NOVA SCOTIA COURT OF APPEAL

Citation: Nova Scotia (Community Services) v. A.S., 2007 NSCA 82

Date: 20070705
Docket: CA 278918
Registry: Halifax

Between:

A.S.

Appellant

v.

The Minister of Community Services

Respondent

Restriction on publication: **pursuant to s. 94(1) of the Children and Family Services Act**

Judges:	Cromwell, Oland and Hamilton, JJ.A.
Appeal Heard:	June 15, 2007, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Cromwell, J.A.; Oland and Hamilton, JJ.A. concurring.
Counsel:	Janet Stevenson and Janine Kerr, for the appellant Lorne MacDowell, Q.C. and Lindsay M. MacDonald, for the 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:

> **94(1) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.**

Reasons for judgment:

I. INTRODUCTION:

[1] The appellant's two year old son was ordered into the permanent care and custody of the Minister of Community Services. The judge, Wilson, J.F.C., found that the child was in need of protective services and that a permanent care order was the only available option that would protect him. On appeal, the appellant attacks both findings, submitting that they are not supported by the evidence.

[2] As announced at the conclusion of the hearing, we are all of the view that the appeal must be dismissed. Our reasons follow. In summary, the judge did not err in finding on this record that the child was at substantial risk, that the appellant proved herself unable to remedy it and that there was no viable plan for the child other than permanent care.

II. ISSUES AND STANDARD OF REVIEW:

[3] The appellant raises a number of points but, in my view, they all relate to two main questions:

1. Did the judge err in finding that the child continued to be in need of protective services?
2. Did the judge err in concluding that a permanent care order was required to protect the child?

[4] These are mainly factual issues: the appellant claims that the evidence did not support the judge's conclusions and that he ignored or misunderstood the evidence.

[5] In considering these claims, one must bear in mind an appellate court's limited role in reviewing a trial judge's assessment of the evidence. An appeal is not a retrial on the written record. The appellate court is not to act on its own fresh assessment of the evidence but to intervene only if the trial judge erred in legal principle or made a palpable and overriding error of fact: **Children's Aid Society of Cape Breton-Victoria v. A.M.**, 2005 NSCA 58, 232 N.S.R. (2d) 121 (C.A.), para. 26.

[6] The appellant says that we are free to draw our own inferences from the trial evidence where there is no question about its truthfulness. This proposition has been frequently stated in the past: see, for example, **Children's Aid Society of Halifax v. M.D.**, [1992] N.S.J. No. 280 (Q.L.) 113 N.S.R. (2d) 27 (C.A.). However, the more recent authorities from the Supreme Court of Canada, which we have followed in our subsequent decisions, show that this is no longer the correct approach.

[7] The law is now clear that we may interfere with findings of fact only if the judge made a "palpable and overriding error", that is, an error which is clear and affected the result. This standard of review applies to all findings of fact. It applies whether or not the findings are based on the judge's assessment of credibility. It applies to inferences which the judge draws from the evidence: **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235 at paras. 19 - 25 and **H.L. v. Canada (Attorney General)**, [2005] 1 S.C.R. 401 at paras. 62 - 76. It applies to review of facts in cases involving child custody and a child's best interests: **Van de Perre v. Edwards**, [2001] 2 S.C.R. 1014 at paras. 13 - 15.

[8] Where it is alleged that the judge failed to consider relevant factors or misapprehended the evidence, the appellate court's task is to determine if there has been a material error. The Supreme Court explained this in **Van de Perre**, para. 15:

> ... appellate review requires an indication of a material error. ... [O]missions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial. ... [A]n omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.

[9] The fundamental point is that absent clear and determinative errors of fact or material errors of reasoning, the trial judge's decision stands.

III. ANALYSIS:

[10] As noted, the appellant makes two main submissions: first, that the child was not in need of protective services and, alternatively, that even if he was, a permanent care order was not necessary for his protection. I will address these

points by first putting them in their proper legal context and then turning to an analysis of each in light of the record and the judge's reasons.

A. Legal Principles:

[11] Under appeal is a permanent care order made at a final disposition hearing. There is no dispute about the judge's role at that disposition hearing: he had to determine whether the child continued to be in need of protective services and, if so, to make an order in the child's best interests: see, for example, **Catholic Children's Aid Society of Metropolitan Toronto v. C.M.**, [1994] 2 S.C.R. 165; **Children's Aid Society of Halifax v. T.B.**, 2001 NSCA 99, 194 N.S.R. (2d) 149 (C.A.) at para. 26; **Nova Scotia (Minister of Community Services) v. D.W.S.**, [1996] N.S.J. No. 349 (Q.L.), 168 N.S.R. (2d) 27 (F.C.) at paras. 320 - 324; **Nova Scotia (Minister of Community Services) v. F.A.**, [1996] N.S.J. No. 447 (Q.L.) (F.C.) at paras. 21 - 22.

[12] The final disposition came at the end of over a year of court proceedings and services with respect to this child. Review of the disposition hearing must be undertaken in light of the factual and procedural context in which it occurred. In this case, there are two critical aspects of that context: first, the time limits under the **Children and Family Services Act**, S.N.S. 1990, c. 5 ("**CFSA**") and, second, the requirement that previous findings that the child was in need of protective services made earlier in the process must be accepted as having been correct when made.

[13] I turn first to the time limits.

[14] The child was initially taken into care in November of 2005 and was found to be in need of protective services at a protection hearing in January of 2006. This part of the procedure is addressed by s. 40 of the **Children and Family Services Act**, S.N.S. 1990, c. 5 ("**CFSA**"). Beginning in March of 2006, there followed a series of disposition hearings under s. 41 of the **CFSA** which resulted in orders for temporary care and custody for specified periods as set out in s. 42(1)(d).

[15] The total period of all such orders may not exceed 12 months: s. 45(1) **CFSA**. In this case, that period expired in early March of 2007. Thus, when the matter came before the judge for final disposition on February 13 and 14, 2007, little time remained. Any further temporary care or a supervision order could only

have been put in place for about three weeks, that is, until early March. Realistically, the options before the court at the final disposition hearing were either permanent care, as requested by the Minister, or dismissal of the proceedings and return of the child to the appellant as she requested.

[16] There are other requirements which must be established before a permanent care order may be made. They include, and I will state them only in a shorthand way at this point, that less intrusive alternatives have been exhausted and the unlikelihood that the circumstances justifying the order will change within a reasonably foreseeable time not exceeding the maximum time limits: s. 42(2) and 42(4) **CFSA**. These requirements are to be assessed within the time-frames contemplated by the statute.

[17] The second critical part of the context relates to the effect of the findings earlier in the process that the child was in need of protective services. At the final disposition hearing, it is not the judge's function to reconsider these earlier determinations: those previous findings must be accepted at face value. They are assumed to have been properly made at the time they were: **G.S. v. Nova Scotia (Minister of Community Services)**, 2006 NSCA 20, 241 N.S.R. (2d) 148 (C.A.) at para. 19. At the final disposition hearing, the judge is to consider whether the need for protective services continues at that time. As Chipman, J.A. put it in **Nova Scotia (Minster of Community Services) v. S.E.L. and L.M.L** , 2005 NSCA 55, 184 N.S.R. (2d) 165 (C.A.) at para. 20: "... Once a finding of the need for protection has originally been made, there is still the requirement ... to consider whether the child is or is no longer in need of future protection. Children's needs and circumstances are continually evolving and these ever changing circumstances must be taken into account."

[18] In summary, two of the key issues at the final disposition hearing are to determine whether the child remains in need of protective services and what order is required in the child's best interests. The issue of the ongoing need for protective services is not to be considered in a vacuum, but in light of the previous findings of the court which must be taken as having been right at the time they were made. The nature of the order required in the child's best interests must take into account the time limitations in the statute.

[19] In light of this legal framework, I will now turn to the two main issues on appeal.

B. First Issue: Did the child continue to be in need of protective services?

[20] The appellant submits that there was no evidence either that her son suffered or was at risk of suffering from emotional harm or that she could or would not remedy such harm. The judge also failed, in the appellant's submission, to appreciate the strength of the bond between her and her son or her ability and willingness to appropriately care for him. The judge, she argues, should simply have dismissed the proceeding and returned the child to her.

[21] Respectfully, these submissions must be rejected. A review of the evidence and the judge's reasons shows that the judge's conclusions are well-supported by the evidence.

1. The evidence:

[22] The Minister alleged that the child suffered or was at substantial risk of suffering emotional harm and that the appellant could or would not remedy this situation. This is addressed in s. 22(2)(f) and (g) of the **CFSA**:

> **22(1)** In this Section, "substantial risk" means a real chance of danger that is apparent on the evidence.
>
> **(2)** A child is in need of protective services where ...
>
> (f) the child has suffered emotional harm, demonstrated by severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour and the child's parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;
>
> (g) there is a substantial risk that the child will suffer emotional harm of the kind described in clause (f), and the parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;

[23] I will first set out a relatively brief chronology of the proceedings and then turn to a more detailed examination of the evidence before the court at the final disposition hearing.

(a) The proceedings:

[24] The appellant's son was first taken into care in November of 2005. He was 4 months old. The social worker involved at the time testified that agency intervention was prompted by concerns about housing, adequate care for the child and the mother's relationships, particularly her relationship with the child's father, J.B.

[25] The worker testified that when he entered the home on an unscheduled visit in November of 2005, J.B., the appellant and the child were present. There was marijuana piled in a dustpan on the floor and J.B. was rolling a joint. He spoke about his addiction to crack cocaine and also his use of other chemicals and soft drugs. In conversation with the worker, the appellant admitted that J.B. often cared for the child alone for extended periods when she was not present, including overnight, and that he was the parent who got up with the infant at night. J.B. was, in her view at that time, a good parent. She did not at the time see the difficulty with J.B.'s drug use or that it could place the child at any risk.

[26] The worker observed that there was conflict between mother and father and offered the appellant access to a safe house which she declined.

[27] The child was apprehended on November 4, 2005. During the apprehension, J.B. threatened "to get" the agents. He was described in the evidence as having "a hell of a temper", being "unpredictable" when not under the influence of drugs and, when under that influence, as being "... outright dangerous... [with] no concern [for] the well-being of others...".

[28] A protection hearing under s. 40 of the **CFSA** was held in mid-January of 2006. The court found that the child was in need of protective services under s. 22(2)(f) and (g).

[29] Following the finding that the child was in need of protective services, a series of orders were made between March and September of 2006 committing the child to the temporary care and custody of the Minister. Section 40(3) **CFSA** provides that a parent may admit that a child is in need of protective services as alleged by the agency. Section 41(4) **CFSA** contemplates that a parent may consent to a disposition order. The appellant admitted that her son was in need of protective services and consented to each of the temporary care and custody disposition orders made over the course of roughly a year. It follows that when the matter came before the judge for final disposition in February of 2007, the fact that the child was

in need of protective services and that temporary care and custody was necessary in his best interests had been admitted by the appellant, repeatedly, over the course of roughly a year of court appearances. Whether the child was in need of protective services was only placed in issue by her at the final disposition hearing.

[30] When a parent, as in this case, consents to a disposition order that removes the child from the parent's care, the court must inquire whether the parent has been offered services that would enable the child to remain with the parent and whether the parent has consulted legal counsel. The court must satisfy itself that the parent understands "the nature and consequences of the consent and consents to the order being sought and every consent is voluntary.: s. 41(4)(c) **CFSA**. In addition, before making these orders, the court is required to be satisfied that "less intrusive alternatives, including services to promote the integrity of the family ... have been attempted and have failed [or] have been refused ... [or] would be inadequate to protect the child.": s. 42(2) **CFSA**. The appellant was represented by counsel throughout these proceedings and, as noted, she consented to each order which preceded the final disposition order. Each order recites that the court was satisfied that the relevant statutory thresholds had been met.

[31] Throughout the following year, various services were offered and, when accepted, put in place for the appellant and J.B. These included individual therapy, random drug testing, parenting education and a parental capacity assessment. There were some positive results in relation to the appellant. In September of 2006, the agency filed a revised plan of care which recommended an attempted transition of the child back into the appellant's care. The court ordered the transition on conditions including the appellant's abstinence from alcohol.

[32] At this point, the hopes of the appellant being able to care for her son on her own started to unravel.

[33] Between the order and the transition actually taking place, the agency received a referral and workers conducted a home visit to the appellant. She had two black eyes. She acknowledged that she had been drinking, suggesting that she was "celebrating" the return of her son. As a result, the agency halted the transition and brought the matter back to court for review. Further temporary care orders followed with the appellant's consent.

[34] In November of 2006, the agency decided to attempt another transition. It made it clear to the appellant that there was no room for further difficulties because

the matter was nearing the end of the time permitted under the statute. (As noted, the time limit would expire in early March, 2007.) The court issued a transition order on November 21, 2006. It set out several conditions, including that the appellant co-operate with services recommended by the agency and that J.B. not visit her home without agency approval.

[35] It quickly became apparent that the transition was not working. A worker visited on November 25, 2006. The appellant was having difficulty coping. She had missed her meeting with her therapist. She was not participating in the Kids First program although recommended to her. The worker explained that she ought to continue with these services. The appellant responded: "I still have to do that, why?" In early December, the appellant requested respite. It was clear that she had remained in close contact with J.B. throughout. He had not respected either the terms of the order in relation to his access or the requirements for drug testing. The child was taken back into care on December 8, 2006. The appellant declined further services. A further temporary care and custody order was made later that month with the appellant's consent and February 13 and 14, 2007 were set for a disposition hearing. At that hearing, the judge made the permanent care order which is under appeal.

(b) The evidence at the final disposition hearing:

[36] I will not summarize all of the extensive affidavit and oral evidence before the court at the final disposition hearing in February. I have already referred to some of it in the course of setting out the chronology of the proceedings. As noted earlier, this evidence must not be viewed in isolation, but in the context of the earlier findings on consent that the child was in need of protective services. That aside, there was considerable evidence that the child continued to be at risk.

[37] Psychologist Michael Bryson was engaged to conduct a parental capacity and psychological assessment of the parents. His assessments gave rise to several serious concerns in relation to parenting, substance abuse and the nature of the relationship between the appellant and J.B. He outlined these matters in his testimony:

> **Q.** ... Dealing first with Ms. [S.], when you became involved in your initial report of March 7, '06, what were identified as the main concerns arising from the assessment?

> **A.** Several concerns. One was the level of her parenting with her son, [M.]. Those concerns arose primarily from observations of her with [M.]. And, secondarily, there were concerns around substance use. She had reported having difficulties with alcohol use in the past, had obtained treatment at the age of 14, had continued to use alcohol and, periodically, marihuana. And there had been concerns about [J.B.]'s use of substances. Finally, concerns about the relationship she had with [J.B.]
>
> **Q.** Let's talk about that one for a moment. What were ... what was the concern arising from your initial assessment as regards the relationship between [J.B.] and [the appellant]?
>
> **A.** [The appellant] presented as a woman who was very motivated to have her child return to her care, [M.]. I talked with her. I found her to be quite forthcoming about how difficult it was. She was certainly cooperative in the assessment, answering the questions asked of her.
>
> I didn't find she had significant insight or understanding of what the concerns of the applicant, particularly with regards to [M.]'s safety. And when I initially worked with her, she appeared to not really appreciate or understand any concerns there might be about her relationship with [J.B.]. I found her to be fairly straightforward in responding to questions. She answered the questions ... questionnaires in a forthright manner. ...

[38] The impact on the child of the relationship between the appellant and J.B. and the appellant's apparent lack of insight into this problem were at the root of this protection proceeding. There was extensive evidence about the risk J.B. posed to the child and the inability or unwillingness of the appellant to address it. I respectfully but emphatically disagree with the appellant's counsel's submission that there was no evidence of such a risk.

[39] In his initial assessment, Mr. Bryson put it this way:

> My overall impression of [the appellant] is that she is a young mother who has not fully matured, she loves her son, and does not believe that she placed him in any jeopardy by allowing the use of illicit substances in the home. [The appellant] also loves her partner, [J.B.], and has no interest in ending their relationship. She reported that he claims to be drug free, which she accepts as proof that their family no longer requires involvement of the Applicant. Instead of presenting as an overly malicious person, it is my impression that her naivety and strong need to be appreciated by [J.B.] allows her to remain at risk of allowing [M.] to be neglected. The neglect is that she raised him in an unsuitable environment, and she lacks sufficient skills to parent him more appropriately.

[40] In his September 15, 2006 assessment, Mr. Bryson noted that J.B. continued with his daily marijuana use, had not attended addiction treatment and required parenting training. The assessor continued: " [J.B.] poses a risk of harm to his son until such time that he can sustain assisted abstinence from psychoactive substances."

[41] In his testimony, Mr. Bryson expressed concerns about whether the appellant could assert herself, make good decisions and be an independently functioning adult. As he had in his initial assessment, he identified in his testimony that the relationship between the appellant and J.B. was a risk factor for the child's development and that the appellant had real difficulties setting up appropriate boundaries with J.B. that would safeguard her son. Mr. Bryson said that he had no confidence that the appellant could control the relationship.

[42] The appellant's dependent personality type and the relationship with J.B. had been the focus of therapy with therapist Gary Neufeld. He testified that the appellant was well aware that this was an inappropriate relationship for her to continue. However, in his view, she had not been able to act on this knowledge. His evidence was that this issue had not been resolved in therapy.

[43] Evidence of J.B.'s behaviour in December of 2006 was before the court. The RCMP were called to the psychiatry department of St. Martha's Hospital where they arrested J.B. He had been driving around with a firearm attempting to locate one of the social workers involved with his son as well as his son's foster home. A psychiatrist testified that J.B. confirmed to him that he was using illicit drugs and driving with a gun and bullets looking for the worker. The attending psychiatrist testified that J.B. was suicidal and homicidal. He was diagnosed with substance abuse mood disorder and marijuana and cocaine dependence. He pleaded guilty to two charges of uttering death threats.

[44] The evidence was that before J.B. went to the hospital, the appellant had been aware that J.B. was "freaking out" and threatening both the worker and his own mother. J.B. told the appellant that he wanted to "make everyone pay". She did nothing with this information because, as she put it, she "... didn't believe him." The appellant was in criminal court to support J.B. when he pleaded guilty to the charges.

[45] The concerns about the appellant's parenting were not limited to her relationship with J.B. Simply put, if the problem was not with J.B., it could be with somebody else. As Gary Newfeld, the therapist, said: "If not [J.B.], it's likely to be somebody else in a similar kind of relationship. ...That is the pattern that is worrying." Mr. Bryson, the psychologist, put it this way in his testimony:

> **Q.** Generally, throughout your reports and throughout your testimony, would you agree that your major concern in this situation is [J.B.] and his impact on the entire situation?
>
> **A.** No. My major concern would be the consistency of treatment for [M.]. I think the unpredictable behaviour of [J.B.] is part of what creates an unstable environment for [M.] and I think that [the appellant]'s inability to follow through with having a healthy relationship with a partner and to develop the insight and awareness necessary to make prolonged changes for her son, the ongoing use of psycho-active substances by both, that caused me concerns about their parenting. But, ultimately, what I'm called to do in assessment is to make recommendations in the best interest of the child.
>
> . . .
>
> **Q.** And **assuming that [J.B.] is completely out of the picture, for the sake of this question, does that ... how would that affect your opinion about whether [the appellant] would be able to affect these changes?**
>
> **A. It wouldn't.**
>
> **Q.** So, in other words, even with [J.B.] still around, you think she could make the changes?
>
> **A.** No. I'm sorry. The way I understood the question was I'd be concerned about her parenting, particularly her personality dynamics. **Whether she's in a relationship with [J.B.] or not, there's a fairly high risk that she hasn't obtained the treatment that I think would be necessary to change her . . . the way of choosing partners and relating in relationships, that she'd likely seek out future relationships that would potentially pose risk to [M.]**. (Emphasis added)

[46] Mr. Bryson's evidence was that in order for the child to develop appropriately, he required consistent parenting in a stable environment. His opinion was that the appellant could not at that time provide these things and that there was a very low likelihood of her being able to do so in the time frames available under the **CFSA**. In fact, his view was that the therapy necessary to allow the appellant to do so would be a lengthy process requiring her real commitment.

[47] A family skills worker, Ms. Nichols, had been involved with the appellant since February of 2006 and, since May, had coached her on parenting skills, day to day scheduling, activities and so forth. The worker testified that the child displayed aggressive behaviour, temper tantrums and hit the appellant. She indicated that this behaviour began when the access to the appellant became unsupervised and she had not seen that sort of behaviour during supervised access visits. The worker expressed concerns that the appellant was not following through with what she was being taught.

[48] The child was returned to the appellant's care following a transition order dated November 21, 2006. Within two weeks, she had asked for respite. Respite arrangements were agreed to under which, on December 5, 2006, the child went to stay with his grandmother. It is true, as the appellant points out, there is no evidence that the potential consequences of this request were explained to her. However, the evidence does support the conclusion that the appellant very much needed respite even though the child had been back in her care for only a short time.

[49] The appellant then did not contact the agency and made no arrangements for the return of the child to her. On December 8, she left a message that she could not make her scheduled therapist appointment. J.B was found to be at her residence on December 7, contrary to the terms of the court's transition order. It is difficult to accept her explanation for this which she offered at trial and there is no indication that the judge did. In her trial evidence, the appellant confirmed that J.B. had stayed overnight on December 6 and, according to the appellant's witness, Ms. Durley, he had been with the appellant around the time she had requested the respite. J.B. continued to stay with the appellant after the child was taken back into care and, shortly after, she refused to comply with the drug sample collection required in the court order.

[50] There was extensive evidence from social worker Sean O'Neil. His testimony was that the child had reacted very negatively over the couple of months preceding

the hearing. He said that the child appeared to be suffering. When he was returned to the same foster care in which he had been previously, the foster family had requested respite because of the deterioration in the child's behaviour. He observed that once access was reduced to once a week under supervision and stability was re-established, those behaviours were no longer present. He also testified that the appellant had remained in contact with J.B. throughout and that based on the agency's experience over the preceding year, he thought the appellant had no ability to protect her son from J.B. Further, he testified that since the reapprehension, the appellant did not want any support services whatsoever unless there was a guarantee that she would get her child back, that she refused to participate in a parenting program and had had no contact with the agency. His evidence was that the appellant had no insight as to why the child was in care.

[51] The appellant testified to her love for her son and her wish to care for him. She indicated that she now realized the importance of protecting her son from J.B. and felt she could do so. She conceded however, that she had spoken with J.B. as recently as the preceding evening. She knew that he was not in Alberta, as had been represented to the court and that he was in the area on weekends. She admitted that if the child were returned to her, he would be close to a home that J.B. visited frequently. She indicated a desire to return to some of the programming which she had discontinued but did not outline any steps she had taken towards doing so.

2. The judge's decision with respect to the ongoing need for protective services:

[52] The judge was clearly alive to the requirement for him to determine whether the child remained in need of protective services. He made a clear finding in this regard at paragraph 7 of his reasons where he indicates that the agency had met its burden to show "throughout the proceeding" that the child remained in need of protective services under s. 22(2) of the **CFSA**. (Emphasis added)

[53] The judge's reasons reflect that he essentially was looking for positive change in the appellant's ability to parent the child. This was the right approach given the number and the recency of the findings that the child continued to be in need of protective services. As noted, there had been several such findings, all with the appellant's consent and none challenged in any way. The appellant was represented by counsel throughout. In addition, the transition orders specified, with the appellant's consent, that her non-compliance with the orders would be grounds for the agency to take the child back into care. After the second attempted

transition failed, the child was again taken into care and a further temporary care and custody order was made. At that time, the appellant consented to the order, including a provision that the Court found there to be reasonable and probable grounds to believe that the child was at substantial risk of harm pursuant to s. 22(2) of the **CFSA**. As discussed earlier, the judge was not only entitled, but obliged, to consider that these orders were correct at the time they had been made.

[54] The judge reviewed the services which had been provided and which had yielded, at best, mixed results. He concluded, based on the evidence, that the situation had, if anything, got worse since those other findings had been made. Two attempts to return her son to her had failed because of the appellant's conduct. She showed no ability to protect him from the dangerous and chemically-dependent J.B.

[55] J.B.'s conduct and the risk he posed to the child were much on the judge's mind. But he was careful to direct his attention to the appellant's own ability to parent. His conclusion, which is strongly supported by the evidence, was this:

> [10] ... As she testifies today, she considers her relationship with [J.B.] is over and she certainly acknowledges that it is not a healthy or appropriate relationship. I believe she is sincere in stating that. I have more doubt as to whether or not she yet has the skills to make that a reality. I think the nature of the issue, as I tried to [elicit] from Mr. Newfeld, the dependency issue, is that simply removing [J.B.] doesn't solve the problems for the longer term. That [J.B.] not get replaced by somebody else in a similar kind of situation is the challenge that [the appellant] faces. I think she's recognizing it. I think the therapy process to deal with it and overcome it is a long term issue. Certainly, it can be done but I don't think we are there yet.
>
> [11] This case is really about [the appellant]'s struggle to get herself independent and stable outside of the dependency relationship and it is really a two prong thing. There is the breaking the relationship with [J.B.] and the second, which is her own issue and she has to reach a point where she can demonstrate her ability to function outside of dependency relationships. Dependency relationships tend to be, again indicated in the evidence, tend to be situations that abuse the dependent party and what I understand from the evidence about her history, both in her family of origin and in the relationship with [J.B.] is that she indeed has been abused.
>
> . . .

> [14] ... Mr. Bryson was asked directly whether or not he thought the issues could be addressed through services in the roughly two or three weeks between now and then and his evidence was that they could not.
>
> . . .
>
> [18] ... it is my job to make a decision and while the court, I think always sympathizes with the circumstances of parents and supports their efforts to overcome their adversity, again I have to focus on the child.
>
> [19] It is not whether or not parents can be good enough sometime[s]. I think [the appellant] may be good enough with time, therapy and a commitment to change. But again, the test that I'm told by my Court of Appeal to apply is whether or not the level of care is good enough today. The legislation directs me to make that decision now and unless there is a reasonable possibility of a turn this around say within a week or two, then the time required for the parents to deal with their issues is beyond what is in the best interests of the child. I believe that the insight and therapy necessary to make the required changes requires a lot more time [than] is available to us in this case.
>
> [20] In this case the evidence is that things have perhaps actually deteriorated over the past month or so. Certainly there has been non-compliance with services. I think some of that may be a level of frustration, but even without that, the psychological work that is necessary to be available to provide a stable and nurturing environment for M., that's not going to happen before March 7th.
>
> [21] The plan itself put forward [i.e. by the appellant] is pretty rough, to put it bluntly. She is in the process of moving and hopefully that's better. What is the plan with respect to household finances and other support services. There is simply not a viable plan in the short term that is available to us.

[56] The numerous earlier findings, coupled with the evidence at the disposition hearing and particularly in light of the evidence that the appellant's ability to parent had, if anything, deteriorated since the earlier findings, amply justify the judge's conclusion that the child remained at risk of emotional harm which the appellant sadly could or would not address or remedy. The judge, in my view, not only did not err in finding the child in continuing need of protective services; he made the only decision reasonably available to him on this record.

[57] The appellant says that the judge erred because he did not understand or ignored the evidence about her ability and willingness to care for her son appropriately and the bond between them. Respectfully, I disagree. The appellant's

affection and willingness to care for her son are commendable. It was her lack of ability to protect him from the substantial risk of emotional harm which he faced in her care that was in issue. Both attempts to return the child to the appellant failed because of her conduct. She had no viable plan to care for the child or to protect him from J.B. The judge did not misunderstand or overlook the relevant evidence. In my view, he drew the only reasonable conclusions one could draw from it.

C. Second Issue: Was the permanent care order justified?

[58] The appellant submits that the judge erred in directing his attention to her difficulties rather than to the question of whether it had been shown that her son needed to be removed from her care. Respectfully, the two cannot be so neatly separated. To have ignored the appellant's difficulties would have been to assume away one of the problems which led to the child being in care in the first place.

[59] The judge addressed the key consideration of whether less intrusive alternatives were available. The record makes clear that the services which had been provided in the past had not resulted in the appellant being able to appropriately parent the child. No further services were proposed other than the appellant indicating she would like to go back to her own therapy and return to the Kids First program which she had stopped attending when her son was returned to her. There was no evidence that she had taken any concrete steps in this regard. There was evidence that the appellant had refused all further services after the child had been reapprehended. As the judge pointed out, there was no alternative family placement before him to be considered.

[60] The judge also addressed the requirement that a permanent care order must not be made 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.

[61] The appellant's plan for the child was that he should be returned to her. This plan did not do much to address the obvious risk posed by J.B. The appellant intended to move into a trailer located about a 10 minute walk from her father's home and about a two minute drive from her friend, Ms. Durley. The evidence was that J.B. was a friend of Ms. Durley's husband. Ms. Durley gave evidence that J.B. had been at her residence the weekend before the hearing working on cars with her husband. Although J.B.'s lawyer had written to the court advising that J.B. was going to Alberta, the evidence at the disposition hearing was that he was, in fact,

working in Halifax and staying on weekends at a home which was about five minutes from Ms. Durley and in the same area as the appellant's proposed residence. The appellant testified that she "didn't know" if J.B. was living in Halifax, but said that he was going to pay for her rent. She admitted that he had called at the end of the first court day of the disposition hearing to see how things had gone and that she had spoken to him, although her evidence also was that they were not speaking to each other. Her evidence was that she had not been with him since January, but she testified that she knew that he was living on the weekends in the same area that she proposed to live with her son.

[62] The judge's reference to this plan as "pretty rough" was a kindly understatement. As he said, "[t]here is simply not a viable plan in the short term that is available to us." (para. 21 of reasons) This conclusion, on this record, was, in my view, inevitable.

[63] As noted earlier, the judge's decision to order permanent care must be reviewed in light of the statutory constraints. Given the time limits under the statute, the judge could either have dismissed the proceeding or made a permanent care order. There was no more time to wait and see if the appellant could become an adequate parent in the future. At the disposition hearing, the appellant seemed to have little insight into the depth of her difficulties. She continued to be incapable of extricating herself from her dependence on J.B even though she recognized that her son's best interests required it. She apparently had no interest in working further with the agency unless the return of her son was guaranteed. She had no viable plan for his care. All of this left the judge out of time and out of options.

[64] The judge thought that there was perhaps hope in the longer term. However, he found the required changes would take a lot more time than was available. This was clearly right given the time limits imposed by the **CFSA** and the evidence before him about what would be required to address the risks to the child posed by the appellant's parenting.

[65] In my view, the record amply supports the judge's conclusion that the permanent care order was required in the child's best interests.

IV. DISPOSITION

[66] I share the judge's obvious sympathy for the appellant. However, I am persuaded that he made no reviewable error in making the permanent care order. As announced at the hearing, the appeal is dismissed.

Cromwell, J.A.

Concurred in:

Oland, J.A.

Hamilton, J.A.