NOVA SCOTIA COURT OF APPEAL

Citation: *J.L.T. v. Nova Scotia (Community Services)*, 2017 NSCA 68

Date: 20170714
Docket: CA 458919
Registry: Halifax

Between:

J.L.T.

Appellant

v.

The Minister of Community Services and K.A.D.

Respondents

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

Judges:	Fichaud, Bryson and Bourgeois, JJ.A.
Appeal Heard:	May 19, 2017, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs, per reasons for judgment of Bourgeois, J.A.; Fichaud and Bryson, JJ.A. concurring
Counsel:	Jill S. Perry, for the appellant Adam B. Neal, for the respondent Minister

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

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] The appellant, J.L.T., is the father of a male child, now age 16. The child, M.T., has significant intellectual difficulties. Due to a number of concerns, M.T. has been in the temporary care and custody of the Minister of Community Services (the "Minister") since September 2012.

[2] The appellant has had regular access with M.T. After a number of years in temporary care, and the completion of various services by the appellant, he and the Minister formulated a joint plan for M.T. to be returned to his care, subject to supervision.

[3] A hearing into the merits of that joint proposition was held before Justice Theresa M. Forgeron over four days in June 2016. Justice Forgeron declined to make the order sought by the parties. She ordered that M.T. remain in the temporary care of the Minister, with access between him and his father to be supervised. Her written reasons are reported at 2016 NSSC 276. Before this Court, the appellant challenges the trial judge's conclusion and requests that M.T. be placed in his care, subject to the supervision of the Minister. For the reasons that follow, I would dismiss the appeal.

Background

[4] In or around early 2001, the appellant commenced a relationship with the female respondent, K.A.D. At that time, K.A.D. was the mother of a 4-year-old daughter. This child was referred to as the "step-daughter" in the trial judge's decision. I will continue to refer to her as such in these reasons.

[5] The appellant and K.A.D. subsequently had two children, M.T., born in 2001, and another son, born in 2003. Although there were a number of historic referrals received by the Minister over the years, concerns apparently came to a head in 2012. The trial judge noted in this regard:

> [9] The scope of the Minister's involvement changed dramatically in the summer of 2012 following her investigation of major presenting problems concerning sexual abuse, physical abuse, substance abuse, neglect and the father's suicide attempt. After substantiating these concerns, the Minister filed a protection application on September 5, 2012.

[6] Various interim hearings were held, with all three children eventually being placed in the temporary care of the Minister. The orders provided the appellant with supervised access to both boys.

[7] A protection hearing was held on December 5, 2012. It was resolved by consent. The only ground upon which the protection finding was made was s. 22(2)(b) of the *Children and Family Services Act*, S.N.S. 1990, c. 5 (a substantial risk a child will suffer physical harm). M.T. remained in temporary care, with access to the father.

[8] The initial disposition hearing took place on February 11, 2013. On consent, the orders in relation to all three children did not change. A number of review hearings followed. The plans for each of the children then diverged. The youngest son was placed in the permanent care of the Minister in September 2013, with a provision for access with the appellant. The step-daughter was placed in permanent care in August of 2014. That order has now terminated. Only M.T. remains in temporary care.

[9] The trial judge described the process that unfolded in relation to M.T. as follows:

> [15] On April 26, July 25, September 30, and December 11, 2013; and March 5, May 1, June 24, July 30, and October 22, 2014, the provisions of the temporary care order in respect of the older son was affirmed.
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> [16] The July 30 consent order also directed the father to participate in a psychological assessment with a sexual component. The father asked that the assessment be completed as quickly as possible because he wanted to have the son returned to his care. The Minister was not successful in locating an expert to complete the ordered assessment, primarily due to the fact that there was neither an admission, nor conviction of sexual wrong-doing.
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> [17] By February 11, 2015, the Minister was supporting the father's plan to have the son returned to his care under the provisions of a supervision order. I, however, would not approve this plan without an assessment into the merits because of the sexual abuse allegation involving the father and step-daughter. A hearing was therefore scheduled. On March 31, 2015, the temporary care order was maintained while the parties awaited the scheduled hearing.

[10] The review hearing proceeded with the court hearing from a number of witnesses, including the step-daughter and the appellant. Two matters had been determined by the parties in advance:

> [20] Before the hearing began, two preliminary issues were resolved. First, the parties agreed that the court had the jurisdiction to refuse their joint request based on the court's overriding authority to secure the son's best interests. Second, counsel requested that I not consider the mother's statements outlined in agency affidavits because the mother was unavailable for cross-examination having elected not to participate in the hearing. I agreed to this request.

[11] In rendering her decision, the trial judge posed and answered two questions:

- Did the father sexually abuse his step-daughter?
- Have protection concerns been sufficiently reduced such that it is in the child's best interests to be returned to the supervised care of his father?

[12] With respect to the first question, the trial judge concluded:

> [44] I find that the Minister has proven, on a balance of probabilities, by clear, convincing and cogent evidence, that the father regularly sexually abused the step-daughter for about seven years, beginning when she was about nine years old and continuing until August 2012 when protection authorities began their investigation. The sexual abuse assumed various forms, including intercourse. The step-daughter carries many emotional scars as a result of her victimization from the man she regarded as her father.

[13] With respect to the second question, she concluded:

> [54] Although the father made significant changes in his behaviour as evidenced in the favourable reports from service providers, protection risks have not been sufficiently reduced so that it is safe to return the son to the father's care under the provisions of a supervision order. It is not in the son's best interests to do so.

[14] As will be noted further below, the appellant says the trial judge erred in reaching both conclusions.

Issues

[15] The appellant advances two issues on appeal, alleging:

1. The trial judge erred in finding that the appellant sexually abused his step-daughter; and
2. The trial judge erred by refusing to allow the child to return to the care of the appellant in the absence of any evidence of risk to the child.

[16] In her factum, the Minister purports to put forward three additional grounds of appeal, asking:

1. Does the Court have the ability to make an order contrary to a joint recommendation of parties in a Civil Procedure matter, and specifically a *Children and Family Services Act* matter?
2. What is the appropriate evidentiary standard in child protection matters?
3. What is the appropriate legal standard on findings of credibility on the part of a trial judge?

[17] I find the Minister's approach in this matter unusual and puzzling. In his arguments, both written and oral, counsel made it clear that the Minister did not take a position with respect to the grounds of appeal raised by the appellant. Rather, his intent was to clarify the Minister's position with respect to the law relevant to the three grounds outlined above. The Minister's submissions then proceeded accordingly.

[18] With respect, none of the so-called "grounds of appeal" advanced by the Minister are properly before this Court. The Minister did not file a Notice of Contention or Cross-Appeal. Perhaps that is because, as counsel made clear, the Minister is not "taking a position" with respect to the issues raised by the appellant. What the Minister appears to be doing is raising questions of a general nature solely in her factum, and inviting a response from this Court.

[19] I have no intention of accepting the Minister's invitation. If the Minister was of the view that this appeal raised a "question of public importance", then the process contemplated in *Civil Procedure Rule* 90.18 may have been of interest to counsel. Or, if the Minister felt a reference under the *Children and Family Services Act* was warranted, perhaps *Rule* 90.23 would have provided a procedural avenue.

[20] The Minister cannot reasonably expect this Court to address "grounds of appeal" not properly before it. Although one or more of the Minister's "grounds" may be incidentally touched upon in my reasons, I will not, for the reasons noted, address them directly.

Standard of Review

[21] There is no dispute with respect to the standard of review engaged in this matter. On appeal, this Court will only intervene if the trial judge made an error of law or has made a palpable and overriding error in her appreciation of the evidence (see *Mi'kmaw Family and Children's Services of Nova Scotia v. H.O.*, 2013 NSCA 141). In *S.G. v. Children's Aid Society of Halifax*, 2001 NSCA 70, Justice Cromwell described this Court's role on child protection appeals as follows:

> [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."

[22] As will be seen in the discussion to follow, the appellant alleges palpable and overriding error on the part of the trial judge. Given the arguments advanced, a return to the fundamentals of that concept is useful. In *Housen v. Nikolaisen*, 2002 SCC 33, Justices Iacobucci and Major (for the majority) wrote:

> [1] A proposition that should be unnecessary to state is that a court of appeal should not interfere with a trial judge's reasons unless there is a palpable and overriding error. **The same proposition is sometimes stated as prohibiting an appellate court from reviewing a trial judge's decision if there was some evidence upon which he or she could have relied to reach that conclusion.**
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> . . .
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> [5] What is palpable error? The *New Oxford Dictionary of English* (1998) defines "palpable" as "clear to the mind or plain to see" (p. 1337). The *Cambridge International Dictionary of English* (1996) describes it as "so obvious that it can easily be seen or known" (p. 1020). The *Random House Dictionary of the English Language* (2nd ed. 1987) defines it as "readily or plainly seen" (p. 1399).
>
> [6] The common element in each of these definitions is that palpable is plainly seen. Applying that to this appeal, in order for the Saskatchewan Court of Appeal

> to reverse the trial judge the "palpable and overriding" error of fact found by Cameron J.A. must be plainly seen. As we will discuss, we do not think that test has been met.
>
> . . .
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> [22] Second, with respect, we find that by drawing an analytical distinction between factual findings and factual inferences, the above passage may lead appellate courts to involve themselves in an unjustified reweighing of the evidence. Although we agree that it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error. As stated above, trial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.
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> [23] **We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion.** The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts… . (Emphasis added)

[23] To this I would add that an error being palpable is not sufficient to justify appellate intervention, it must also be material. That is, it is not only clear and obvious from the evidentiary record, but it gives rise to a reasoned belief that the error affected the trial judge's conclusion (see *Van de Perre v. Edwards*, 2001 SCC 60 at para. 13; *H.A.N. v. Nova Scotia (Community Services)*, 2013 NSCA 44 at para. 32).

[24] Finally, at the heart of this appeal is the trial judge's assessment of credibility. In considering the trial judge's conclusions in that regard, I found helpful the comments of Cromwell, J.A. (as he then was) in *MacNeil v. Chisholm*, 2000 NSCA 31:

> [9] The judge, as the trier of fact, must sort through the whole of the evidence and decide which to accept and which to reject so as to piece together the more plausible view of the facts. Many considerations properly influence this decision,

> including the nature of any unreliability found in a witness's testimony, its relationship to the significant parts of the evidence, the likely explanation for the apparent unreliability and so forth. The trial judge may find that some apparent errors of a witness have little or no adverse impact on that witness's credibility. Equally, the judge may conclude that other apparent errors so completely erode the judge's confidence in the witness's evidence that it is given no weight.
>
> [10] Making these judgments is the job of the trial judge and the Court of Appeal generally should not substitute its own judgment on these matters. An appellant alleging an error of fact must show that the trial judge's finding is clearly wrong. Not every error in findings of fact permits appellate intervention. As Lamer, C.J.C. said in **Delgamuukw**, supra at para 88:
>
> > ...it is important to understand that even when a trial judge has erred in making a finding of fact, appellate intervention does not proceed automatically. The error must be sufficiently serious that it was 'overriding and determinative in the assessment of the balance of probabilities with respect to that factual issue'.
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> **Where credibility is in issue, only errors that fundamentally shake the appeal court's confidence in the trial judge's findings of fact justify appellate intervention.** (Emphasis added)

Analysis

1. Did the trial judge err in finding that the appellant sexually abused his step-daughter?

[25] The appellant acknowledges that the above finding is one of fact, and therefore he must show a palpable and overriding error on the part of the trial judge. The appellant argues that such an error is found in the trial judge's misapprehension of the evidence in five instances:

- The impact of the step-daughter's psychosis on her reliability was unduly minimized by the trial judge;
- The trial judge gave no consideration to the relevance of the multiple allegations of abuse the step-daughter had made against others;
- The trial judge did not adequately consider all of the statements against interest made by the step-daughter;
- The trial judge gave insufficient weight to the fact that the step-daughter's mother had told her she was sexually abused as an infant; and

- The trial judge gave insufficient consideration to the seriousness and consequences of the step-daughter's allegations.

[26] In her oral submissions, counsel for the appellant conceded that none of the above concerns would be sufficient on its own to give rise to a palpable and overriding error, but that threshold is met when they are considered collectively.

[27] Counsel for the appellant further acknowledged several times during the course of oral submissions that the errors as alleged related to how the trial judge improperly chose to weigh the evidence before her, which undermined her ultimate conclusion that the step-daughter was credible.

[28] At this point, it is helpful to outline aspects of the trial judge's decision which are not challenged on appeal. Significantly, the appellant takes no issue with the trial judge's stated approach to the assessment of credibility generally. She wrote:

> [29] Issues related to burden of proof, credibility and reliability lie at the heart of this determination. In **C. (R.) v. McDougall**, 2008 SCC 53 (S.C.C.), a civil sexual abuse case, Rothstein, J. confirmed the following applicable points of law:
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> - There is only one standard of proof in civil cases - proof on a balance of probabilities. A heightened standard of proof, where criminal or morally blameworthy conduct is alleged, is rejected: paras 39, 40, and 49.
> - Where appropriate, a judge must be mindful of inherent probabilities or improbabilities, or the seriousness of the allegations and consequences – all within the context of the one standard of proof: para 40.
> - In all cases, the court must scrutinize the evidence when deciding whether it is more likely than not that an alleged event occurred: para 45.
> - Evidence must be sufficiently clear, convincing, and cogent to satisfy the balance of probabilities test, although there is no objective standard to measure sufficiency: para 46.
> - There is no rule as to when inconsistencies in a plaintiff's evidence will cause a judge to conclude that the evidence is not credible or reliable. A witness' testimony must not be considered in isolation, but rather examined based upon the totality of the evidence to assess the impact of inconsistencies on questions of credibility and reliability relating to core issues: para 58.

- Corroborative evidence, although helpful, is not a legal requirement in sexual abuse cases, and indeed this requirement has been removed in the criminal law context: paras 80 and 81.
- The ***W. (D)*** approach is not an appropriate tool for evaluating evidence in a civil case: para 86.

[30] In **Baker-Warren v. Denault**, 2009 NSSC 59, as approved in **Hurst v. Gill**, 2011 NSCA 100 at para. 16, this court reviewed guidelines associated with credibility assessment at paras 18 to 21 which reviews the law as follows:

- Credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:" **R. c. Gagnon**, 2006 SCC 17 (S.C.C.), para. 20. … "[A]ssessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" **R. v. M. (R.E.)**, 2008 SCC 51 (S.C.C.), para. 49.
- There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety: **Novak Estate, Re**, 2008 NSSC 283 (N.S.S.C.). On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence, **Novak Estate, Re,** *supra*, quoting **R. v. J.H.** *supra*.
- Questions which should be addressed when assessing credibility include:

  a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony, and the documentary evidence, and the testimony of other witnesses: **Novak Estate, Re**, *supra*;

  b) Did the witness have an interest in the outcome or was he/she personally connected to either party;

  c) Did the witness have a motive to deceive;

  d) Did the witness have the ability to observe the factual matters about which he/she testified;

  e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;

  f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions:

> **Faryna v. Chorny** (1951), [1952] 2 D.L.R. 354 (B.C.C.A.);
>
> g) Was there an internal consistency and logical flow to the evidence;
>
> h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant, or biased; and
>
> i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?

[29] Further, the appellant does not challenge the trial judge's unfavourable conclusion regarding the appellant's credibility. She concluded:

> [43] Fifth, the father's evidence was not compelling for a number of reasons, including the fact that the father resisted making admissions against interest, and at times, was hesitant, evasive and strategic when recounting events. The following are examples of these conclusions:
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> - He denied all domestic violence allegations, except the 2003 incident which he then went on to trivialize.
> - He denied using physical force on the children, even though he admitted to Ainslie Elgebeily that he "spanked them on the arse if they started hitting each other but nothing major".
> - He minimized his role in the creation of the unfit living conditions in the home, instead placing most of the blame on the mother.
> - He minimized his responsibility for the step-daughter's parentification.
> - At the hearing, he denied giving the step-daughter alcohol during the August 2012 incident, even when confronted with his earlier statement that he had given her vodka.
> - He attempted to hide the fact that his new girlfriend spent time with the son when unsupervised access commenced. During the investigation, the father was asked whether the girlfriend had visited his home or spent overnights with the child; the father confirmed that she had not. Instead, the father noted that he and the son "bumped into her once at the Mall". During the hearing, however, the father admitted that the girlfriend visited with the son at his home.

[30] I turn now to address the appellant's specific complaints.

The impact of the step-daughter's psychosis on her reliability was unduly minimized by the trial judge

[31] The appellant says that the trial judge unduly minimized the impact of the step-daughter's psychosis on the reliability of her evidence. In other words, the existence of the psychosis ought to have negatively impacted upon the trial judge's credibility assessment of the step-daughter.

[32] There are a number of problems with the appellant's argument in this regard. Firstly, the trial judge was aware of the step-daughter's mental health issues and considered them in reaching her conclusion that sexual abuse had occurred. She wrote:

> [36] I make this finding despite the step-daughter's admission that while experiencing psychotic episodes in the past, she was unable to distinguish fact from fiction. I note that the step-daughter was not in a psychotic state when she reported the abuse to protection authorities in 2012. Neither was the step-daughter in a psychotic state when she testified before me in June 2016. The step-daughter's psychosis is being treated. I find that the step-daughter's recollection of the sexual abuse by the father is not rooted in, or fueled by a psychotic episode. The step-daughter's recollection is fact-based.

[33] The appellant says there was no evidence upon which the trial judge could reach the above conclusions. In particular, there was no evidence that the step-daughter was in a psychotic state when testifying at trial.

[34] The only evidentiary source as to the nature of the step-daughter's mental health condition, its treatment and currency, was the step-daughter herself. She testified to having had psychotic episodes during which she had difficulty distinguishing reality from fantasy. She also testified that she had received treatment. Her direct evidence on the nature, extent and treatment was scant. Her evidence on cross-examination did not serve to illuminate matters further.

[35] Neither party called expert evidence to establish how, if at all, the step-daughter's psychosis impacted on the reliability of her evidence. The appellant says that expert evidence was not mandatory in order for the trial judge to conclude whether the step-daughter was suffering from psychosis when testifying, but merely preferable.

[36] The trial judge had little to go on other that the step-daughter's own evidence and the manner in which she presented in the witness box. Although the

evidence could have been more fulsome, the trial judge reached a conclusion with what she was given. There is nothing in the record to establish that the trial judge made a palpable and overriding error in concluding that when testifying, the step-daughter was not suffering from psychosis, or that the diagnosis would render her recounting of the ongoing historic abuse unreliable.

The trial judge gave no consideration to the relevance of multiple allegations of abuse the step-daughter had made against others

[37] The evidence at the hearing established that the step-daughter had made other allegations of sexual abuse in the past against others. This included a family friend, a landlord, a foster parent and two female peers. The appellant argued at trial, and before this Court, that the sheer number of other allegations of abuse raised serious reliability concerns with the step-daughter's allegations against him.

[38] The trial judge was aware of the past allegations and appreciated the appellant's argument, set out at para. [33] of her decision as follows:

> • The step-daughter made many unfounded allegations of sexual abuse in the past, including allegations involving a former landlord, a friend's father, two female friends, and possibly a woman. None of these allegations resulted in criminal convictions. The sheer number of allegations make it less probable than not that the sexual abuse allegations against the father are true.

[39] The trial judge ultimately concluded that the past allegations of abuse were "neutral factors" in the assessment of the step-daughter's credibility, explaining:

> [38] I make this finding despite the fact that the step-daughter stated that other individuals also sexually abused her in the past. I do not accept the premise that the sheer number of past sexual abuse allegations renders the father's sexual abuse less probable. This hearing was about the father's sexual abuse, not the sexual abuse of other individuals. I am not in any position to speculate as to the authenticity of other abuse claims in the absence of a full hearing into each of them. The other allegations of the step-daughter are neutral factors in my assessment of the evidence.

[40] In reviewing the record, there was little evidence of the nature and context of the other alleged incidents of abuse. Although the step-daughter conceded some may have been a result of her psychosis, at trial she was firm that other incidents had taken place. It was the trial judge's job to weigh the evidence before her. She gave the other allegations little weight. That, absent a demonstrable error, was her

prerogative. I see no error, palpable or otherwise, in the trial judge's treatment of this evidence.

The trial judge did not adequately consider all of the statements against interest made by the step-daughter

[41] In her decision, the trial judge set out her reasons for concluding the step-daughter's evidence was "sufficiently clear, convincing, and cogent to satisfy the balance of probabilities test for five reasons". In paras. [39] through [43], the trial judge details those reasons, the third being:

> [41] Third, the step-daughter readily made admissions against interest. For example, she admitted to police that she drank alcohol; she admitted that she sent an e-mail to the father questioning whether the sexual abuse actually occurred; and she admitted when there was a factual error in the affidavit of the Minister.

[42] The appellant submits that in addition to the specific admissions against interest noted above, the step-daughter had made more serious admissions which the trial judge failed to consider. Counsel submits a proper consideration of these admissions would have shown the step-daughter to be unreliable. In her factum, counsel explains:

> [42] The decision makes no mention, however, of the much more serious admissions against interest made by Ms. [D.] during cross-examination. First, Ms. [D.] admitted that she confessed to sexually abusing her brother, [J.], when she was young. When questioned about whether she still believes she did this, she said "[t]hat's something I'm honestly confused about whether or not I, I done or not". … Second, Ms. [D.] acknowledged that in the summer of 2014 she confessed to sexually abusing a two-year old but since then, has decided that she did not do this.
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> [43] Ms. [D.'s] evidence demonstrated that she was capable of believing extremely troubling acts to be true and, at later points, believing them not to be true or questioning their truth. This should raise serious concerns for the trier of fact about the overall reliability of her testimony. Indeed, [J.D.] was very credible on the topic of her own unreliability. Justice Forgeron placed great weight upon much less serious admissions against interest in support of a finding of credibility. In so doing, she failed to appreciate the greater significance of these very troubling statements against interest made by the complainant. To make no mention of these admissions, while placing emphasis on the lesser admissions, amounts to a palpable and over-riding error in the apprehension of the evidence.

[43] Again, I am unable to agree with the appellant. Firstly, I do not accept that the trial judge overlooked the "more serious admissions". Her summary of the appellant's position clearly shows she was aware of reliability concerns and, in particular, that the step-daughter had experienced false memories. At para. [33] she noted:

> • The step-daughter suffers from psychosis and at times is unable to distinguish between reality and fantasy, truth and fiction. She admits to having flashbacks and believing certain disturbing memories were true when they were subsequently proven to be untrue, including the false belief that she sexually assaulted the little sister of a former boyfriend.

[44] I am not satisfied that the trial judge overlooked material evidence. What is at the heart of the appellant's complaint is the weight the trial judge afforded to it. Further, even if the appellant was able to convince this Court that there was a palpable error, I am far from convinced that the error was material. The trial judge set out four other detailed reasons for reaching the conclusion that she believed the step-daughter's claim of sexual abuse. I am not satisfied that her specific consideration of the other admissions against interest would have ultimately changed her finding.

The trial judge gave insufficient weight to the fact that the step-daughter's mother had told her she was abused as an infant

[45] The evidence at trial was that the step-daughter was told by her mother on a number of occasions that she had been sexually abused as a very young child by a third party.

[46] I am not satisfied that the trial judge overlooked this evidence or the concerns the appellant submits it raises with the step-daughter's reliability. In fact, the trial judge was aware of it and the appellant's argument as to how it impacted upon the step-daughter's credibility. She wrote at para. [33]:

> • The step-daughter was raised by a mother who was not only absent, uninvolved and physically abusive, but who also repeatedly filled the step-daughter's head with tales of being sexually abused as a baby.

[47] The appellant does not like the fact that the trial judge placed no weight on this particular evidence. This Court does not interfere with a trial judge's weighing of evidence unless the appellant demonstrates a palpable and overriding error. None has been shown here.

The trial judge gave insufficient consideration to the seriousness and consequences of the step-daughter's allegations

[48] The appellant acknowledges that there is only one civil burden, but submits that "the seriousness of allegations and the consequences of those allegations (if proven) are still, however, factors that must be considered" by a trial judge. Counsel argues that the trial judge's decision, although not giving rise to a criminal conviction, has "permanent and irreversible consequences" for the appellant. It is submitted that the consequences of the decision "are as severe as can be imagined – nothing short of the permanent severing of a father-son family unit for a special needs child who has no other biological parent available to him".

[49] In her factum, counsel writes:

> [52] The Supreme Court of Canada is clear that such factors must be considered by the trial judge when assessing whether the evidence meets the civil burden of proof. The closest Justice Forgeron comes to considering the gravity of the consequences is her short statement recognizing that "…the son will be distressed by [her] decision". . . . the appellant submits that this fleeting statement does not meet the test set out by the Supreme Court of Canada and, as a result, constitutes a palpable and over-riding error in the apprehension of the evidence.

[50] With respect, the appellant's argument is without merit. Firstly, the criticism of the trial judge's "fleeting statement" regarding the consequences of the decision is unwarranted. The trial judge was, contrary to the appellant's assertions, well aware of the impact of her decision on the most important person, M.T. She wrote:

> [22] The son's wishes were presented in a thoughtful Voice of the Child Report prepared by his counsel, Jillian MacNeil. The son's wishes were also confirmed through the evidence of other witnesses including Ryan Ellis. In addition, Dr. Landry provided insight into the son's abilities.
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> [23] I make the following findings in respect of the son:
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> - The son is moderately developmentally disabled. Although having a chronological age of 14 at the time of the testing, the son has a mental age of about seven years.
> - Despite having well-developed expressive language skills, the son's cognitive ability, which affects abstract thinking and problem solving, is significantly below average.
> - The son will likely never be independent.

- The son wants to live with his father. The son and father share a strong bond.
- The son stated in reference to foster care, that he had been "stuck here long enough".
- The son has no real appreciation as to why he is in the Minister's care. The son thought "he was not being good" and so was not able to live with his father.

[51] Secondly, I do not accept that the trial judge's decision is a permanent revocation of the child-parent relationship. The procedural context here is important. This was not a permanent care hearing, rather a review disposition hearing. Unlike his siblings, the Minister was not seeking permanent care of M.T. There is nothing in the record before this Court to suggest that such a disposition is a given. What is apparent is the Minister's ongoing willingness to facilitate the appellant's continued relationship with M.T. despite the various concerns, including the sexual abuse claim.

[52] The trial judge wrote a detailed and thoughtful decision setting out the appellant's position and the evidence. She set out, carefully, why she accepted the step-daughter's evidence relating to the alleged sexual abuse, notwithstanding clear concerns with respect to her evidence. After considering all of the evidence, the trial judge concluded she believed the step-daughter, and did not believe the appellant. There is nothing in her reasons to suggest that the trial judge was not aware of the gravity of her decision – the care she took in expressing the basis for her conclusion suggests the opposite.

[53] For the reasons above, I would dismiss this ground of appeal.

2. Did the trial judge err by refusing to allow the child to return to the care of the appellant in the absence of any evidence of risk to the child?

[54] Before setting out the appellant's argument under this ground, it is helpful to reiterate the nature of the hearing. This was not a protection hearing where parents often argue that the child is not in need of protective services. Nor was it a final disposition hearing where the parents argue that protection concerns have been alleviated. This matter was a review hearing, where the only issue was whether the protection risks had been sufficiently decreased to permit M.T. to return to the appellant's care subject to ministerial supervision. Implicit in this, is the recognition that M.T. remained in need of protective services.

[55] The appellant summarizes his concerns with the trial judge's decision as follows:

> [65] The appellant maintains the trial judge erred in refusing to return [M.T.] to his father under a supervision order as proposed [by] Mr. [T.] and the Minister. Justice Forgeron did not correctly apply the law regarding risk and least intrusive alternatives to the facts of this case. There were four key flaws in her apprehension of the evidence and application of the law to that evidence: 1) she equated her finding of sexual abuse of [J.D.] with risk to [M.T.] in the absence of any evidence of actual risk to [M.T.]; 2) she gave insufficient weight to the ample evidence of a healthy father-son relationship; 3) she gave insufficient weight to evidence the change in circumstances and the successful completion of all services in the plan of care by Mr. [T.]; and 4) she gave insufficient weight to the evidence of risk to [M.] if not returned to the care of Mr. [T.] Taken together, these flaws in the court's reasoning amount to a palpable and over-riding error on findings of fact and/or questions of mixed law and fact.

[56] In her oral submissions, counsel also pointed out that the protection finding in relation to M.T. was not based upon a risk of sexual abuse. As such, it was improper for the trial judge to use this as the sole reason for her conclusion that M.T. needed to remain in temporary care. Counsel submits that the trial judge inappropriately used the finding of sexual abuse to automatically find a risk, without further analysis, to M.T.

[57] Again, as is apparent from the above written submissions, the bulk of the appellant's concerns relate to the weight the trial judge afforded to certain aspects of the evidence. Without more, this Court will not intervene.

[58] I am satisfied the trial judge was cognizant of the correct legal principles. She noted these as follows:

> [46] Section 46 of the ***CFSA*** provides the court with the jurisdiction to vary prior disposition orders, or to make further or other orders. In making such orders, I am directed to consider the following factors:
>
> - whether the circumstances have changed since the previous disposition order was made;
> - whether the plan for the child's care that the court applied in its decision is being carried out; and
> - what is the least intrusive alternative that is in the child's best interests.

> [47] In making my decision, I am also mindful of the legislative purpose. The purpose of the *Act* is to promote the integrity of the family, protect children from harm, and to ensure the best interests of children. However, the paramount consideration is the best interests of children as stated in s. 2(2) of the *Act*.
>
> [48] In addition, the *Act* must be interpreted according to a child centered approach in keeping with the best interests principle as defined in s. 3(2) of the *Act*. This definition is multifaceted. It directs the court to consider various factors unique to each child, including those associated with the child's emotional, physical, cultural, and social developmental needs, and those associated with risk of harm.
>
> [49] A review hearing also requires the court to determine whether children continue to be in need of protective services within the meaning of the legislation. The court must consider whether the circumstances which resulted in the protection finding still exist, or whether there has been a change in circumstances: **Children's Aid Society of Halifax v. V. (C.),** [2005] N.S.J. No. 217 (C.A.) at para. 8.

[59] She reviewed the position of both parties that protection concerns had been adequately reduced to permit a return of M.T. to his father's supervised care. She was in tune with the wishes of the child:

> [52] Finally, the son has expressed a firm desire to return to the care of his father. They love each other. The son enjoys his time with his father and with the extended paternal family. Access has been a positive experience for the son.

[60] The trial judge ultimately concluded:

> [53] I cannot permit the son to return to the father's supervised care because protection risks have not been reduced to the point where it is safe or in the son's best interests to do so. A real chance of danger would be created if I agreed to the joint request. The following reasons support my conclusion:
>
> - I do not accept the premise that protection risks are reduced because the father's sexual abuse involved a non-biological female, while the son is a biological male. The logic of this premise escapes me.
> - The protection risk does not arise because the father has a heterosexual orientation. The protection risk arises because the father systematically abused a vulnerable child, his step-daughter, for his own pleasure and control. The sexual abuse spanned approximately seven years. Within that seven year period, the father manipulatively groomed the child to provide him with unlimited sexual favours, often while plying her with alcohol, and while convincing her that this odious sexual relationship was

> normal. The father was a sexual predator who abused his position of trust. The step-daughter is scarred for life because of the father's conduct.
>
> - The considerable protection risk associated with this lengthy period of sexual predation against a vulnerable child has not been addressed by addiction counselling, mental health therapy, family support sessions or any other service.
> - This protection risk has not been reduced because the father no longer abuses alcohol and does not take illegal drugs. I am unable to draw the inference that child abuse is caused by alcoholism.
> - **My concerns for the son's safety are further heightened because of the father's lack of insight and minimization of some of the other presenting problems, despite having engaged in services.** For example, the father no longer abuses alcohol. When questioned about his reasons for stopping, the father stated that he "wanted to take a break from it". When asked what was bothering him about his alcohol consumption, the father stated that he "was spending too much money on it to be honest; it was costing too much". When asked whether the father had any concerns about his behaviour while intoxicated, the father said "no cause I'm usually happy go lucky when I drink". Further, the father assumed little responsibility for the violence in the home or for the unacceptable state of the home. The father deflected most of the blame for these protection issues onto the mother. (Emphasis added)

[61] Contrary to the appellant's assertion, the trial judge's focus was not solely on the sexual abuse allegation. She clearly considered the evidence as it related to other protection concerns. Importantly, she, after having had the opportunity to see and hear the appellant, found that he continued to lack insight into the problems which had initiated ministerial involvement. The trial judge was in the best position to make that assessment and to conclude therefrom that the longstanding temporary care order ought not be varied as requested.

[62] I am not persuaded that the trial judge's factual conclusions were based upon palpable and overriding error, or that she inappropriately applied the law. I would dismiss this ground of appeal.

Disposition

[63] For the reasons above, I would dismiss the appeal, without costs.

Bourgeois, J.A.

Concurred in:

Fichaud, J.A.

Bryson, J.A.