NOVA SCOTIA COURT OF APPEAL

Citation: ***H.A.N. v. Nova Scotia (Community Services)***, 2013 NSCA 44

Date: 20130410
Docket: CA 408964
Registry: Halifax

Between:

H.A.N.

Appellant

v.

Minister of Community Services, C.N. and A.V.

Respondents

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

Judges:	Oland, Fichaud and Bryson, JJ.A.
Appeal Heard:	March 25, 2013, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs, per reasons of Fichaud, J.A.; Oland and Bryson, JJ.A. concurring
Counsel:	H.A.N., Appellant in Person
	Peter C. McVey, for the Respondent Minister of Community Services
	C.N., Respondent in Person, but not making representations
	A.V., Respondent in Person, not appearing

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

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:

[1] This is an appeal from an order, under the *Children and Family Services Act*, that a two and a half year old girl enter the permanent care and custody of the Minister of Community Services. After a contested protection hearing, a judge of the Family Court ruled that the child was in need of protection. Time passed, and the matter moved to a disposition hearing. The parents do not seek care, but the child's maternal grandfather submitted a plan of care. After the disposition hearing, the judge ordered that the Minister have permanent care. The grandfather appeals. He submits that his granddaughter never needed protection, there was no need for her apprehension in the first place, and he will attend to all the child's needs.

Background

[2] A.N. was born in April, 2010. Her mother, C.N., was sixteen years old at the time. A.N.'s father, E.S., does not seek custody and has played no role in this proceeding.

[3] In March, 2011, C.N. had a second daughter, K.N.. By consent, K.N. has been placed in the care of her father, A.V.. According to counsel, more recently C.N. has given birth to a son, whose custody arrangements are not in evidence.

[4] This appeal concerns A.N., now almost three years old.

[5] The appellant H.A.N. is A.N.'s grandfather, and C.N.'s father.

[6] In July and August, 2011, the Department of Community Services (which I will describe as the "Agency" or "Minister") received referrals about C.N.'s daughters. The complaints were that C.N. was "in and out of the home", leaving A.N. and K.N. with others, and that there was a domestic assault between C.N. and her then boyfriend T.M.. On August 5, 2011, H.A.N. told the Agency of his concern for his two granddaughters, and said he would seek custody.

[7] In August, 2011, the Agency's representative twice met with C.N., and informed her of the Agency's concern that C.N.'s chaotic lifestyle and her children's multiple caregivers would impair the children's attachment capacity and

emotional development. Yet, on August 30, 2011, the Agency received a further referral from A.N.'s paternal grandmother (T.S.), that C.N. had left the children in the care of others and had gone to Bridgewater for five days. Up to that time, while C.N. would come and go, the children had been left with H.A.N., or T.S., or "a few of [C.N.]'s friends", or babysitters.

[8] On August 31, 2011, after a Risk Management Conference, the Agency decided to take the children into protective care. On August 31, 2011, the Agency took A.N. and K.N. into care under s. 33(1) of the *Children and Family Services Act*, S.N.S. 1990, c. 5 ("*Act*").

[9] On September 7, 2011, Judge Comeau of the Family Court held an interim hearing under s. 39 of the *Act*. C.N. and H.A.N. attended. The judge found there were reasonable and probable grounds to believe the children needed protective services, and ordered that the Minister have interim custody.

[10] On September 12, 2011, H.A.N. informed the Agency's representative that he did not expect his daughter would get "straightened out" and "settle down any time soon", and that he wished to present his own plan for care. The next day, C.N. informed the Agency's representative that she supported her father's plan for care.

[11] On September 16, 2011, the interim hearing continued in the Family Court, this time before Judge Burrill. C.N., represented by legal counsel, acknowledged that the children needed protective services. She proposed that the children reside with H.A.N.. The Minister wished to assess this proposal. The judge adjourned the matter.

[12] On October 14, 2011, the matter returned to Judge Comeau for a conference before the protection hearing. C.N.'s counsel stated that the children should be placed with H.A.N. H.A.N.'s plan had the children in the care of C.N.'s mother, N.M., during the weekdays. Counsel for the Minister stated that the Minister had decided not to support that plan. At the later protection hearing (November 28, 2011), Ms. Jessica Kressebuch, a child protection worker with the Agency, explained the Agency's reasons for not supporting H.A.N.'s plan:

> **A.** Mr. [H.A.N.]'s plan which he presented to us on, I believe it was, October the 13th had included ... sorry. I had met with him following his presentation of that plan. And he had spoken about it because he had mentioned respite in the plan.
>
> And he had advised at that time that [C.N.]'s mother, [N.M.], would be involved in that plan. His plan was for her to come down during the weekdays. [C.N.] would stay in Yarmouth. And then on Fridays, he would return [N.M.] to Yarmouth and pick up [C.N.] for the weekend, have her there, and then return her on Sunday and pick up [N.M.] again.
>
> **MR. HARDING:** And so your concerns, then, with the other caregiver ... with [N.M.]?
>
> **A.** Yes.
>
> **Q.** And what would that be?
>
> **A.** Because of the child-protection history that we had had with her and her care of [C.N.].
>
> **Q.** And has she recently been involved in some fairly noteworthy problems, [N.M.]?
>
> **A.** There had been a history with concerns about drug abuse and alcohol abuse.

H.A.N. testified that, some years earlier, his children, including C.N., had been "apprehended a couple, two or three times" from N.M.'s care and that N.M. had been a "serious alcoholic". The Agency viewed H.A.N.'s proposal that N.M. be the weekday caregiver as contrary to the children's interests.

[13] At the hearing on October 14, 2011, Judge Comeau repeated the earlier determination that there were reasonable and probable grounds to believe that A.N. and K.N. needed protective services.

[14] On October 19, 2011, C.N. informed the Agency's representative that she intended to live with her father and that she wanted the children returned to her custody.

[15] On November 14, 2011, Judge Comeau held another pre-trial conference before the protection hearing. H.A.N. had filed an application for custody under the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160. The judge explained that the upcoming protection hearing was to deal with whether or not the children needed protective services, and that H.A.N.'s custody application would proceed after the completion of the protection hearing.

[16] On November 28, 2011, Judge Comeau conducted the protection hearing under s. 40 of the *Act*. Two Agency social workers, Ms. Kressebuch and Miranda Snow, testified, as did C.N. and H.A.N.. In her testimony, C.N. acknowledged her transient lifestyle, leaving the children with others for up to a week and a half, contacting caregivers only by text messaging, and leaving the children with H.A.N. without saying where she was going or when she would return. H.A.N. acknowledged this history, but felt that his daughter had matured and those concerns "no longer exist". H.A.N. sought dismissal of the protection proceeding and return of the children not to him, but to the custody of C.N. as primary caregiver living in H.A.N.'s home. H.A.N. testified "'she's going to be the primary caregiver, not me". The judge and H.A.N. had the following exchange:

> **THE COURT:** You've got to get her to take care of her children.
>
> **A.** Uh-huh
>
> **THE COURT:** You didn't do that in the past, did you?
>
> **A.** Yeah, and the ... yes.
>
> **THE COURT:** That's an explanation I'd like to hear.
>
> **A.** Yes, and she did.
>
> **THE COURT:** No, no, you let her take off for a week and a half and that sort of thing, didn't you? What did you do about it?
>
> **A.** She did that. I mean, you know, you call the authorities. What does the authorities tell you? They can't bring her back.
>
> **THE COURT:** And now she's ...

A. You know.

THE COURT: ... in a few days or a few weeks, she's matured that that's not going to happen again. That question was asked of you before.

A. Yes. No, I truly believe it won't. I can honestly sit here and say it won't.

[17] On November 28, 2011, Judge Comeau ruled that the children were in need of protective services. He said:

THE COURT: ... So if I look at the circumstances of the mother in this particular case, the issue is on a balance of probability whether the children are in need of protective services, and I find them to be in need of protective services, the other issue is if they were returned, is there a substantial risk which is defined in the **Act** as a real chance of danger if they were returned to her at this point in time. And I certainly believe that there would be a substantial risk. ...

There's a lot of things that she has to do. She has to see the family-support worker. She even has to self-refer to Mental Health counselling, et cetera.

And if Mr. [H.A.N.] should realize that once she goes through all this and she gets her children back and they're going to be staying with him, it's going to be a lot easier on him if she's matured more. And I really don't believe that he either understands or he believes what he's saying, that he's saying that she's mature now, because she certainly isn't.

[18] The Care and Custody Protection Order was issued on December 5, 2011. The Order said that the two sisters, A.N. and K.N., were in need of protection under s. 22(2) of the *Act*, and would be in the Minister's care and custody with parental access.

[19] On January 30, 2012, the matter returned to Judge Comeau for a pre-hearing conference before the Disposition Hearing. C.N. said she wished to be represented by her father, H.A.N.. C.N.'s counsel withdrew.

[20] The Disposition Hearing for both sisters convened on February 27, 2012, before Judge Comeau. The judge directed that a parental capacity assessment be completed for those seeking custody, including H.A.N.. Judge Comeau joined

H.A.N. as a party. The matter adjourned to await the parental capacity assessment, to be performed by Dr. Susan Hastey.

[21] The disposition trial of A.N. and K.N. occurred on August 13 and 23, 2012. At the outset, all parties agreed that K.N. would be in the custody of her father A.V., with access by C.N.. The trial proceeded respecting A.N..

[22] Dr. Hastey had prepared a parental capacity assessment, and testified. Dr. Hastey is an educational psychologist, in private practice, and specializes in parenting capacity and children's needs assessment. H.A.N. told the judge that he did not object to Dr. Hastey's qualification as an expert.

[23] The key findings in Dr. Hastey's report included:

> [H.A.N.] is stating that [C.N.] will assist him in the parenting of both children should they be placed in his day-to-day care and custody. [C.N.] has reported to this Assessor that she expects to perform the role of parent to her daughters and be in her father's home in "the same way as I always have". When asked what expectations her father had of her; what expectations they had discussed pertaining to her role as well as his role in the parenting of the children since her return to the [H.A.N.] home; [C.N.]'s response to this Assessor was "I will do some cooking, I have to keep my room clean and pick up my things off the bathroom floor". In this Assessor's opinion, these are a parent's expectations of a teenager and not of an involved parent of two children, aged 1 and 2.
>
> In clinical interviews with [H.A.N.] and [C.N.], neither individual took an appropriate level of responsibility for events and issues preceding the apprehension of the two children. Both have stated they had no responsibility for the children being reported as having lice, when they entered foster care, nor do they take responsibility for subsequent incidents of lice being found on one of the children after access visits in which their mother was involved.
>
> This pattern of minimization and denial was evident in both the parenting capacity assessment results of [H.A.N.] and [C.N.] and yet many of the characteristics of chronic neglect are evidenced in this Assessor's opinion, throughout the documentation of this case, throughout the assessment conducted by this Assessor in this case and in observations of [H.A.N.] and [C.N.] during an access visit with the children and in access reports reviewed by this Assessor.
>
> Neither [H.A.N.] or [C.N.] have an understanding of the 'attachment' concerns raised by the Applicant Agency and without the acceptance of attachment issues

being a concern and without their taking an appropriate level of responsibility for this concern, this Assessor believes the parenting attitudes and lifestyles of both [H.A.N.] and [C.N.] will continue to reinforce a home environment that will continue to place the children at risk of chronic emotional, social and physical neglect.

Assessment results of [C.N.] indicate that she has a low tolerance to frustration, an inability to establish appropriate adult boundaries, an inability to place her children's needs as a priority and an inability to commit to a stable and responsible lifestyle for herself and her children.

[H.A.N.] can verbalize several positive parenting attitudes and he can verbalize the importance of appropriate parenting behaviours but his own parenting experiences in regard to his parenting of his daughter [C.N.], from the age of 9, do not evidence the application of many of these parenting attitudes or behaviours. This Assessor notes that [C.N.] left school at age 14, has lived a nomadic life for the past several years, been in high risk relationships with male partners and has not taken appropriate levels of parenting responsibility for her two children. In this Assessor's opinion, [H.A.N.] has not been able to appropriately parent nor has he actively and appropriately supervised his daughter [C.N.], during her teenage years. He reports that he and [C.N.] have a positive relationship and yet [C.N.] has not been able to model and transfer his reportedly positive parenting behaviours and attitudes to the parenting and parental supervision of her own two children. [H.A.N.]'s assessment results indicate he has great difficulty in admitting to errors in judgment or in his making mistakes in general. This does not bode well for his cooperation in future services intended to address personal and parenting deficits.

[H.A.N.]'s Plan of Care for his two granddaughters is vague; particularly as it relates to his own role, should he gain employment which he states he is actively seeking.

Without a significant period of intense intervention with [C.N.] and significant intervention with [H.A.N.], it is unlikely that their attitude toward parenting, [C.N.]'s attitude toward herself and other adults and their attitude and beliefs toward the needs of children, will change. Even given these concerns, this Assessor notes that [H.A.N.] has clearly stated during the course of his assessment of parenting capacity that his ultimate goal is to eventually see both children being parented and living with their mother, [C.N.], on a full time basis.

[24] Dr. Hastey's report offered the following from her interviews of H.A.N and C.N.:

> [H.A.N.] is reporting a relationship history in which there appears to have been difficulties in his establishing, at times, appropriate adult boundaries and, at times, appropriate child-adult boundaries. He has struggled with the parenting of his daughter [C.N.] although he does not view her adolescence as having been that problematic. In fact, [C.N.]'s adolescence has been highly volatile with significant evidence that [C.N.] has not developed an appropriate level of tolerance to frustration, not developed a sense of responsibility for herself or for her two children and she continues to be an adolescent who has a high risk lifestyle and appears to have few concerns for her own well being or the well-being of her children.
>
> ...
>
> In interviews, [H.A.N.] has reported repeatedly that he disagrees with the apprehension of his two granddaughters. He believes that these children were not at any risk and that they should not have been taken from his day-to-day care. He does not believe that there were any significant concerns regarding the well-being of these two children that should have lead to their apprehension. This Assessor notes that, in reviewing the Case Events Recordings pertaining to issues precipitating the apprehension of the children and in interviewing the foster parents of these two children, there appeared to have been numerous physical concerns, as well as concerns pertaining to the emotional well-being of the children, that were observed in their behaviour at the time of the apprehension. The foster parents report that both girls were infected with lice when they entered foster care. They state that the language development in both children appeared delayed and that there was a significant concern regarding the presentation of the youngest child, [K.N.]. She frequently screamed for no apparent reason and went very stiff when the foster parents attempted to hold her. The child [A.N.] was noted to be overly trusting of strangers and to go to adults she had just met without any hesitation. [A.N.]'s language development was not age appropriate at the time she entered into foster care and she had only a few words in her vocabulary. In September 2011, the foster mother reported to Jessica Kressebuch, Social Worker of the Applicant Agency, that she viewed both girls as being Special Needs. She reported that the child [A.N.] was emotionally upset quite frequently, craved attention and would cry whenever the person giving her attention left the room. It is difficult for the child to go to sleep at night without someone sitting by her constantly while she falls asleep. The foster mother also noted that the youngest child, [K.N.], seemed to be angry a great deal of the time, had an angry cry and it was only in September 2011 she starting to laugh or smile

through the day. Both girls later exhibited temper tantrums and aggressive behavior. Both girls experienced some difficulty in sleeping patterns and some difficulty in being placed on schedules. These are all indications of children who were not consistently on an age appropriate schedule in their maternal home. They were children who were moved about a great deal when in their mother's care and may have had numerous short term caregivers. When children are not established in a home and on a home based schedule at an early age, there is a tendency for schedules to slip or for schedules such as sleeping, eating, not to be established and maintained on a regular basis. This undermines the child's development in social, emotional and behavioural domains. This Assessor notes that there have been lapses even in the access visit attendance of both [H.A.N.] and [C.N.]. [H.A.N.] has stated to this Assessor that he found that the girls, particularly [A.N.], found it too difficult the access visits and she would be emotionally upset with his leaving. He believed that it was in her best interest to not go to visits and therefore there was a significant lapse in his access visits with the girls at one point in time following the apprehension of the children.

...

[H.A.N.] has never noted in interviews with this Assessor that [C.N.] is less than an active and enthusiastic parent. He has a tendency to deny problems and to gloss over any issues of concern, particularly as they pertain to either his parenting or the parenting of [C.N.].

This Assessor notes that in 2009, when [C.N.] was in his parental care and [H.A.N.] was living with his parents, [C.N.]'s home stability was investigated by the Applicant Agency after receiving a referral that she was living at her brother [M.]'s home and that [M.] had a serious drug and alcohol problem. This investigation lead the Agency to interviews with [H.A.N.]'s daughters, [A.S.] and [T.P.]. Both older daughters of [H.A.N.] indicated that [C.N.] was not living in proper housing but was 'couch surfing' from house to house. They stated that her teeth were in a rotting condition, she had lost weight and had not received proper medical attention for a period of time and that she had not attended school since she was 12 years of age. They stated that [C.N.] had recently had a miscarriage and did not receive proper medical care at that time. Ms. [A.S.] also informed the Application Agency that her half-sister [C.N.] was observed to have lumps on the side of her neck that "moved around" and she believed that [C.N.] should be seeing a doctor for this condition. They also informed the Applicant Agency that [C.N.] had lice to the extent that her hair and scalp gave off an odour. They noted that when she had visited them previously, that she also had had lice. Community referrals at that time stated the belief that [C.N.] was living in a state of neglect. Community referrals stated concerns regarding the age of [C.N.]'s friends, the level of parental supervision she was receiving and the significant instability in

her lifestyle. These are issues that neither [H.A.N.] or [C.N.] were honest about when questioned pertaining to [C.N.]'s adolescence by this Assessor. This pattern of minimization and denial of both past and present problems is very worrisome and does not bode well for either [H.A.N.] or [C.N.] having parenting responsibilities for young children. If parents cannot identify a problem and take appropriate levels of responsibility for them, it is unlikely that the problems will be addressed appropriately over the long term.

...

[C.N.] in this Assessor's opinion is failing as a young parent because she did not have consistently strong and age appropriate expectations made of her by either parent when she was growing up. She has been in the day-to-care of [H.A.N.] since she was nine years of age and there was ample opportunity for this young woman to have had consistent expectations made of her, reinforcement of positive behaviour in addressing these expectations and appreciation of growing up as a child and adolescent who had a sense of family and a sense of responsibility to family. [C.N.] does not have any of these characteristics at this point in time. She appears to feel no remorse in regard to the apprehension of her children. She takes no responsibility for their apprehension and she seems to not appreciate the extent and the energy her father has vested in trying to put forward a Plan of Care for her two children.

...

When asked if [C.N.] and her father had talked about what a typical week would look like should her father be given the day-to-day care and custody of her two daughters, she stated "no they had not talked about this". When asked if her father did acquire employment what her role would be on any given day that the children were in her father's care, [C.N.] replied that it would [be] the same as it always had been. She believes that she took appropriate care of her daughters. They were well fed and cared for and generally healthy and happy little girls. [C.N.] does not believe she needs assistance in regard to having courses on parenting. She does not believe that there is any information that such programs could provide her with that would help her be a better or more appropriate parent. She does not want to engage in any counselling.

...

In this interview, [H.A.N.] did state that he views the rightful parent of both children to be [C.N.] and that his ultimate goal is to have the children live with her and be in her full time care and custody.

...

RECOMMENDATIONS:

Given the findings of the above assessment and the findings and observations of collateral sources, I believe it is in the best interest of the child, [A.N.] ... for the following to take place and I therefore recommend:

1. **THAT** the child, [A.N.], be placed in the Permanent Care and Custody of the Applicant Agency.

[25] Dr. Hastey testified:

> The fact that, you know, [C.N.]'s had two children and is expecting a third prior to turning 18 years of age would indicate to me that at the very least, serious discussions in regard to responsibility for children, responsibility for the children she had and responsibility for any planned or unplanned children would have been a serious and ongoing discussion between a parent and daughter that did not take place.

Dr. Hastey said that H.A.N. has not been able to take responsibility for the deficiencies in his daughter's parenting. Consequently:

> And I think those in general, given the age of this child, given the presentation of the child when she went into care certainly bring the possibility of chronic neglect into question in this case, and the possibility that we would once again have a child who would have numerous caregivers and too much inconsistency in their life for them to establish a sense of self and a sense of wellbeing in going forward through very formative years.

[26] Ms. Kressebuch testified that the Agency had established a parenting skills program for C.N.. This included enrollment in both schooling and mental health counselling. She testified that C.N. never attended these sessions. Dr. Hastey spoke in a similar vein - that family support services had been scheduled for C.N., but that C.N. had failed to attend. Dr. Hastey testified:

> When I interviewed [C.N.] at the last appointment I had with her and asked her if she needed any services, if there were any services such as family support work

> that could assist her, she adamantly stated, no, she did not need any services, she knew how to parent.
>
> I asked her if counselling in regard to any childhood or adolescent issues or any present issues in regard to domestic violence concerns in the past could assist her. She said, no, they couldn't, and she did not want counselling.

[27] C.N. did not testify at the disposition hearing.

[28] After the conclusion of the hearing on August 23, 2012, Judge Comeau reserved. He issued a written decision on September 18, 2012 (2012 NSFC 17). His ruling directed that, further to s. 42(1)(f) of the *Act,* A.N. be placed in the permanent care and custody of the Minister without access. The judge (para 18) referred to Dr. Hastey's findings that were quoted above (para 23). The judge reasoned:

> [24] The Respondent mother's circumstances are such that she is unable to care for the child. Most of this appears to be because of immaturity and she is transient in nature and financially unable to provide for the child's needs. She is presently expecting another child. It follows that the question is, can the man who raised the mother since she was nine years old, care for another child, given his parenting abilities to date, as manifested in the type of person his daughter has become, relative to parenting children.
>
> ...
>
> [26] The Respondent's argument is that his daughter (the Respondent mother) was (is) a teenager out of control and he could do little with her. He is the one who made complaints to the Minister's agents about her lifestyle. He wants to preserve his family, wants [A.N.] to know him and extended family. He believes it is in her best interests.
>
> [27] ... Discussion of the Respondent grandfather's parenting abilities is contained in the Parental Capacity Assessment prepared by Susan Hastey. She believes:
>
> > "Neither [H.A.N.] (the grandfather) or [C.N.] (the mother) have an understanding of the attachment concerns raised by the Applicant Agency and without acceptance of attachment issues being a concern and without their taking an appropriate level of responsibility for this concern, the Assessor believes the parenting attitudes and lifestyles of both [H.A.N.]

> and [C.N.] will continue to reinforce a home environment that will continue to place children at risk of chronic emotional, social and physical neglect".
>
> [28] The grandfather is very articulate in verbalising positive parenting attitudes. He knows what to do, or says he does, but the evidence of "his own parenting experience in regard to his parenting of his daughter [C.N.] from the age of 9 do not evidence the application of many of these parenting attitudes or behaviours".
>
> [29] The Respondent grandfather's offer to take [A.N.] is admirable. He truly believes that he has the appropriate parenting abilities to care for her and guide her into childhood. Although age is not the major concern here, he is fifty-four and has had trouble caring for a teenager. He will be some eleven years older when [A.N.] becomes a teenager. Evidence is that it was difficult for him to properly parent his daughter now. Eleven more years would make it much more difficult. This is just one minor aspect of why his plan for long term care would not be in the child's best interest. The major concern is attitude and parenting ability as described by the Parental Capacity Assessment.
>
> [30] The Respondent grandfather's ability to parent has been observed by the problems his daughter has with her lifestyle and parenting. There is no evidence that he would do any better with his grandchild.
>
> ...
>
> [32] He is asking for a Supervision Order but the Court is of the opinion that the time line in the ***Act*** for such an order would not change the situation. That is to say, his parenting style and ability would not be corrected.
>
> [33] In this context, his plan is not reasonable, sound, sensible or well conceived (see ***T.B.*** and ***Children's Aid Society of Halifax*** and ***S.M.R. and B.***, 2001 NSCA 909).
>
> [34] The Court finds that it is in the best interests of the child [A.N.] that she be placed in the permanent care and custody of the Minister without access.

[29] The Disposition Order to that effect was issued on October 1, 2012.

[30] On November 9, 2012, H.A.N. filed a notice of appeal to this Court under s. 49 of the *Act*.

Issues

[31] I will re-group the points, which I quote from H.A.N.'s notice of appeal, as follows:

1. Dr. Hastey's report was "not an independent report" and the judge erred by relying on it.

2. There was "no evidence" of harm or risk to A.N., who "was never in need of protective services", and "no evidence was brought forth to prove that [H.A.N.] could not protect the child".

3. The Agency made "no effort" to place A.N. with H.A.N. and less intrusive measures to maintain family integrity were "never offered".

Standard of Review

[32] The Court of Appeal applies standards of correctness to issues of law, and palpable and overriding error - meaning an error that is both clear and material - to issues of either fact or mixed fact and law with no extractable legal error: *Housen v. Nikolaisen*, [2002] 2 S.C.R 235, paras 8-10, 19-25, 31-36; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, paras 4, 65, 69, 72-74. These normal standards of appellate review apply to a judge's custody decision involving the child's best interests. In *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, Justice Bastarache, for the Court, elaborated:

> 13 As I have stated, the Court of Appeal was incorrect to imply that *Hickey*, *supra* [*Hickey v. Hickey*, [1999] 2 S.C.R. 518], and the narrow scope of appellate review it advocates are not applicable to custodial determinations where the best interests of the child come into play. Its reasoning cannot be accepted. First, finality is not merely a social interest; rather, it is particularly important for the parties and children involved in custodial disputes. A child should not be unsure of his or her home for four years, as in this case. Finality is a significant consideration in child custody cases, maybe more so than in support cases, and reinforces deference to the trial judge's decision. Second, an appellate court may only intervene in the decision of a trial judge if he or she erred in law or made a material error in the application of the facts...

> 14 It is clear from this case that it is necessary for this Court to state explicitly that the scope of appellate review does not change because of the type of case on appeal... Rather than indicating that appellate review differs when a court must consider the best interests of the child, *Gordon* (*Gordon v. Goertz*, [1996] 2 S.C.R. 27) is consistent with the narrow scope of appellate review discussed later in *Hickey*, *supra*. The case does not suggest that appellate review is appropriate whenever a trial judge has failed to mention a relevant factor or to discuss a relevant factor at depth.
>
> 15 As indicated in both *Gordon* and *Hickey*, the approach to appellate review requires an indication of a material error. If there is an indication that the trial judge did not consider relevant factors or evidence, this might indicate that he did not properly weigh all of the factors. In such a case, an appellate court may review the evidence proffered at trial to determine if the trial judge ignored or misdirected himself with respect to relevant evidence. This being said, I repeat that omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial. As stated in *Van Mol (Guardian ad Litem of) v. Ashmore* (1999), 168 D.L.R. (4th) 637 (B.C.C.A.), leave to appeal refused [2000] 1 S.C.R. vi, an 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.

To the same effect: *Nova Scotia (Community Services) v. B.F.*, 2003 NSCA 119, paras 44-45, leave to appeal refused [2004] 1 S.C.R. v.

First Issue - Dr. Hastey's Independence

[33] H.A.N. submitted that the judge erred by accepting Dr. Hastey's findings. His reason is that Dr. Hastey was not "independent".

[34] Dr. Hastey is a psychologist in private practice with expertise in the field. She is not employed by any of the parties. There is no finding or evidence that she was associated with any party. Dr. Hastey was independent and qualified, and her opinions were properly admitted into evidence.

[35] At the hearing in the Court of Appeal, H.A.N. was asked why he challenged Dr. Hastey's independence. H.A.N. replied that Dr. Hastey had read the Agency's file before she interviewed H.A.N., and this information from the Agency had tainted her view of H.A.N.'s later responses to her questions.

[36] H.A.N.'s submission addresses the weight of evidence or credibility, not legal "independence". It is normal that a parental capacity assessor would begin by reviewing the file, to become acquainted with the matter and to focus her inquiries. The judge heard Dr. Hastey's testimony, including her cross-examination by H.A.N.. The judge accepted Dr. Hastey's objectivity and opinions. The judge committed no palpable or overriding error. The Court of Appeal is not positioned to reassess weight and credibility from reading dry extracts of a transcript.

Second Issue - Risk to A.N.

[37] H.A.N. says that A.N. never was harmed or at risk, should not have been apprehended, and there is no evidence that, in the future, A.N. would be at risk in H.A.N.'s household.

[38] This is an appeal from the Disposition Order, not from the earlier Interim Order or Protection Order. Nonetheless, I will address H.A.N.'s submission that, at the time of those orders, A.N. was neither at risk nor in need of protection.

[39] Section 22(2) of the *Act* states that a child is in need of protective services in a number of situations, including a "substantial risk" of harm. Section 22(1) says that "substantial risk" means "a real chance of danger that is apparent on the evidence". The standard does not require that the judge be satisfied the future risk will materialize. But the judge must be satisfied, on the balance of probabilities from the evidence, that there exists a real possibility the risk will materialize: *M.J.B. v. Family and Children's Services of Kings County*, 2008 NSCA 64, para 77. *G.M. v. Children's Aid Society of Cape Breton-Victoria*, 2008 NSCA 114, para 37. Expert evidence, though often helpful, is not essential to satisfy the standard: *Nova Scotia (Minister of Community Services) v. B.M.*, [1998] N.S.J. No. 186 (C.A.), para 80; *J.G.B. v. Nova Scotia (Community Services)*, 2002 NSCA 86. In this proceeding, Judge Comeau made no error in his appreciation and application of these legal principles.

[40] Dr. Hastey's evidence explained the risks to A.N.'s health and well-being that stemmed from C.N.'s erratic abandonment of her children, and H.A.N.'s inability to fill the parental void. Extracts from that extensive evidence are quoted

above (paras 23-25). The judge agreed with Dr. Hastey. The judge's assessment of risk is a factual matter, and is supported by evidence. The judge made no palpable and overriding error. It is not the Court of Appeal's role to retry the facts.

[41] As to the future, H.A.N. said he would be the primary caregiver for now. H.A.N.'s plan of care says he expects to be working "no less than five days a week", and he would be joined as A.N.'s caregiver by another of H.A.N.'s daughters, "a lot of nieces that will also babysit for me if need be", along with day-care, a local Pregnancy Centre "if needed, for respite for short lengths of time", and, incrementally, by C.N.. At the hearing he told the Court of Appeal that C.N. would "smarten up" and he would "work on a plan" to hand over A.N.'s full care to C.N. - his ultimate goal. Basically, A.N. would be with various caregivers until H.A.N. feels that C.N. has matured. At the disposition hearing, H.A.N. testified, but none of C.N., H.A.N.'s other daughter and nieces and potential caregivers appeared as witnesses.

[42] Dr. Hastey, whose view the judge accepted, saw no significant difference between H.A.N.'s plan and the scenario that led to A.N.'s apprehension. In their view, with which I agree, A.N. needs a responsible parent's anchorage now, not merely a shifting cast of adults in the house, and A.N.'s psyche is forming too quickly to just wait until her mother grows up. The judge found (para 33) that H.A.N.'s plan "is not reasonable, sound, sensible or well conceived". This is primarily a factual assessment of A.N.'s best interests, and is supported by evidence.

[43] Dr. Hastey and the judge acknowledged H.A.N.'s genuine wish to secure his granddaughter's interests, and this was apparent at the hearing in the Court of Appeal. But earnest intent is not the issue. H.A.N. has not shown that the judge either erred in law or made a palpable and overriding error of fact by finding H.A.N.'s plan to be not in A.N.'s best interests.

Third Issue - Family Integrity

[44] In a disposition proceeding, as in all other matters under the *Act*, the judge's prime directive is the child's best interests: ss. 42(1) and 2(2). The *Act* delivers guidance as to the meaning of "best interests". Section 3(2) defines "best

interests" with reference to numerous factors, including the child's emotional needs, the potential risks to the child, the merits of the plans of care, and the benefits of positive relationships and bonding with parents and relatives. Section 42(2) provides that, before removing the child from the family, the court should be satisfied that less intrusive measures to promote family integrity have failed, were refused or would be ineffective. That approach reinforces the *Act*'s purpose, outlined by s. 2(1), "to protect children from harm, promote the integrity of the family and assure the best interests of children".

[45] The authorities have explained how the endorsement of family integrity folds into the objective of promoting the child's best interests.

[46] In *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, Justice Abella for the Court said:

> 43 It is true that treating a child in need of protection can sometimes be done in a way that meets with the family's satisfaction in the long term. But it is not the family's satisfaction in the long term to which the statute gives primacy, it is the child's best interests. The fact that the interests of the parents and of the child may occasionally align does not diminish the concern that in many, if not most of the cases, conflict is inevitable.
>
> 44 The primacy of the best interests of the child over parental rights in the child protection context is an axiomatic proposition in the jurisprudence. As Daley J.F.C. observed in *Children's Aid Society of Halifax v. S.F.* (1992), 110 N.S.R. (2d) 159 (Fam. Ct.):
>
> > [Child welfare statutes] promot[e] the integrity of the family, but only in circumstances which will protect the child. When the child cannot be protected as outlined in the [Act] within the family, no matter how well meaning the family is, then, if its welfare requires it, the child is to be protected outside the family. [para. 5] [further citations omitted]
>
> 45 This Court has confirmed that pursuing and protecting the best interests of the child must take precedence over the wishes of a parent [citations omitted]. It also directed in *Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)*, [1994] 2 S.C.R. 165, that in child welfare legislation the "integrity of the family unit" should be interpreted not as strengthening parental rights, but as "fostering the best interests of children" (p. 191). L'Heureux-Dubé J. cautioned at

> p. 191 that "the value of maintaining a family unit intact [must be] evaluated in contemplation of what is best for the child, rather than for the parent".
>
> 46 It is true that ss. 1 and 37(3) of the Act make reference to the family, but nothing in them detracts from the Act's overall and determinative emphasis on the protection and promotion of the child's best interests, not those of the family. The statutory references to parents and family in the Act, which the family seeks to rely on to ground proximity, are not stand-alone principles, but fall instead under the overarching umbrella of the best interests of the child. ...

To similar effect: *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519, para 80, per L'Heureux-Dubé for the majority; *Family and Children's Services of Kings County v. B.D.*, [1999] N.S.J. No. 220 (C.A.), para 19, per Cromwell, J.A., adopting a passage from Williams, F.C.J. in *Nova Scotia (Minister of Community Services) v. S.B.*, [1999] N.S.J. No. 144 (F.C.), paras 225-27; *L.L.P. v. Nova Scotia (Community Services)*, 2003 NSCA 1, paras 29-30, per Bateman, J.A..

[47] The Agency offered services to C.N., which C.N. initially accepted half-heartedly, then later declined. H.A.N. participated in supervised access visits. After H.A.N. advanced his plan for care, he was joined as a party and was referred as a potential custodian for the parental capacity assessment. Based on that assessment, authored by Dr. Hastey, and the other evidence, the judge was satisfied that A.N.'s interests were better served by permanent care with the Agency than with H.A.N.. The judge did not misapply the legal principles respecting family integrity. His factual findings on A.N.'s best interests are supported by evidence and display no palpable and overriding error.

Conclusion

[48] I would dismiss the appeal without costs.

Fichaud, J.A.

Concurred:

Oland, J.A.

Bryson, J.A.