the door with what appeared to be part of a child's crib. S.J.R. pleaded with J.A. to stop and open the front door but he ignored her pleas. Constable MacLellan told J.A. to open the door and come outside. J.A. replied "FU pig" and barricaded the door further. Is that what happened?

A. Yup.

[37] When asked why he did this he responded: “Cause I was in a rage. They were taking my babies.”

[38] He further testified:

> A. Yeah. It’s me locking and boarding the house up and telling them that they’re gonna have to kill me to take my babies.
>
> Q. Mm-hm.
>
> A. The only thing that I care about.
>
> Q. Mm-hm.
>
> A. That’s true.
>
> Q. Ok. And, your babies the only thing that you care about were in the home with you at the time, weren’t they?
>
> A. That’s right and I wasn’t going to let them go.
>
> Q. And. Did you think at the time that, that might not be an appropriate reaction in front of the children?
>
> A. I didn’t give a shit really. Really.
>
> Q. You didn’t give a shit about whether or not the kids were in the house?
>
> A. No. I didn’t care what. I was not letting them come and take the babies without a fight…
>
> Q. … It didn’t bother you that the children were there? …. And observing?
>
> A. Absolutely not. I was protecting them from these crazy ass people.

Effects of Therapy

[39] J.A. testified he is attending individual and couples counseling, sometimes going at 7 am because that was the only time he could go. He missed a number of sessions for what he believed were valid reasons. He believes he has changed and the therapy has helped him.

Evidence of Respondent, S.J.R.

Reasons Children in Care

[40] S.J.R.'s evidence is that the children were initially taken into care because J.A. was found in her house when he was not supposed to be there in March 2013. Services were put in place for family support and therapy for both parents.

Incidents of October 2013

[41] By October 2013, the children had been returned to the Respondent parents, and again removed from their care. S.J.R. testified she had spoken with agent Twila Burton regarding the need for the children to be in therapy; S.J.R. suggested a different therapy firm asking to have a meeting with the Agency and the lawyers to get it all ironed out. Thinking her requests were being considered, she was surprised when four days later the police and the agents arrived once more to take the children into care.

[42] Her evidence is the kids were screaming: "Please don't let them take us away again." J.A. would not let the agents in the house; S.J.R. begged them to tell her why they were taking them, and Twila Burton would not tell her. The police kicked the door in, punched J.A. in the face, "…and blood splattered all over my walls and they started attacking him, both the police gouging him in the eyeballs." S.J.R. asked the police to stop hurting J.A., sat with the children on the couch and told them she loved them and everything was going to be okay. She packed their things, got them a treat and a juice box and watched as they were put in a car and taken away again.

[43] Subsequently when S.J.R. read the documents the children were removed yet again because of the Applicant's belief they had failed to follow-through with remedial services. Play therapy seemed to be the issue, but S.J.R. said she was willing to have the children in play therapy, wanting only to change therapy firms.

Applicant's Plan to Return the Children to S.J.R. in February/March 2014

[44] S.J.R.'s evidence is that on February 20, 2014, she moved into a two-bedroom duplex having been told by agent Vanessa MacDonald that if she got an apartment on her own, without J.A. residing with her, the Applicant would return the children to her. Her income at the time was income assistance.

S.J.R.'s Need for Financial Assistance and Applicant's Response

[45] As a single person residing in the apartment her evidence is that she would receive $500.00 from income assistance and this was not enough to afford the apartment and living expenses. She recognized she needed further financial assistance for the rent and damage deposit and believed the Applicant was going to assist her with funding. Although the child tax credit was $1,800.00 a month she would not have access to it until the children had been with her for approximately one month, perhaps two. Third party, D.C., had care of the children and further was in receipt of the child tax credit at this time.

[46] The evidence is that the Applicant Minister had been paying D.C. an extra $400.00 plus a month to keep the children in her care. The evidence confirmed by

Applicant witnesses is that they were prepared to offer S.J.R. $200.00 a month, even though S.J.R. would not have access to the child tax credit for a period of time.

Effects of Therapy

[47] S.J.R. believed the counseling she and J.A. had "… has completely changed our relationship in the past two years." She said they were not abusive with each other anymore and more loving and caring. "We are talking things out before they can escalate or get into a bad situation. We are being more hopeful toward each other. He is not taking off and not coming home, when he says he is going to be there, and doesn't show up. He is being more supportive and helpful."

[48] Though if the children were to be returned S.J.R. would have very little money for services, she is willing to use $75.00 to $100.00 a month to continue with therapy for the benefit of herself and the children.

Would S.J.R. Allow J.A. Back in the Home if the Children were Returned?

[49] When asked by her counsel how the court could be comfortable knowing she would keep J.A. away from her residence she responded:

> A. I am willing to call the police or make sure if he did come to the residence, which I am almost 100% positive he wouldn't. We would not ever put our children through this, ever again.
>
> Q. What are you talking about?
>
> A. The stress of being separated and not together, crying all the time that they want to go home. I would never do that to them again.

[50] The Court observed S.J.R. as she made this comment, and finds S.J.R. was sincere.

[51] During cross-examination by the Applicant a discussion was referenced regarding one of the children who during an access visit sat on S.J.R.'s lap:

> "… while she talked to him softly about the things they would do when they all got home. [He] told her he didn't want to go back home. [S.J.R.] asked him why and he said 'because it will happen all over again.'
>
> Q. And then you told him things are going to be different this time.
>
> A. Yeah because when he came back home last time everything was going fine and the kids were apprehended… So he is assuming if he goes back home, even if everything is good, people are going to show up at the door and take him away again… He had also told me on the same day that if he didn't get to go home in 5 days, at 8 years old, that he wanted to kill himself…

> Q. And did you report that to anybody?
>
> A. Yes. I told access worker what he had said… He has told me many times while I have sat there and talked to him, that if he goes home they are going to come and take him away again. And he has also told me to come and tell the workers how much I love him and want him at home and miss him, so that they can let him go home."

[52] The court carefully observed S.J.R.'s demeanor through this exchange, and finds she was visibly shaken by her son's concerns.

[53] In cross-examination by the Applicant she was asked: "How can the court be satisfied that you won't put your and J.A.'s relationship before the children?" And she responded:

> "I don't think I would ever do that. The only reason me and J.A. have been so dependent on each other for the past year and a half is because the kids, the kids haven't been there and we have been trying to go to therapy to try to deal with all of our problems and issues and we have been spending more time together to try to make things better, and when you only have each other and your kids are taken from you, you have nobody else really to rely on but each other to fix things and to make your family better."

[54] S.J.R. states:

> "I have the strength to be separated from J.A. and to hold him accountable for the things he says in the presence of the children. We are stronger than we were when this proceeding commenced. We have had to support each other throughout this proceeding. I am optimistic that we can someday live together as a family. Nonetheless the children are my priority. Until J.A. has completed his counseling, there will be no re-unification. "

[55] Having observed S.J.R. on the stand, the court finds this a credible statement. The court finds she loves her children. She does not want to lose them again.

Children Separated since July 2014 in Foster Care

[56] Until the children were removed from Respondent D.C.'s home in July 2014, all four resided together. Since that time, they are in three different foster homes.

[57] S.J.R.'s evidence, supported by D.C. is that her children have a close bond. S.J.R. testified:

> "They get along well. They love each other. They are happy wonderful kids that never had any issues like this before. They're really dependent on me and [J.A.] and they are used to everybody, all of us being together.

> And them being separated and not together or not in a home with their mom has been the hardest thing I have ever seen them be put through ever."

[58] She further testified:

> "… they've been screaming, crying, begging to go home. Every single time I have to put them in the car I have to pretty much pull my babies off me and put them in the car and buckle them in, kiss them and hug them and pretty much get away from the car because they will sit there and try to unlock the doors, they will try to get out and try to come with me. They have also, E.'s been in a foster home and the foster parent has told her, when E. asked her to read her a book, that she is 10 years old, to grow up, to learn to do things herself. She had an accident and the toilet overflowed and she was yelled at and they made her clean up the poop and pee water all over the floor. That the babies are crying all night long, in the foster home and she can't sleep. The foster parents just go in and turn the lights out and let the babies cry."

March 2014

[59] Cross-examination by the Applicant dealt with the Applicant's plan for the children to be returned to S.J.R. under a supervision order. Her testimony was that even though the apartment she had found was expensive, it was her understanding the Applicant would assist her with funds. She testified that in spite of the Applicant witnesses saying they would only give her $200.00 a month to help with the apartment costs, this was not her understanding before she moved into the apartment.

S.J.R.'s Plan of Care

[60] S.J.R.'s plan is to have primary care of the children and parent them together, under the terms of a Maintenance and Custody order, as attached to her affidavit of September 8, 2014.

A Difficult Summer

[61] There is evidence from all parties that the summer of 2014 was difficult, not just S.J.R. – who was in a three-car accident – but J.A. as well who was awaiting sentencing in provincial court.

Court's Findings

[62] The court observed S.J.R. closely throughout her testimony and finds that she clearly recognizes and understands the harm caused to her children as a result of not following the court orders and allowing J.A. to be there when he was not permitted to be. The court finds her grief at putting the children through this believable and sincere. The court finds that S.J.R. is now painfully aware that she and J.A. are unable to parent together at this time and understands that as devastating as this matter has been for

herself, it is exponentially more painful and damaging for her children.

Analysis

(a) Preliminary Rulings – The court reserved the right to reduce all oral rulings to writing with reasons.

(i) The issue of case notes being submitted as "business records"

[63] This issue rears its head in just about every hearing involving the Applicant, who argues with regularity that the Agency case notes should be admitted as evidence pursuant to s. 23 of the *Evidence Act*, R.S.N.S., ch. 154.

[64] Ms. Whelton, for the Applicant, advised the court she would be relying on the case notes for the bulk of her cross-examination. She had also advised Respondent counsel on the record that if there were any deponents of the case notes that they would wish to cross-examine, to let her know.

[65] Traditionally the family Court in this area, under the confines of a practice memorandum, has not permitted case notes to be filed separately, attached to affidavits, or reiterated in overly long affidavits.

[66] This issue was extensively canvassed by Levy, J.F.C., in *Family and Children's Service of Kings v. A.M.S. and S.H.*, July 4, 1997, and in fact was the backbone for the practice memorandum above-noted.

[67] He holds:

> "The widespread use of these case notes puts the Respondent (parents) in the virtually impossible position of having to respond to perhaps hundreds of different allegations, never being confident that the one that they might be tempted to ignore won't strike a chord with the judge."

[68] He goes on to say at p. 17:

> "In essence I believe it is Section 23 of the Evidence Act can be an asset in the pursuit of truth and for an efficient trial, but that there is, as Justice Richards said " a danger of a too broad application....) of Section 23", a danger to which child protection proceedings as Judge MacDonald and Professor Thompson have noted, are particularly vulnerable."

[69] Case notes are often voluminous in nature, made by any number of workers dealing with the file. There is little relevance to much of the contents. How many times does one have to read that a worker called a parent and there was no answer, for instance? And what relevance has such information to the case? Technically, case notes are hearsay, they are not the best evidence, and when submitted holus-bolus often contain a significant amount of irrelevant information.

[70] In *H.M.Y. v. T.G.Y.*, 2006 NSSC 185 (CanLII), MacDonald, J., addresses this issue. In her decision, she sets out the contents of the applicant's affidavit:

> "T.G.Y. has attached to his affidavit all documents in the custody and possession of the Department of Community Services regarding Ms. H.M.Y. and the parties children. These documents are often referred to as "Agency file notes" and I will use this term in reference to these documents. Some of these notes consist of recordings of conversations between the applicant and employees of the Department of Community Services. Some consist of conversations with other persons. Some consist of information given to other persons by different persons and then to the social worker. Some consist of information not necessarily within the personal knowledge of the social worker directly involved in the file. Some consist of letters from and to lawyers. Some consist of opinions expressed by third parties. As a result many of these agency notes consist of irrelevant material, hearsay, multiple hearsay, opinions and other information that, unless this material can properly be admitted as part of a "business record", would require the maker of the statements to be present as a witness available to be cross-examined."

[71] Section 23 (1) and (2) sets out that:

> *(a) "business" includes every kind of business, profession, occupation, calling, operation of institutions, and any and every kind of regular organized activity, whether carried on for profit or not;*
>
> *(b) "record" includes any information that is recorded or stored by means of any device.*
>
> (2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.

[72] MacDonald, J., held in *H.M.Y. v. T.G.Y.*:

> There appears to be uncertainty in Nova Scotian jurisprudence whether information received from persons other than the parties and whether irrelevant material contained in agency file notes may be admitted as part of the "business record". It does appear that opinions of the type that must be given by a qualified expert, contained in an agency record, cannot be accepted into evidence unless the expert is to be called as a witness.

[73] In *Nova Scotia (Community Services) v. M.F*, 2009 NSFC 16 (CanLII), Milner, J.F.C., thoroughly canvasses the evidence regarding use of agency case notes. He notes:

> In a child protection proceeding, it is difficult for a judge to decide how much weight should be given to a written summary of events in the family's history - made by an agency worker who: never testifies under oath; and never answers questions in court about the recorded events, or about the recording itself. It is especially difficult when the witness testifying about the records, has no personal knowledge whatsoever of the events 'spoken about' in the records.

[74] In the case before the court, the court originally indicated it would not accept case notes, but upon hearing further argument from counsel determined in this one instance, because of the seeming 'revolving door' of agents involved in the lives of these children and the Respondents, and the numerous times these children have been relocated, it would be in the best interests of the children to review the case notes, in an attempt to find some semblance of continuity. It must be said that in some instances affidavits have been known to only espouse the negative, while the case notes tell a different story. Ms. Whelton, for the Applicant, was most reasoned in her offer to have any deponent of the case notes available, for cross-examination purposes, to the Respondents upon being so advised. She further prepared affidavits by deponents of the case notes that she felt germane to this matter.

[75] This is not a precedent to indicate the court will always allow the admission of case notes as business records. It is a one-off given the specific facts of the case, recognizing that a court can never use a "cookie-cutter" approach when dealing with the lives and best interests of children. Further, if the writer of the notes did not testify, the court has only considered the content of the notes as going to weight.

[76] In this one instance, the court factored all of the reasons noted above, especially the best interests of the children, and determined the case notes could be admitted as "business records."

(ii) Subpoena *Duces Tecum*

[77] The Applicant made application to have all file notes and file contents made by the professionals available to the parties and the court, not just their written reports which was contested by the Respondents.

[78] The decision of the Court of Appeal in the Supreme Court of Newfoundland and Labrador in *Carroll (RE); Kent v. Kent*, 2010 NLCA 53, notes the following:

> Issues of privacy still have relevance in at least two respects. First, they require careful consideration of whether the live issue in a dispute requires the degree of disclosure requested. In other words, the existence of a legitimate claim to protection of a privacy interest requires the court to a production of no more information that is reasonably necessary for the purpose of the case.

[79] In *Family and Children Services of Kings County v. M.S. and J.S*., 2002 NSFC 16, Levy, J.F.C., quotes from *Children's Aid Society of Algoma v. H(L)* 1996 Carswell

Ontario 1970:

> It is an inappropriate that fishing expeditions in both civil and criminal cases should be allowed for the excursion price of one summons to witness or one subpoena. Considering the level to which disclosure is available to parties by statues, by rules, and by case law prior to hearing it is my view that the proper test for maintaining a summons to witness is the likelihood of material evidence test for purposes of those summons issued under the rules of the Ontario Court provincial division in family matters. The test is more onerous than mere possibility of material evidence. Moreover the determination of whether the proper threshold has been reached based on some evidence.

[80] The court is tasked with determining what is in the best interests of the children, and the court ordered counseling and other services involving assessments for the Respondents in the hopes they would become better parents. The professionals are qualified to 'weed through' information and data to render a report. Although there are times when the courts have allowed and relied on raw data, this is not one of them. This case does not rise or fall on what may be the raw data of the experts.

(b) Should the Court order permanent care or return the children to the parents?

Jurisprudence and Statutory Regime

[81] The *Act* sets out the framework for the court in matters of child welfare in this province. Section 2 defines the purpose of the *Act* to protect children from harm, promote the integrity of the family and assure the best interests of children. In all proceedings pursuant to the *Act*, the paramount consideration is the best interests of the child.

[82] The children, have been found in need of protective services with the consent of S.J.R. and J.A. on May 1, 2013.

[83] Pursuant to the *Act*, at the conclusion of the disposition hearing the court must make an order in the child's best interests, and at that stage has numerous options. However, the time has since run out and at present the court has but two available options. They are, pursuant to s. 42:

> (a) dismiss the matter;
>
> ….
>
> (f) the child shall be placed in the permanent care and custody of the agency, in accordance with Section 47.
>
> 42 (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.

42 (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.

[84] In *Minister of Community Services v. C.M. and G.M.* 2011 NSSC 112 para. 72, the court held: "…Permanent Care Orders should only be granted in cases where there is clear, convincing, and cogent evidence supporting the conclusion that all reasonable measures, including placement within the extended family have been exhausted." In addition, the court must determine that the services provided in the course of this proceeding have been tried and failed, or have been refused by a parent. Ultimately, the court must decide, at the time of making a disposition order, whether the children are in need of protection under one of the enumerated grounds of s. 22(2) of the *Act*.

[85] In *Children's Aid Society of Pictou County v. A.J.G.* [2009] N.S.J 363, Wilson, J.F.C., held: "In making such a determination, the court must always keep in mind that the 'standard' is 'good enough parenting' and 'manageable risk'."

[86] In *Minister of Community Services v. C.M.*, 2001 NSSC 112, the court held that the respondents had successfully completed sufficient remedial services to satisfy the court that they have gained insight into the domestic issues, substantially eliminating or reducing the risk. The court confirmed that the evidence showed that the respondent had changed for the better and that this change is substantive, sufficient, and real enough for the court to be satisfied that the children were no longer in need of protective services at that time and can be safely returned home.

[87] The court must determine on a balance of probabilities if the Applicant has made out a case for permanent care of these four children, taking into account whether the risk has been reduced or eliminated through remedial services and insight gained by the Respondent parents, but also if the parenting that can be provided by S.J.R. is "good enough" parenting, all under the umbrella of what is in the best interests of these children.

[88] In F.H. v. McDougall, 2008 SCC 53, at para. 49:

> … [I]n civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred...

[89] Pursuant to s. 42(2) of the *Act*, the court must be satisfied that services pursuant to s. 13 to promote the integrity of the family have been tried and failed, refused, or would be inadequate to protect the children.

[90] Section 13 reads as follows:

13 (1) Where it appears to the Minister or an agency that services are necessary to promote the principle of using the least intrusive means of intervention and, in particular, to enable a child to remain with the child's parent or guardian or be returned to the care of the child's parent or guardian, the Minister and the agency shall take reasonable measures to provide services to families and children that promote the integrity of the family.

(2) Services to promote the integrity of the family include, but are not limited to, services provided by the agency or provided by others with the assistance of the agency for the following purposes:

(a) improving the family's financial situation;

(b) improving the family's housing situation;

(c) improving parenting skills;

(d) improving child-care and child-rearing capabilities;

(e) improving homemaking skills;

(f) counselling and assessment;

(g) drug or alcohol treatment and rehabilitation;

(h) child care;

(i) mediation of disputes;

(j) self-help and empowerment of parents whose children have been, are or may be in need of protective services;

(k) such matters prescribed by the regulations. 1990, c. 5, s. 13.

[91] *In Nova Scotia (Minister of Community Services) v. L.L.P.*, [2003] N.S.J. No. 1 (C.A.), para. 25, the court holds:

> The goal of services is not to address the [parents] deficiencies in isolation, but to serve the children's needs by equipping the parents to fulfil their role in order that the family remain intact. Any service-based measure intended to preserve or reunite the family unit, must be one which can effect acceptable change within the limited time permitted by the Act. If a stable and safe level of parental functioning has not been achieved by the time of final disposition, before returning the children to the parents, the court should generally be satisfied that the parents will voluntarily continue with such services or other arrangements as are necessary for the continued protection of the children, beyond the end of the proceeding. Ultimately, parents must assume responsibility for parenting their children. The Act does not contemplate that the Agency shore up the family indefinitely.

[92] When the Applicant determined the plan of care in approximately February or March 2014 would be to return the children under a supervision order to S.J.R., there was a duty to assist in improving the family's financial situation in order to improve the housing situation. Offering $200.00 to assist with rent knowing S.J.R. would have to wait at least a month to receive the child tax credit was unrealistic, especially since the Applicant willingly helped third party D.C. to the tune of $450.00 plus per month until she received the child tax credit when she had the children in her care. Further, the evidence is that the Applicant was spending in excess of $2,000.00 in transportation costs some months for S.J.R. and J.A. to have parenting time with the children. It stands to reason that if the children were returned to S.J.R. under a supervision order, and the Applicant had helped her with – for instance – one full month's rent in the amount of $1,000.00, it would have been far less money than they ended up paying in access and transportation costs.

[93] This would have served "… the children's needs by equipping the parents to fulfil their role in order that the family remain intact." (*MCS v. LLP*, *supra*). Providing S.J.R. with sufficient money to maintain an apartment until she received the Child Tax credit, as noted in LLP was a "…. service-based measure intended to preserve or reunite the family unit," which could have effected "… acceptable change within the limited time permitted by the Act." Therefore, the court is not satisfied that services to promote the integrity of the family – specifically with respect to ss. 13 (2)(a) and (b) – have been tried in relation to the Applicant's decision in April 2014 to change their plan to one of permanent care.

[94] The Applicant argued time limits in her brief, and the court is most sensitive to time limitations in child welfare matters and the resulting jurisprudence; however, the matter was commenced *pro forma* within the timelines and adjourned on the consent of counsel June 25, 2014. The court offered dates the end of July but the Applicant was unavailable, so the matter was set for continuation in September.

Conclusion

[95] The court has considered all of the evidence affording it the weight the court believes appropriate.

[96] The court finds the Respondent parents are aware of how their actions in wanting to co-parent have negatively impacted their children. The court finds their evidence, with respect to their hard-learned understanding that they cannot co-parent, to be sincere and compelling. They have learned a difficult lesson and will not again subject their children to the grief of being separated from them, and the sorrow of being separated from one another.

[97] The court finds that the Respondent parents have been together since approximately September 2001. There has been a history of domestic violence, from minor arguments, to yelling and swearing, to incidents where things were thrown and smashed, and at least two assaults when the children may have been present in the house. The court finds there is evidence of the assaults having left physical marks and evidence that S.J.R. admitted to changing the stories saying she embellished the facts to get back at J.A. There is evidence of police involvement with these parties even if charges were not laid, and evidence of J.A. being intoxicated.

[98] The court finds there is evidence of J.A. being charged with assaulting a police officer when his children were being apprehended, while he screamed he would die before his children would be taken away again, in October 2013. Ms. Whelton for the Applicant has argued: “In the fall of 2013 Mr. J.A.’s behaviors in front of the children were outrageous, criminal and harmful.” The court finds J.A has a criminal record for assault in 2012 on S.J.R., failure to comply with undertakings, four breaches of probation, theft. There is evidence of S.J.R. being on probation.

[99] The court finds there is a history of financial difficulties, evidence of the parties being adamant they had no risk of inappropriate conflict - making it difficult for therapists to continue or identify goals for the parties, evidence of the parties engaging and then disengaging and then engaging again in services, evidence they have been separated with no plans to reconcile, and then they do reconcile, evidence of court orders preventing J.A. from being with S.J.R. with the children which were disregarded, and evidence of J.A. being involved in altercations with other people. Further there is evidence of the Respondent parents moving to different locations and having difficulties with landlords.

[100] What is glaringly apparent in spite of the evidence, noted above and known to the Applicant, is that in March 2014 the Applicant was more than satisfied to return the children to the care of S.J.R. on a supervision order.

[101] Since this matter began the children have been moved at least eight different times, the Respondents have been subjected to the ever changing roster of Applicant agents, and in March of 2014 the hope the children were to be returned followed by the frustration of not having the financial wherewithal to make that happen. The Respondents are impoverished. The Applicant is and was certainly aware of this.

[102] The court finds that the Applicant, rather than recognizing J.A.'s outbursts as frustration that his children would remain in foster care because he and S.J.R. had no one to rely on financially, chose to change their plan of care to one of permanent care. This was a situation that could have been easily avoided if the Applicant had provided a reasonable and adequate amount of money, as they had with D.C., until S.J.R. had her child tax credit reinstated, which is clearly set out as a service to promote the integrity of the family in ss. 13 (2) (a) and (b) of the *Act*.

[103] If the Applicant is going to provide meaningful services to impecunious Respondents, they have to invest in housing. How many single parents in these applications can support their children without the child tax credit? These children have been penalized and kept from a caring parent because of the Applicant's decision to underfund a crucial and vital service that would have promoted the integrity of this family.

[104] Once the Respondents realized they could not parent together, all S.J.R. required for a short period of time, was adequate financial assistance to afford the apartment she had rented for herself and the children until she was once again in receipt of the child tax credit. The Applicant did not meet the burden to provide these services refusing to put the resources where they were needed most.

[105] The court has to be concerned with what is in the best interests of the children. That is the heartbeat of all child welfare proceedings in this country. The court finds it to be in the best interests of the four children to be together with a family member rather than face an uncertain future in foster care.

[106] Keeping in mind the standard is "good enough parenting" and "manageable risk", the court finds on a balance of probabilities the Applicant has not shown there exists a real possibility of risk if this matter were to be dismissed and an order under the *MCA* be granted. The court is not satisfied that less intrusive alternatives have been effectively and fairly employed.

[107] Further, the Respondents have completed sufficient remedial services to satisfy the court that they have gained insight into the domestic issues, substantially eliminating or reducing the risk. Having considered and weighed all of the evidence, the court finds the Respondents have changed for the better, the change is substantive, sufficient, and real enough for the court to be satisfied that the children are no longer in need of protective services at this time and can be safely returned home to the care of S.J.R. pursuant to the *MCA* application filed with this court. The matter is dismissed, and the *MCA* order as granted by the court is attached hereto.

M. Melvin, J.F.C.