NOVA SCOTIA COURT OF APPEAL
Citation: ***E.U. v. Nova Scotia (Community Services)***, 2015 NSCA 61

Date: 20150617
Docket: CA 436141
Registry: Halifax

Between:

E. U.

Appellant

v.

The Minister of Community Services

Respondent

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

Judges:	MacDonald, C.J.N.S., Scanlan and Bourgeois JJ.A.
Appeal Heard:	June 2, 2015, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs, per reasons for judgment of Bourgeois, J.A.; MacDonald, C.J.N.S. and Scanlan, J.A. concurring
Counsel:	Coline Morrow, for the appellant Danielle Morrison, for the respondent

Restriction on publication: Pursuant to s. 94(1) *Children and Family Services Act,* S.N.S. 1990, c. 5.

<u>PUBLISHERS OF THIS CASE PLEASE TAKE NOTE</u> THAT s. 94(1) OF THE *<u>CHILDREN AND FAMILY SERVICES ACT</u>* 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:

[1] This is an appeal from an order of the Honourable Justice Kenneth Haley, placing an 22 month old girl in the permanent care and custody of the Minister of Community Services ("the Minister"), pursuant to the *Children and Family Services Act*, S.N.S. 1990, c. 5 ("the *Act*"). That order resulted from a contested disposition hearing, which spanned over nine days, and included the evidence of 14 witnesses. The order documented the conclusions reached by Justice Haley in a written decision rendered January 6, 2015 (2015 NSSC 4).

[2] The appellant now comes to this Court seeking to have the permanent care and custody order set aside, and the child returned to her care. She argues the trial judge made fatal errors in his assessment and interpretation of the evidence, resulting in an improper finding that the child was in need of protective services, and as such, the permanent care order was not in her best interests.

BACKGROUND

[3] This appeal concerns the child [A.J.U.] born March *, 2013. The appellant is the child's mother. The child's father died shortly after her birth. Tragically, the appellant awoke one morning to find her husband dead beside her in bed. His death was subsequently found to be a result of a drug overdose. Both parents had a lengthy history of drug abuse.

[4] The appellant is 26 years old. The record before this Court indicates that she has not had an easy life. The appellant was born and lived most of her life in Ontario. As a child there was much upheaval in her family of origin, including addiction and neglect issues. She was then reportedly sexually abused by a male relative while in the care of her aunt. Sadly, the appellant's life continued to spiral downwards, with her becoming addicted to street drugs, and involved in prostitution to obtain the funds to support her drug habit. After finding herself homeless in Toronto, the appellant and her husband moved to Nova Scotia in 2012, hoping his family in this province could be a source of support for them. As matters turned out, they were not.

[5] The appellant is no stranger to the involvement of child protection authorities. The record discloses that A.J.U., the subject of these proceedings, is

the appellant's fourth child. Child protection authorities in Ontario became involved with the appellant in 2007. The appellant's three older children have all been permanently removed from her care. In the midst of the current proceedings, the appellant gave birth to her fifth child in September, 2014. Like his sister A.J.U., he was apprehended at birth. Proceedings in relation to the youngest child are ongoing, and not the subject of this appeal.

[6] The Minister commenced proceedings in relation to A.J.U. under the *Act* by way of a "Notice of Child Protection Application" filed in the Supreme Court (Family Division) in March, 2013. That application was supported by an affidavit sworn by Ainslie Kehoe, a social worker in the employ of the Minister. Both the application and supporting affidavit highlighted that the Minister's concerns included the appellant's significant drug use, the existence of domestic violence in the marital relationship, and the status of her mental health.

[7] These concerns were ultimately reflected in the various orders rendered in the proceeding. As early as the order rendered April 2, 2013 concluding the interim hearing, the appellant was directed to co-operate with drug testing, attend Addiction Services for assessment and counseling, and to engage in a mental health assessment and follow-up with counselling and treatment resulting therefrom. The appellant was represented by Ms. Morrow at the April 2nd hearing, and at all subsequent court appearances, including the contested final disposition hearing.

[8] The above terms continued in all subsequent orders rendered in the proceeding, including the "Protection Order" rendered May 7, 2013 in which A.J.U. was found to be in need of protective services, and in five further orders arising from disposition hearings held July 19, 2013, October 2, 2013, November 19, 2013, December 18, 2013 and April 14, 2014.

[9] Although not contained in the interim order of April 2, 2013, nor the Protection Order, all subsequent orders added a requirement that the appellant "engage with Transition House Outreach Program for education regarding the effects of domestic violence, and for ongoing support and counselling".

[10] In July 2013, the appellant returned to Ontario for several months. During this timeframe, she did not engage in any services. She acknowledged using marijuana during this timeframe. Drug testing also showed the use of crack cocaine during this time period. The appellant explained that she had become

involved in an abusive relationship while in Ontario, and that individual would smoke crack while she slept, and he would blow the smoke in her face. She terminated that relationship, and while in Ontario, commenced a new one with her current partner, Mr. H.. Within weeks of commencing their relationship, the appellant and Mr. H. decided to move together to Nova Scotia.

[11] She returned to Nova Scotia in December, 2013. The record shows the appellant began engaging in services in January of 2014. It is worthy of note at this juncture, that the maximum duration of all disposition orders in relation to a child of A.J.U's age, is 12 months (s. 45(1)(a)). Almost half of that time frame passed without the appellant engaging in the services repeatedly ordered by the court.

[12] The final disposition hearing commenced on July 22, 2014, and as noted earlier, was continued over nine days. The Minister took the view that the child remained in need of protective services. Notwithstanding the appellant's recent efforts, the Minister submitted her mental health concerns remained unresolved, and her involvement with other services had not served to adequately reduce the risk of harm to the child should she be placed in the appellant's care.

[13] The appellant strenuously challenged the Minister's position. She submitted that she had fully complied with all requests made to her by the Minister, and by doing so, had eliminated, or in the alternative, had significantly reduced any risk to the child. She argued that it was in the best interests of the child, that she be returned to her care.

Decision under appeal

[14] The trial judge's written decision encompasses 235 paragraphs. He comprehensively reviewed the procedural background, and undertook a thorough review of the evidence presented by both the Minister and the appellant. After considering the legislative framework, he made findings of fact and reached his conclusions.

[15] With respect to the legislative framework, the trial judge was keenly aware that given the statutory timeframe for all disposition orders had expired, he was left with very limited options. He instructed himself as follows:

> [187] According to the legislation, which I must follow, the Court has only two (2) stark options available at this time:
>
> (1) order permanent care, or
>
> (2) dismiss the proceeding and return the children (*sic*) to the Respondent, E.U.
>
> [188] There is no middle ground. As noted by the Nova Scotia Court of Appeal in **G.S. v. Nova Scotia (Minister of Community Services)**, [2006] N.S.J. No. 52 (NSCA) at paragraph 20:
>
> **If the children are still in need of protective services the matter cannot be dismissed.**
>
> [189] The law is clear that should a trial judge conclude at a Disposition Hearing or Disposition Review Hearing in relation to a Temporary Care Order, that circumstances are unlikely to change, the judge has no option …but to order permanent care. **Nova Scotia (Minister of Community Services) v. L.L.P.**, [2003] N.S.J. No. 1 (NSCA).
>
> [190] The need for protection may arise from the existence or absence of the circumstances that triggered the first order for protection, or from circumstances which have arisen since that time **G.S. v. Nova Scotia (Minister of Community Services)**, [2006] N.S.J. No.52 (NSCA).
>
> [191] It is not the Court's function to retry the original protection finding, but rather the Court must determine whether or not the child continues to be in need of protective services. (emphasis in original)

[16] The appellant has not questioned the correctness of the trial judge's statement of the law, or his stated mandate. Nor do I. As only his conclusion relating to whether the child remained in need of protective services has been challenged before this Court, I will confine my review accordingly.

[17] Although concerned with respect to the appellant's drug use and relationship, it is clear from the trial judge's decision, that it was the status of her mental health which was pivotal to the outcome. It is also apparent that the evidence of one witness, Dr. Neil Christians, was central to the trial judge's conclusions. Some key passages from the decision are illustrative of the above:

> [195] The evidence with regard to the Respondent's past drug use problem is clear, convincing and cogent. Likewise, the evidence regarding E.U.'s past relationships and ongoing mental health issues is clear, convincing and cogent.
>
> [196] Although the Respondent appears to be increasingly gaining insight into her past and present issues, she currently lacks the necessary insight into how her

> history of drug abuse and domestic violence, along with her, as yet unresolved, mental health issues impact upon her ability to care for her daughter without risk.

And further:

> [202] The Respondent's recent commitment and focus to be a mother to her child cannot go unnoticed. Her progress in this regard has been excellent. The Court fully acknowledges and respects the Respondent's efforts in this regard.
>
> [203] Simply put, however, it is too little, too late. The evidence is clear, convincing and cogent that the Respondent is not yet ready to undertake the important and challenging task of parenting. There are too many unresolved issues for her yet to address and I accept Dr. Christians' evidence in this regard.

[18] The trial judge then proceeds to quote extensively from the post-hearing brief filed by the Minister, relating to the risk posed to A.J.U. by virtue of the appellant's mental health:

> [204] The Minister submits at page 33 of its Brief, as follows:
>
> **The fundamental element in Dr. Christian's (*sic*) testimony was that it was going to take a great deal more time to even fully diagnose Ms. U.'s mental health functioning, it was also going to take a great deal more time to stabilize with medication, and then to treat those issues which are not conducive to stabilization through medication, through other therapy.**
>
> **Dr. Christian (*sic*) in his report and in his testimony, referenced "borderline traits" and the broader classification of "Cluster B Personality traits" which includes borderline personality traits. He could not rule out Borderline Personality. It appears that Ms. U. never disclosed to him that she had a prior diagnosis of Borderline Personality Disorder from Ontario in 2010, although she admitted this in cross-examination. Dr. Christians provided the DSM 5 criteria for Borderline Personality Disorder.**
>
> > **So the characteristics of a borderline personality is it's a pervasive pattern of instability in interpersonal relationships. So it's relationships. It's image. Ah, self...these, ah, image as well as impulsivity. Um and then it needs to be five of the following, okay. Um, a fear of being abandoned. Ah, a pattern of unstable relationships. Um, the emptiness or identity issue that I mentioned. Impulsivity in arears (*sic*) of, um, substances, reckless driving, binge eating. Ah, recurrent suicidal behaviour, um, effective instability in either words or**

> **mood swings. Ah, feelings of emptiness. Inappropriate anger or difficulty controlling anger, and um, paranoia, ah, or which is stress related.**
>
> **With or without a diagnosis of Borderline Personality Disorder, these aspects of Ms. U.'s conduct result in a risk to a child in her care.**
>
> **…**

[205] The Minister continues at page 40 of its' written Submissions:

> **The Applicant submits that Ms. U. continues to engage in a chaotic lifestyle, exhibits a lack of impulse control and some manipulative behaviour. With the continuation of Ms. U.'s mental health concerns, partially undiagnosed and almost completely untreated, there continues to be a risk to the child, A.U., and she continues to be a child in need of protective services.** (bolded emphasis placed by trial judge)

[206] The Court agrees with the Minister's above submission noting that no formal diagnosis of the Respondent, as it relates to borderline personality disorder, has been made to date.

[19] The trial judge concludes:

> [215] Ms. U. still has a host of mental health issues, which represent a risk to a child in her care and have not been meaningfully addressed. The evidence is that even addressing the outstanding mental health concerns through medication will require an additional three to six (3–6) months, assuming E.U. is compliant.
>
> [216] While the Respondent has made great strides in addressing her addiction issues and completed programming relating to domestic violence, there continues to be issues of concern.
>
> [217] The outstanding protection concerns relating to mental health remain unchanged, and until the mental health concerns are addressed, relapse into addiction, and domestic violence remains a palpable risk.
>
> [218] I find that E.U. is not capable of assuming the demanding role of parenting at this time. The child, A.U., remains in need of protective services. It is not safe to return A.U. to the Respondent's care.

ISSUES

[20] In her Notice of Appeal, the appellant put forward the following grounds of appeal:

1. That the learned trial judge erred in fact in failing to give proper consideration to Ms. U.'s compliance with the services requested by the Minister;
2. That the learned trial judge erred in fact in failing to give proper consideration to the substantial change in Ms. U.'s progress in her parenting skills;
3. That the learned trial judge erred in not giving sufficient weight to the evidence of the access supervisor who observed Ms. U. as a caregiver;
4. That the learned trial judge erred in law in not allowing all portions of Dr. Christians' reports to be part of the evidence in the hearing;
5. That the learned trial judge erred in accepting the submission of the Minister of Community Services in his decision and not the actual evidence of Dr. Christians on the issue of Ms. U.'s mental health, and
6. That the learned trial judge erred in law in not giving sufficient weight to Dr. Christians' evidence that the appellant was not a risk of harm to herself or others.

[21] In her factum, the appellant re-formulated the alleged errors made by the trial judge, asking:

1. Did the learned trial judge make a palpable and overriding error in his findings and facts in relation to the evidence of Dr. Christians?
2. Did the learned trial judge err in accepting the Minister's submission, said submission containing alleged facts and argument, fail to give sufficient weight to the testimony of Ms. Elgebeily in relation to Ms. U.'s lifestyle and commitment to being drug free and being a good parent? and
3. Did the learned trial judge err in finding what was in the best interest of the child to be placed in permanent care?

[22] In my view, all of the appellant's complaints can be synthesized into one question:

Did the trial judge err in finding the child A.J.U. remained in need of protective services?

STANDARD OF REVIEW

[23] The appropriate standard of review is a set out by this Court in **Mi'kmaw Family and Children's Services of Nova Scotia v. H.O.**, 2013 NSCA 141. There, Saunders, J.A. for the Court wrote:

> [26] Questions of law are assessed on a standard of correctness. Questions of fact, or inferences drawn from fact, or questions of mixed law and fact are reviewed on a standard of palpable and overriding error. As Justice Bateman observed in *Hendrickson v. Hendrickson*, 2005 NSCA 67 at ¶6:
>
> > [6] ... Findings of fact and inferences from facts are immune from review save for palpable and overriding error. Questions of law are subject to a standard of correctness. A question of mixed fact and law involves the application of a legal standard to a set of facts and is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law, subject to a standard of correctness. ...
>
> [27] Experienced trial judges who see and hear the witnesses have a distinct advantage in applying the appropriate legislation to the facts before them and deciding which particular outcome will better achieve and protect the best interests of the children. That is why deference is paid when their rulings and decisions become the subject of appellate review. Justice Cromwell put it this way in *Children's Aid Society of Halifax v. S.G.* (2001), 193 N.S.R. (2d) 273 (C.A.):
>
> > [4] In approaching the appeal, it is essential to bear in mind the role of this Court on appeal as compared to the role of the trial judge. The role of this Court is to determine whether there was any error on the part of the trial judge, not to review the written record and substitute our view for hers. As has been said many times, the trial judge's decision in a child protection matter should not be set aside on appeal unless a wrong principle of law has been applied or there has been a palpable and overriding error in the appreciation of the evidence: see **Family and Children Services of Kings County v. B.D.** (1999), 177 N.S.R. (2d) 169 at ss. 24. The overriding concern is that the legislation must be applied in accordance with the best interests of the children. This is a multi-faceted endeavour which the trial judge is in a much better position than this Court to undertake. As Chipman, J.A. said in **Family and Children Services of Kings County v. D.R. et al.** (1992), 118 N.S.R. (2d) 1, the trial judge is "... best suited to strike the delicate balance between competing claims to the best interests of the child."

[24] In my view, determining whether a child is "in need of protective services" is an issue of mixed law and fact. A trial judge must correctly identify the law which defines that term, however, once that is done, findings of fact, will govern whether a child falls within that definition. Challenges to those factual findings will be reviewed on a "palpable and overriding error" standard.

ANALYSIS

[25] The appellant puts forward a number of alleged errors made by the trial judge which she says individually or cumulatively, constitute palpable and overriding error justifying appellate intervention. Specifically, it is alleged the trial judge both misapprehended and ignored the evidence of Dr. Christians as to the status of the appellant's mental health; the trial judge improperly accepted submissions of the Minister which had no evidentiary basis; the trial judge placed insufficient weight on the evidence relating to the appellant's positive efforts; and the trial judge erred in finding that the appellant's mental health constituted a risk to the child, in the absence of evidence. I will address each of these concerns in turn.

Did the trial judge err in his assessment of the evidence relating to the appellant's mental health?

[26] The appellant challenges the trial judge's findings regarding the status of her mental health, and its resulting impact on the risk to A.J.U. on a number of fronts. All of her concerns are rooted in the evidence of Dr. Christians.

[27] The appellant says Dr. Christians' evidence did not support the conclusions reached by the trial judge. She asserts the trial judge erred by accepting the Minister's inaccurate description of Dr. Christians' evidence, as opposed to what was contained in his testimony. She asserts the trial judge further ignored the evidence offered by Dr. Christians which supported her assertion that she was capable of parenting A.J.U.. Specifically, that she was not suicidal, that she would be compliant with ongoing treatment, and that she did not pose a risk of harm to herself or others. The appellant submits the trial judge erred by refusing to consider a statement contained in Dr. Christians' written report of October 6, 2014 in which he states "[i]t's acceptable to look after children despite the element of having anxiety, moderate depression but reasonably good support".

[28] With respect, I do not share the appellant's view. A review of the record provides ample evidentiary support for the position advanced by the Minister, and the conclusions reached by the trial judge relating to the appellant's mental health. Events leading to referrals being made to Dr. Christians in relation to the appellant, as well as her follow up contacts with mental health services, were contained in the chart of the Cape Breton District Health Authority. Those records disclose:

- On July 25, 2012, the appellant was brought to the hospital by police and hospitalized pursuant to the *Involuntary Psychiatric Treatment Act*, due to her making threats of self-harm. Upon being initially discharged, the appellant ran to the shoreline, again threatening to end her life. Eventually the appellant was released, denying any suicidal ideation, with a referral being made to mental health services;
- A letter dated August 1, 2012 from Mental Health Services to the appellant notes she failed to attend her scheduled appointment;
- On March 20, 2013, the appellant attended at the Emergency Department claiming to be "overwhelmed" with issues in her life including the involvement of child welfare, the removal of her child from her care, and lack of family support. After being assessed, a referral was made to Dr. Christians noting:

  > Client presented due to being overwhelmed with issues in her life. . . She is a past abuser of cocaine-crack. Quit Dec 2012. She has post partum depression. Past suicidal attempts. Hanging, cut wrist, overdose – did not come to the hospital for these.

- In response to the above referral, Dr. Christians met with the appellant on April 4, 5, 18, and 26, 2013;
- The file material discloses the appellant did not attend for further appointments scheduled for May 10 and 28, 2013;
- A Mental Health referral was received from Addiction Services on June 4, 2013. The reason for the referral was noted as follows:

  > Client has expressed suicide ideations . . .Client should be assessed as soon as possible to determine what her mental health needs are.

- The appellant was seen next by Mental Health Services on June 2, 2014, being an appointment with Dr. Christians. This was as a result of a referral from her family physician, made in January, 2014.

[29] Following her re-involvement with Dr. Christians in June, 2014, the appellant's counsel requested a report for the purpose of the Court proceedings. Dr. Christians was questioned extensively about that report, dated July 22, 2014, as well as a number of other written consultation reports contained within the Mental Health Services file materials, including those dated July 7, 2014, September 16, 2014 and October 6, 2014.

[30] It is helpful to highlight some of the contents of Dr. Christians' written reports introduced into evidence. The "Ongoing Contact Notes" dated July 7, 2014 state:

> [E.] came with her common-law of almost a year. She has to go to court within the next two to three weeks over the issue of custody of her child, it's now up for adoption. *Unfortunately we don't have the whole picture*, there is an issue of substances. She does have significant mood swings, appears when she is down, appears when she is agitated. *There is Cyclothymia although there is Cluster B Personality Traits*. She reports that she is off substances. She is now on the Prozac and is due in three month's time.
>
> She generally comes over as pleasant, interactive, *struggling with the issue of mood disorder but we need to address it more intensely later on*. Unfortunately she is pregnant and we will have to monitor the process further.
>
> The attorney, is requesting a report for court in the next two to three weeks. Contact was made with her telephonically, *I explained to her that I will only be able to provide a preliminary report as we are still in the process of treatment and assessment . . .I cannot comment on parental capacity as this requires a special assessment*. … (emphasis added)

[31] As noted above, Dr. Christians provided a written report dated July 22, 2014 at the request of Ms. Morrow. It provides a significant amount of information relating to the appellant's relevant background, current mental health status and prognosis. With respect to the appellant's "Background History", Dr. Christians noted:

> Her childhood was not pleasant. Apparently there were 14 children and her parents were separated when she was very young. She found her grandfather dead when she was very young. She was sexually molested by her cousin. Apparently her brother was murdered. She was involved in an abusive relationship previously. She has always been trying to find security. …

[32] With respect to her current mental health, Dr. Christians opined:

> She does, at the present time, *have features of Major Depression of a moderate nature and is described as 50% good days and 50% down days.* There are periods of feeling worthless and useless. She reports loss of interest in pleasurable activities and feels tired and exhausted. She also reports problems with concentration and focus, as well as feeling agitated but no suicidal thoughts. *She has mood swings but haven't determined the type of mood disorder. There is no clear picture of Hypomania but we will need further collateral.*
>
> *She also has features of Generalized Anxiety* and always tends to worry excessively and sometimes out of what would be regarded as so called "normal". She is always on the edge and has difficulty trying to control the worries. She worries too much about different things. She has problems relaxing. She has been consistent almost from adolescence. *There is also Social Anxiety*; when she has to perform, especially in front of other people, and when she comes into a room she feels people are watching her. This is of a moderate degree. *There are features of Attention Deficit, moderate, hyperactivity.* In other words, she has difficulty with sometimes trying to complete projects and becomes easily distracted. She recognizes that she does forget appointments and obligations. She finds it difficult to sit still for very long. She also recognizes that she makes careless mistakes, misplaces things and sometime interrupts other people; all the features of the condition of a moderate degree. *There is also emptiness and some features of Borderline Personality Traits; issues of identity and sometimes mood swings and irritability, as well as the fear of being alone and fears of rejection*. (emphasis added)

[33] In concluding his report, Dr. Christians put forward the following "Opinions and Recommendations":

> *This lady has significant undiagnosed and untreated psychiatric conditions*. The undiagnosed condition would be the type of depression, whether it is Major Depression, Cyclothymia or Bipolar. This will be addressed by collecting information over a period of time and watching her mood disorder. *She is presently depressed and is on Prozac (low dose) in the meanwhile just to "tie her over" during the pregnancy. She has untreated Attention Deficit, Hyperactivity, Generalized Anxiety, Social Anxiety, as well as Cluster B Personality Traits.*
>
> In other words, *she has not had proper adequate psychiatric treatment as the present moment*. The previous visits were usually crisis events.
>
> …
>
> *I cannot comment on parental capacity, as this is outside my area of expertise*.
>
> I would recommend that she be followed up regularly by psychiatry to address the conditions as described above. The first issue is "to tie her over" with a low dose of medication without causing any harm to the unborn fetus. Thereafter, it would

> be to identify the type of mood disorder, treating her Attention Deficit with stimulants, as well as the anxiety disorders. These conditions can to (*sic*) be properly treated at this present age.
>
> The issue with Borderline Traits and emotional issues of the past would benefit later, once matters have stabilized from Psychodynamic Therapy and Cognitive Behavioral Therapy. There is a form of Dialectical Therapy which is used for Borderline Clients and is generally successful.
>
> Undiagnosed psychiatric conditions such as Attention Deficit, Mood Disorder; especially mood swings and possibly Cyclothymia, Anxiety can result in issues of compliance to medical treatment. For instance, Attention Deficit is well known for people having problems with obligations and keeping appointments, etc.. By treating the conditions there is less risky behavior. (emphasis added)

[34] Dr. Christians continued to meet with the appellant. In his "Ongoing Contact Notes" dated August 18, 2014 he wrote (reproduced as written):

> [E.] reports that she still has mood swings. *She is now in the present circumstances, her relationship has his own issues. He is almost very controlling, doesn't give her the element of freedom. Unfortunately he is also smoking cannabis. …*
>
> She is depressed with mood swings, with elements of Depression, that is down days, feeling worthless, useless, but no suicidal thoughts. (emphasis added)

[35] A month later, Dr. Christians notes on September 16, 2014:

> She is still connected with [R.] who is also coming for help here. He recognizes he has his own issues.
>
> …
>
> She is still depressed major. One is not sure how much is Bipolarity, Cyclothymia but will address it appropriately.

[36] Following a visit on October 6, 2014, Dr. Christians noted:

> [E.] is basically surviving fifty percent good days, fifty percent down days, she is not sleeping well, has an element of restless legs, however she tends to nap in the day. ...
>
> In view of her being reasonably contained the Prozac will remain 20 mgs once she is not severely depressed and doesn't require active intervention for her depression. She is reasonably contained in that she is supported in the relationship. …

> We therefore held off any psychiatric intervention. If she was very depressed we would discontinue all the actively involved a-typical antipsychotic treatment for the insomnia, etc. *It's acceptable to look after children despite the element of having anxiety, moderate depression but reasonably good support*. … (emphasis added)

[37] It is the comment italicized immediately above which the appellant asserts the trial judge wrongly excluded.

[38] Dr. Christians testified on October 9 and 10, 2014 and was qualified with the consent of both parties, to give expert opinion in the area of "general psychiatry". The following exchange took place between Dr. Christians and counsel for the Minister with respect to the scope of his expertise, and in particular the opinion expressed in the October 6th report:

> **Q.** So the...I'm sorry, what was the second last line you read, Doctor?
>
> **A.** Um, it is acceptable to look after children despite the element of having anxiety, moderate depression, but reasonable good support.
>
> **Q.** Now Doctor it seems to me that when you gave us your report you told us you weren't going to be speaking about her capacity to parent?
>
> **A.** That is correct.
>
> **Q.** And so that comment wouldn't be consistent with that would it?
>
> **A.** That is correct.
>
> **Q.** You said you weren't an expert in that in area and you wouldn't speak to it?
>
> **A.** That is correct.
>
> **Q.** So that statement shouldn't really be there should it, Doctor?
>
> **A.** That is correct.

[39] At trial Dr. Christians was questioned extensively with respect to the appellant's current mental health status and his plan for treatment. His *viva voce* evidence was consistent with his written reports. Particularly, he testified:

- He had diagnosed the appellant as currently displaying Major depression of a moderate degree; Generalized anxiety; Social anxiety; Attention deficit hyperactivity; Cluster B personality traits and Post-traumatic stress;

- He could neither confirm, nor rule out a diagnosis of Borderline Personality disorder, given the early stage of treatment and assessment;
- Other than prescribing a low-dose anti-depressant, the appellant's treatment had been on hold due to her pregnancy, and had continued in a holding pattern given she was breast feeding;
- With respect to a treatment plan, after the appellant finished breast feeding, the appellant would be placed on a medication regime to address her mood and anxiety issues. It was anticipated that stabilization with medication would take between three to six months, after which intensive Cognitive Behavioural and Psychodynamic therapies could start in order to assess and treat the appellant's Cluster B personality traits and historic traumas. That therapeutic process was anticipated to take a further one to two years.

[40] The trial judge found that the appellant had serious and unresolved mental health issues. The trial judge did not accept the appellant's assertion that the evidence showed that she had completed the services asked of her, and had no serious mental health difficulties. The appellant's desired interpretation of Dr. Christians' evidence is based on discrete comments, which the trial judge was entitled to weigh and assess against the totality of the evidence. I am satisfied that the trial judge had ample evidentiary basis to draw the conclusions he did.

[41] Finally, with respect to the appellant's complaint that a portion of Dr. Christians' opinion was erroneously excluded at trial, given the witness' own acknowledgement both at trial and in his reports of July 7 and 22, 2014, that assessment of parental capacity was beyond his expertise, the trial judge can hardly be faulted for not considering it. This complaint has no merit.

Did the trial judge err in accepting submissions made by the Minister, without an adequate evidentiary foundation?

[42] The appellant asserts that as opposed to assessing the evidence for himself, the trial judge accepted assertions made by the Minister, which were unsupported by the evidence. The complaint centers around the following two paragraphs of the trial judge's decision:

> [205] The Minister continues at page 40 of its' written Submissions:

> **The Applicant submits that Ms. U. continues to engage in a chaotic lifestyle, exhibits a lack of impulse control and some manipulative behaviour. With the continuation of Ms. U.'s mental health concerns, partially undiagnosed and almost completely untreated, there continues to be a risk to the child, A.U., and she continues to be a child in need of protective services.**
>
> [206] The Court agrees with the Minister's above submission noting that no formal diagnosis of the Respondent, as it relates to borderline personality disorder, has been made to date. (bolded emphasis in original)

[43] The appellant says there was no evidence upon which the trial judge could make a finding that she was engaging in a chaotic lifestyle, exhibited a lack of impulse control, or demonstrated "some" manipulative behaviour. With respect, I disagree.

[44] The trial judge had the benefit of hearing not only the *viva voce* testimony of 14 witnesses, but also had extensive documentary materials entered into evidence. He noted the appellant's own acknowledgement of her troubled past:

> [160] Under cross-examination, the Respondent acknowledged her past history of child neglect, domestic violence, drug abuse, attempted suicide and prostitution. She made no effort to condone what she did and admitted it was a mistake and that she exercised bad judgment.

[45] During the hearing before this Court, counsel for the Minister highlighted some of the evidence which she submitted, more than adequately laid the evidentiary foundation for the trial judge's characterization of the appellant and her chaotic lifestyle:

- The appellant acknowledged her long-term drug use, it being particularly heavy between 2010 and 2012, during which time she gave birth to a baby boy in Ontario. She was homeless at the time;
- That child was apprehended at birth by child protection services in Ontario, with the appellant and her husband moving to Nova Scotia shortly thereafter;
- The appellant gave birth to the child A.J.U. on March *, 2013, the evidence disclosing the baby was addicted to cocaine when born;

- The appellant's husband died of a drug overdose, and she shortly thereafter met J.M. and her husband;
- Within weeks of meeting J.M. and her husband, the appellant agreed to be a surrogate mother for the couple. A number of attempts at artificial insemination were carried out in J.M.'s basement;
- The appellant became enmeshed in a personal conflict with another friend, who had attempted suicide by overdose. The appellant became upset with this friend because she failed to give the appellant adequate recognition for saving her life. The confrontations that ensued triggered police involvement;
- The appellant asked the Minister to consider transferring the child protection matter to Ontario, and proposed a cousin as a possible family placement in that province;
- The appellant left Nova Scotia in July, 2013 before confirming that transfer was approved, advising that her reason for the move was to access family support in Ontario;
- The appellant did not access family support in Ontario, instead she obtained employment with a job she had held in the past, and where she had been involved in drug usage;
- The appellant left Nova Scotia without advising J.M. of her intention to leave;
- Shortly after arriving in Ontario, the appellant became re-involved with a former boyfriend, a known drug-user. She terminated that relationship in September, 2013, as, she explained, he was blowing crack-cocaine smoke in her face as she slept;
- The appellant then immediately commenced a relationship with G.H., and the couple decided to move to Cape Breton. In December, 2013, the appellant and G.H. moved in with J.M. and her husband;
- By January, 2014, the appellant was pregnant with her fifth child. She agreed that J.M and her husband could adopt the baby when born. J.M. continued as a source of financial and emotional support to the appellant;
- By February, 2014, the appellant was advising agency workers that she was not certain about the adoption plan, but that she had not raised her

concerns with J.M. or her husband. In the meantime, J.M. continued as a close source of support to the appellant;

- In May, 2014, the appellant reported to her Addictions Counsellor that her partner G.H. was physically and emotionally abusive towards her. She was encouraged to leave the relationship. She did not;
- In June, 2014, the appellant advised agency workers that she had decided to keep her unborn child, but that she had yet to advise J.M. that she was no longer in agreement with the plan for adoption;
- In July, 2014, the appellant advised the Minister that G.H. was being verbally abusive towards her;
- In July, 2014, the appellant advised the Minister that J.M. was pressuring her to go through with the adoption. The appellant told the Minister many negative things about J.M. including she was a "psycho" and that she regularly physically abused an elderly family member in her care;
- In August, 2014, the appellant reported to Dr. Christians that her partner G.H. was "very controlling", does not give her "freedom" and was smoking cannabis;
- At trial, the appellant testified that J.M. was a continuing source of support for her, and would be a great resource as part of her plan to parent A.J.U.. She testified that the concerning things that she had earlier reported to the Minister about J.M. were not true. When asked why she would have said such things about J.M., the appellant testified she was "overwhelmed" with her situation.

[46] Based on the evidence before the trial judge, I am unable to conclude that he made a palpable and overriding error in accepting that the appellant's lifestyle was chaotic, that she had difficulties with impulse control, and that she exhibited some manipulative behaviour.

Did the trial judge err in placing insufficient weight on the evidence relating to the positive changes made by the appellant?

[47] The evidence at the hearing supported the appellant's contention that since January, 2014, she had been engaged in services and was working hard at improving her personal circumstances. This evidence was far from lost on the trial

judge. As was referenced earlier, he specifically acknowledged the efforts at improvement and commended the appellant for them.

[48] In finding the efforts were "too little, too late", the trial judge was engaging in the "multi-faceted endeavour" of determining the best interests of the child, which absent palpable and overriding error, is entitled to deference. The trial judge was clearly aware of, and gave consideration to the evidence relating to the appellant's positive efforts. It was his obligation to consider this evidence not in a vacuum, but rather as part of the totality of evidence before him, and within the statutory framework of the *Act*. That is exactly what he did.

[49] The appellant is asking this Court to revisit the delicate balancing of evidence undertaken by the trial judge. That is not our function. The appellant has not established a palpable and overriding error in the trial judge's treatment of the evidence relating to her positive efforts, which would justify this Court's intervention.

Did the trial judge make an error when determining, in the absence of evidence, that the appellant's mental health created a risk to A.J.U.?

[50] The appellant submits that there was no evidence that the appellant's mental health would give rise to a risk of harm to the child. She submits many people with one or more mental health diagnoses effectively parent children, and that the Minister did not call evidence to establish that the appellant could not do so as well.

[51] While it is true that no witness directly testified that the appellant's mental health would pose a risk to A.J.U., I do not view that as problematic in the least. Making a determination as to whether the particular circumstances of a parent give rise to risk as defined by the *Act*, falls squarely within the mandate of the trial judge. It was his function to assess the evidence before him, make findings of fact, and then determine whether those findings gave rise to risk to the child.

[52] In the case before us, the trial judge made findings relating to the appellant's mental health, considered this within the context of the other evidence relating to the appellant's personal circumstances, and found that the child would not be safe in her care. Given the evidence before him, and the factual findings made, it was certainly open to the trial judge to reach that conclusion.

CONCLUSION

[53] With respect, the majority of the appellant's arguments invite this Court to reweigh the evidence. That is not our function. I am far from satisfied that the trial judge committed any error which would justify appellate intervention.

[54] Given the appellant's traumatic history and apparent genuine attempts to improve her situation, it is not difficult to feel empathy for her. When the statutory clock ran out, A.J.U. was still in need of protective services. This left only one option, despite the appellant's commendable efforts. Hopefully she will continue with her positive pursuits, to improve herself and her circumstances.

[55] I would dismiss the appeal, without costs.

Bourgeois, J.A.

Concurred in:

MacDonald, C.J.N.S.

Scanlan, J.A.