NOVA SCOTIA COURT OF APPEAL

Citation: *C.R. v. Nova Scotia (Community Services)*, 2020 NSCA 4

Date: 20200122
Docket: CA 489721
Registry: Halifax

Between:

C.R.

Appellant

v.

Minister of Community Services, T.C. and L.B.

Respondents

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

Judge:	The Honourable Justice Hamilton
Appeal Heard:	November 28, 2019, in Halifax, Nova Scotia
Subject:	**Child Protection, Custody Application under *Parenting and Support Act*, Fresh Evidence**
Summary:	Two young children were taken into care. The father and paternal grandmother applied under the *Parenting and Support* Act, 2015 S.N.S., c. 44 for joint custody of them. The Minister applied for permanent care. While in interim care, the children were placed in the day-to-day care of their paternal grandmother. An Order for their temporary care and custody was granted in January 2018. In her Plan of Care, the Minister indicated she would support and encourage the paternal grandmother to apply to adopt the children if they were found to be in need of protection. Following the trial that ended in February 2019, the trial judge ordered the children placed in permanent care and custody. The mother appeals, seeking to enter fresh evidence.

Issues:

(1) Should the mother's fresh evidence be admitted?

(2) Did the judge err in accepting and applying the psychiatric evidence of Dr. Pogosyan?

(3) Did the judge err in finding the children remain in need of protective services?

(4) Did the judge err in ordering permanent care and custody under the CFSA in preference to granting a custody order under the PSA?

Result:

Appeal dismissed. The mother's fresh evidence is not admitted because it would not be in the children's best interests to do so. It would effectively extend the statutory twelve-month period provided for in s. 45(2)(a) of the *Children and Family Services* Act, 1990 S.N.S., c. 5 by a further nine months. The judge was in the best position to assess the evidence of Dr. Pogosyan. The evidence supports his finding that the children remained in need of protective services and that it was in their best interests to be in a stable home environment where their high needs could be met.

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

Judges:	Beaton, Hamilton and Scanlan, JJ.A.
Appeal Heard:	November 28, 2019, in Halifax, Nova Scotia
Held:	Motion to introduce fresh evidence dismissed; appeal dismissed without costs, per reasons for judgment of Hamilton, J.A.; Beaton and Scanlan, JJ.A. concurring.
Counsel:	Jennifer Reid, for the appellant Peter McVey, Q.C. and Andy Melvin, for the respondent Minister of Community Services Peter Lederman, Q.C. for the respondents T.C. and L.B.

Publishers of this case please take note that s. 94(1) of the *Children and Family Services Act,* S.N.S. 1990, c. 5, 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 mother, C.R., appeals the May 27, 2019 Order of Associate Chief Judge S. Raymond Morse of the Family Court, placing two of her children into permanent care and custody pursuant to the *Children and Family Services Act* ("*CFSA*"), 1990 S.N.S., c. 5. She seeks to have the children returned to her primary care or, alternatively, to have them remain in the primary care of the respondent, L.B., their paternal grandmother, with parenting time for herself, under the *Parenting and Support Act* ("*PSA*"), R.S.N.S. 1989, c. 160, as amended.

[2] The mother applies to introduce fresh evidence. If her fresh evidence is admitted, the respondent Minister and L.B. apply to introduce fresh evidence in reply.

[3] The judge made no errors of law or fact. I would dismiss the mother's application for fresh evidence and dismiss the appeal.

Background

[4] When the relationship between the mother and the respondent T.C., the children's father, ended, T.C. and his mother, L.B., applied under the *PSA* on June 15, 2017, for joint custody of the two then preschool-age children. That proceeding was adjourned and eventually overtaken by the Minister's application for permanent care and custody under the *CFSA*.

[5] The two children were taken into care on August 12, 2017, after twice having been found unsupervised in the community. At the conclusion of the Interim Hearing the children were returned to the mother's custody, subject to the supervision of the Minister.

[6] The children were again taken into care on October 3, 2017. T.C. had hit the older child. The mother had a history of mental and emotional health difficulties, missed counselling appointments, and lying to Agency workers. The children had high needs in general. The older child had not been registered to begin school and the younger child was not having her medical needs attended to. There were also concerns about the safety of the home.

[7] Following the Protection Hearing, the children remained in the interim care and custody of the Minister. On December 5, 2017, they were placed in the day-to-day care of L.B., where they remain.

[8] Following the Disposition Hearing on January 11, 2018, an Order for Temporary Care and Custody was granted. This commenced the twelve-month time period provided for in s. 45(2) of the *CFSA*. This time limit ensures, along with other provisions with respect to time in the *CFSA*, that protection proceedings conclude as quickly as possible, recognizing that a child's sense of time is different from that of an adult.

[9] On March 9, 2018, the Minister applied to have the children placed in the permanent care and custody of the Minister. The Plan of Care filed by the Minister indicated she would encourage and support L.B. applying to adopt the children. There was nothing inappropriate with the Minister indicating this in her Plan of Care.

[10] On December 5, 2018, on his own motion, the judge consolidated the child protection proceeding under the *CFSA* with the custody application of T.C. and L.B. under the *PSA*. This five-day hearing ended February 20, 2019, with final written submissions filed March 12, 2019. The judge was aware the mother was then expecting her third child, who is not involved in this appeal.

[11] By Order dated May 27, 2019, the judge ordered the two children be placed in the permanent care and custody of the Minister.

Fresh Evidence

[12] The mother seeks to have her affidavit, sworn October 23, 2019, admitted as fresh evidence. If admitted, the Minister seeks to have two affidavits of Agency workers admitted and L.B. seeks to have her November 7, 2019 affidavit admitted in reply.

[13] The four affidavits were admitted provisionally at the hearing. Only L.B. was cross-examined. The panel indicated it would provide the decision on the mother's fresh evidence application in these reasons.

[14] On appeal, evidence concerning events after the judge's Order may be admitted into evidence under s. 49(5) of the *CFSA*. In special circumstances, evidence may also be admitted under *Civil Procedure Rule* 90.47, applying the test

in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 – (1) due diligence in adducing the evidence at trial; (2) relevance; (3) credibility and (4) potentially decisive impact. In both cases, it is the best interests of the children that determines if the evidence should be admitted:

> [15] *C.(M.)* [*Catholic Children's Aid Society of Metropolitan Toronto v. M(C.)*, [1994] 2 S.C.R.165] makes it clear that fresh evidence can result in reversal of the judgment of the trial judge in the absence of error when it is in the best interest of the child. An appellant can succeed upon the introduction of new evidence in two ways. If the evidence relates to facts existing prior to the hearing, the appellant must show that the judge would have arrived at a different result in the best interest of the child if the new evidence had been adduced at the trial. If the evidence relates to facts which arose after the hearing, the appellant must show that the result reached by the trial judge is not, or is no longer, in the best interest of the child.
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> [*S.G. v. Children's Aid Society of Cape Breton*, 1995 NSCA 107]

[15] I would not admit the mother's affidavit. It relates to facts that arose after the hearing before the judge, mainly dealing with another child born after the trial and the efforts the mother is making to parent that child under the Minister's supervision. It indicates she has now successfully completed a course recommended by the Agency during the Protection Hearing for her two older children which she failed to take at that time. She self-reports that she is now availing herself of services offered by the Minister, taking her medication for Attention Deficit Hyperactivity Disorder (ADHD) and that others feel she is improving.

[16] What the mother's affidavit does not address is the best interests of the two children placed in permanent care or the judge's key finding that if he granted custody to L.B. under the *PSA*, the mother's adversarial disposition and her hostility to L.B. could lead to further litigation, delaying the creation of a stable placement for the children who require this as soon as possible.

[17] Nor does the mother's affidavit address the judge's concern about her ability to deal with more than one child at a time, as evidenced by her access visits with them having to be held separately. The judge refers to this in his reasons:

> [254] During access visits with the children the Respondent mother was observed as being incapable of managing the two children resulting in separate access visits. The visits did not go well and there was a great deal of frustration and escalation of behaviours for both children during visits. The family support

> worker, Ms. Francis, testified that she felt the dysregulation demonstrated by the children during access visits was due to lack of attention on the part of the Respondent mother as well as her inability to deal with the children's dysregulation, despite her involvement in family support educational sessions. Ms. Francis testified that she felt that the Respondent mother was offered the full opportunity to demonstrate her parenting skills but also indicated that the Respondent mother didn't appear to be able to retain the information that was being provided. Ms. Francis did not see consistent use of information she provided to C.R. during access visits. It is reasonable to infer that some of the difficulties encountered with respect to the Respondent's inability to retain and utilize the information provided by the family support worker may best be understood or explained as a result of the Respondent's ADHD diagnosis and the associated hyperactivity as referred to by Ms. Lightfoot.

[18] Also, the mother's self-reporting in her affidavit of how others feel she is improving is inadmissible hearsay.

[19] The affidavit is not relevant to the appeal as the information contained in it does not show that the result reached by the trial judge is not, or is no longer, in the best interests of the children. To admit it now would inappropriately serve to ignore the time limits for concluding protection proceedings provided for in the *CFSA*, effectively extending the twelve-month period provided for in s. 45(2)(a) by a further nine months.

[20] As I would not admit the mother's affidavit, the affidavits of the Minister and L.B. would not be admitted in reply.

Issues

[21] The mother raises three issues on appeal:

(a) Did the judge err in accepting and applying the psychiatric evidence of Dr. Pogosyan?

(b) Did the judge err in finding the children remain in need of protective services?

(c) Did the judge err in ordering permanent care and custody under the *CFSA* in preference to granting a custody order under the *PSA*?

Standard of review

[22] The applicable standard of review in child protection matters is set out in *G.R. v. Nova Scotia (Community Services)*, 2019 NSCA 49:

> [16] The standard of review of a trial judge's decision on a child protection matter is well-settled. The Court may only intervene if the trial judge erred in law or has made a palpable and overriding error in his appreciation of the evidence. In *Mi'kmaw Family and Children's Services of Nova Scotia v. H.O.*, 2013 NSCA 141 Saunders, J.A. 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. ...
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> > [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.):
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> > > [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."
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> [17] **To justify this Court's intervention, G.R. must satisfy us that in reaching his decision to place the children in permanent care, the hearing judge made an error of law or a palpable and overriding error of fact. Without such an error, we cannot re-weigh the evidence and substitute our view for that of the hearing judge.**
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> [Emphasis added]

Analysis

(a) Did the judge err in accepting and applying the psychiatric evidence of Dr. Pogosyan?

[23] Dr. Maryna Pogosyan, qualified by consent to give opinion evidence as an expert in the field of psychiatry, prepared a Psychiatric Assessment Report of the mother dated February 25, 2018. It indicated the mother met the DSM-V criteria for Post Traumatic Stress Disorder, Panic Disorder, ADHD, Marijuana Use Disorder and Adjustment Disorder with depression and anxiety. It also indicated the mother possessed features suggestive of Borderline Personality Disorder ("BPD").

[24] The self-report of the mother to Dr. Pogosyan and the documents provided to Dr. Pogosyan in advance of her Report did not include information regarding events of January 8, 2018, that only subsequently came to Dr. Pogosyan's attention. Those events were that the mother told her partner she had consumed "three bottles of pills" and she "had a knife and threatened to cut her wrists." Hence, Dr. Pogosyan did not know of this information concerning potential suicide when she prepared her Report.

[25] During the trial, the Minister posed a hypothetical question to Dr. Pogosyan based on the above evidence. She confirmed that with this information it would be her opinion the mother met five, rather than four, criteria for BPD. In response to those questions, Dr. Pogosyan changed her assessment to conclude a diagnosis of BPD, as opposed to merely traits of BPD.

[26] The mother agreed with all these diagnoses except BPD, however, she agreed she had traits of BPD.

[27] The mother argues the judge erred by giving too much weight to Dr. Pogosyan's amended diagnosis that she had BPD. She suggests the amended diagnosis was not based on recent evidence given the testimony of her witness, Judy Lightfoot (a counselor with Colchester Community Mental Health). Ms. Lightfoot testified that the mother may have outgrown her diagnosis of BPD. The mother does not argue that any wrong principles of law were applied by the judge considering the psychiatric evidence.

[28] I would dismiss this ground of appeal. The judge specifically accepted Dr. Pogosyan's testimony over that of Ms. Lightfoot:

> [248] The court is not prepared to place significant weight on Ms. Lightfoot's assertion that the diagnosis of BPD may no longer be applicable. The court accepts and relies upon the evidence of Dr. Pogosyan with respect to the diagnosis of BPD.

[29] The judge is best placed to make this finding. There is nothing suggesting he erred in reaching his conclusion. It is not for this Court to reweigh the evidence and substitute our view for his.

[30] In any event, a careful reading of the judge's reasons indicates that for the most part he relied on the mother having traits of BPD rather than a diagnosis:

> [253] … The extent to which the Respondent's ongoing mental health issues may have contributed to this unfortunate history is unclear but the court would acknowledge that some of the behaviours involved appear to be consistent with behaviours associated with BPD or borderline personality traits as explained by Dr. Pogosyan.
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> …
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> [259] … In many instances, the behavior on the part of the Respondent mother is consistent with the behaviors referred to by Dr. Pogosyan relating to the Respondent mother's BPD traits and associated defence mechanisms.
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> …
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> [327] In some instances her responses to questions appeared consistent with her borderline personality traits involving externalizing or denial. An example would be her suggestion that if she had been given proper treatment, she would not have had such a hard time dealing with the traits of BPD, when in fact the evidence establishes that on two successive occasions the Respondent's lack of commitment to therapy resulted in suspension of therapeutic programs.

(b) Did the judge err in finding the children remained in need of protective services?

[31] The mother argues the totality of the evidence does not support the judge's finding there continued to be a substantial risk that the children would suffer physical harm, emotional abuse or neglect pursuant to s. 22(2)(b), (g) and (k) of the *CFSA* so that he made a palpable and overriding error in finding that they remained in need of protective services.

[32] There was significant evidence of the children's high needs. They struggle with anxiety and sensory processing and don't do well with change, transitions, and sensory regulation, although improvements have been noted since they have been in the care of L.B. There was evidence that living in the unstructured environment of the mother's home, as their brains were developing, without routines or security and with lots of stress, may have caused their sensory processing issues.

[33] In his extensive reasons, the judge considered whether the children remained in need of protective services in paragraphs 214 to 320. Among other things, he stated:

> [250] When the Respondent mother was referred to Ms. Rankin's testimony indicating that the children presented with symptoms of trauma, she responded by initially suggesting that the children's father had abused them. When asked what role she may have played in the children's trauma, she acknowledged that she had yelled. She then admitted that she was an angry person at that point in her life and admitted that she had problems controlling her emotions. She acknowledged that the children would have been subject to trauma and stress while in the care of herself and the children's father. ...
>
> [251] The evidence supports and justifies the conclusion on balance that the children's sensory issues are attributable to the trauma the children have sustained as a result of their previous home environments. When in the care of the Respondents, the children's home environment was chaotic without necessary structure or routine. Domestic violence was a continuing concern. Following the Respondents' separation, the Respondent mother's untreated, or inadequately treated, mental health issues resulted in the children being exposed to situations where they would have been subject to stress and anxiety. The Respondent mother was not able to provide the children with a stable home environment or with parenting that would adequately meet the children's needs for consistency and routine. Both children have made significant gains since being placed in a home environment where their needs are being adequately met on a consistent basis.

[252] The Respondent herself has conceded that her mental health issues have interfered with her ability to adequately parent her children in the past.

[253] The evidence supports social worker MacDonald's concern that the Respondent mother's life was chaotic. There were continuing concerns with respect to domestic violence in her relationship with D.D-S [the mother's then partner]. The status of C.R.'s relationship with D.D-S. was unclear. Sometimes they were a couple and sometimes they were not. They changed residences a number of times during the course of agency involvement. The police attended at the Respondent mother's home on several occasions in 2018 due to domestic conflict, the last such incident having occurred in August 2018, approximately four months before the commencement of trial. The extent to which the Respondent's ongoing mental health issues may have contributed to this unfortunate history is unclear but the court would acknowledge that some of the behaviours involved appear to be consistent with behaviours associated with BPD or borderline personality traits as explained by Dr. Pogosyan.

…

[255] The Respondent failed to co-operate appropriately with, or engage appropriately in, services intended to assist her in addressing her mental health issues despite the repeated opportunities afforded to her.

[256] Successive therapeutic programs for the Respondent were suspended due to the Respondent's inability to keep scheduled appointments. On another occasion a program intended to afford the Respondent the opportunity to participate in DBT therapy was not able to be arranged because the Respondent again missed a scheduled appointment. The Respondent did not demonstrate the necessary commitment to addressing her mental health issues during the course of the protection proceeding despite the opportunities afforded to her.

[257] As noted earlier, there has been considerable confusion with respect to the Respondent's use of prescription medication. At one point the Respondent mother suggested that she ran into difficulty with funding of one of her medications which led to disruption in her use of the medication. At one point she confirmed that she stopped taking her medication because she suspected she was pregnant, only to learn subsequently that she was not. In January 2018 the Respondent felt she had a mental breakdown which she attributed to a negative reaction to medication. As a result, she again stopped taking her medication after consulting with her family doctor. Subsequently, in July 2018 Dr. Locke prescribed Lamotrigine, a mood stabilizer, as well as Methylphenidate for ADHD. Those medications were discontinued in August 2018 when C.R. discovered she was pregnant.

[258] The mother's current therapist acknowledges that medication would be of considerable benefit to her. The court would note however that, while the Respondent mother curtailed her use of medications as a result of her pregnancy, she continued to use marijuana on a regular basis against the advice of her family

> physician and despite her awareness that she has been diagnosed with Marijuana Use Disorder by Dr. Pogosyan. While C.R.'s inability to use prescription medications at time of trial was attributable to her pregnancy, the resulting unfortunate reality is that there is little evidence which would allow the court to properly assess the actual impact or efficacy of appropriate and sustained use of prescription medication on the Respondent mother's mental health issues or her ability to provide adequate parenting.

[34] He concluded that the children remained in need of protective services due to the mother's unresolved or unaddressed mental health issues, the potential for them to be exposed to domestic violence and neglect:

> [317] There continues to be a substantial risk of harm for the children associated with mental health issues on the part of the Respondent mother. The court finds that there is a real chance of danger apparent on the evidence associated with the potential harm or trauma for the children associated with the Respondent's unresolved or unaddressed mental health issues.
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> [318] I am also satisfied that there continues to be a substantial risk of harm associated with the potential exposure to domestic violence if the children were returned to the care of C.R. While the court cannot state that such harm will actually occur, on balance of probability the court is satisfied that there is a real chance of harm associated with the potential exposure to domestic violence.
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> [319] Similarly, I would reiterate my finding that there continues to be a substantial risk of harm for the children associated with neglect.

[35] There was substantial evidence before the judge about the children's needs and the mother's inability to meet them, such as when they were twice found hungry and alone in the community while their mother slept. There was evidence of the mother's inability to appropriately engage in the services she was offered to help her meet their needs and of their exposure to domestic violence. There was evidence of the younger child not having her medical needs met, of not having timely blood work done while in the mother's care, and of the unsafe condition of the mother's home.

[36] The judge made it clear he accepted the evidence of certain witnesses, such as Dr. Pogosyan, over that of the mother:

> [335] In any instance where the evidence of C.R. conflicts with the testimony of Dr. Pogosyan, the court accepts and relies upon the evidence of Dr. Pogosyan.

[37] His findings are reasonably supported by the evidence. He made no palpable and overriding error in finding the children remained in need of protective services.

The mother is in effect asking us to reweigh the evidence and reach a different conclusion. That is not our function on appeal.

[38] I would dismiss this ground of appeal.

(c) Did the judge err in ordering permanent care and custody under the *CFSA* in preference to granting a custody order under the *PSA*?

[39] The mother argues the judge erred in ordering permanent care and custody under the *CFSA* rather than custody under the *PSA* because s. 42(3) of the *CFSA* requires him to order the least intrusive alternative which is an order for custody under the *PSA*.

[40] Section 42(3) provides:

> Where the court determines that it is necessary to remove the child from the care of a parent or guardian, the court shall, before making an order for temporary or permanent care and custody pursuant to clause (d), (e) or (f) of subsection (1), consider whether
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> (a) it is possible to place the child with a relative, neighbour or other member of the child's community or extended family with whom the child at the time of being taken into care had a meaningful relationship pursuant to clause (c) of subsection (1), with the consent of the relative or other person; and
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> (b) where the child is or is entitled to be an aboriginal child, it is possible to place the child within the child's community

[41] The judge specifically recognized his obligation under s. 42(3) of the *CFSA* to consider less intrusive alternatives but noted this was to be done in the context of the paramount consideration of the best interests of the children:

> [360] The court recognizes that Section 42(3) of the *CFSA* confirms the court's obligation to consider less intrusive options having regards to the best interests of the child.

[42] After determining the children continued to be in need of protection, the judge dealt with the application of s. 42(3) to the evidence before him in paragraphs 354 to 381 of his reasons. He noted he had jurisdiction to consider both permanent placement under the *CFSA* and custody under the *PSA* as a result of his previous consolidation of these two matters. He referred to well-established case authority (*T.B. v. Children's Aid Society of Halifax*, 2001 NSCA 99) which

provides that in the context of a child protection proceeding, such as the one before him, where the outside time limit has been reached, there are only two options available: permanent care or dismissal. He accepted the Minister's evidence that the children had done well in L.B.'s care. He recognized L.B.'s preference to proceed with the Minister's plan of care premised on her adoption of the children because of the mother's hostility and ongoing dislike of her, of which there is objective Facebook evidence. He referred to the mother's admission that she had been hostile with L.B. He accepted L.B.'s concerns that ongoing contact with the mother would result in continuing anxiety for one child and would have an unfavourable effect on the stability of the children generally. He recognized the mother's preference for the less intrusive custody option. He correctly pointed out that the best interests of the children are the paramount consideration under both the *PSA* and the *CFSA*.

[43] He considered the case of *S.G. v. Children's Aid Society of Halifax*, 2001 NSCA 70:

> [362] In *S.G. v. Children's Aid Society of Halifax*, 2001 NSCA 70, the parents and paternal grandparents of the children appealed the trial judge's decision granting the agency permanent care and custody. The issues on appeal were whether or not the trial judge erred by ordering permanent care and custody when there were less intrusive measures available and did she place undue emphasis on the possibility of future litigation which she determined would not be in the best interests of the children?
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> [363] At trial, the maternal grandparents supported the agency's plan for permanent care and custody with an intention of pursuing adoption of the children by the maternal grandparents.
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> [364] The trial judge concluded that placing the children with the maternal grandparents in a custodial situation would set them up for ongoing litigation from both paternal grandparents and the parents and expose them to the emotional drain of future litigation in relation to custody and access, which could destroy the stability and viability of the placement. The appellants maintained that the trial judge erred in reaching this conclusion because the risk of ongoing litigation was not a relevant consideration under the *CFSA* or not supported by the evidence.
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> [365] In delivering the judgement of the court and dismissing the appeal, Justice Cromwell (as he then was) indicated as follows, commencing at paragraph 19:
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> > 19 In my respectful view this submission has no merit. The trial judge was obviously of the view that it was in the children's best interests to be in a stable and permanent arrangement for their care as soon as possible. This was a proper consideration. The preamble to the *Act* notes that children have a sense of time that is different from that of adults and that

> services provided pursuant to the *Act* and proceedings taken pursuant to it must respect the child's sense of time. The judge's decision also properly takes into account the time provisions established by the *Act* which had, in fact, been exceeded with respect to B. by the time of her decision. Under s. 3(2)(k) of the *Act*, the effect on the children of delay in the disposition of the case is a factor to be considered in relation to the best interests of the children. In my view, the trial judge did not err in considering the children's need for stability in a timely fashion and in giving it appropriate weight. Nor do I accept the submission that there was no basis for the judge's concern about lack of stability resulting from ongoing litigation about these children. The behaviour of the parents and the dynamics of these proceedings amply justified her concern.
>
> 20 In rejecting family placement as a less intrusive alternative, the judge was entitled to consider, as she clearly did, that the Agency's plan included adoption of the children by the D.s subject to successful completion of the adoption process. While it is true, as the appellants suggest, that the making of a permanent care and custody order did not guarantee this result, the trial judge had before her extensive evidence about the D.s' parenting of the children and she was well aware that the children had been with the D.s virtually for their entire lives. She also was of the view that there was no other realistic option for these children. There was no reasonable prospect that the children could be returned to their parents, placement with the G.s was not a viable option and, in the circumstances of the case, having regard to the family dynamics which she fully reviewed in her reasons, addressing the needs of these children through a custody and access order was not in their best interests.
>
> 21 As the Court stated in *D. (B.) v. Family & Children's Services of Kings (County)*, supra at paragraph 19, the provisions of the *Act* giving priority to family placement and requiring that the least intrusive alternative be pursued must be interpreted and applied in the context of the *Act* as a whole and in light of its paramount purpose to further the best interests of the children. All placement alternatives must be considered in the context of the needs and best interests of the children. In my view, that is exactly what the judge did.

[44] The judge found, as in *S.G.*, that it was in the children's best interests to be in a stable and permanent care arrangement as soon as possible:

> [366] Based upon the evidence before me, I also believe that recognition of the children's sense of time is required in this case and leads to a similar conclusion, namely, that it is in the children's best interests to be in a stable and permanent arrangement as soon as possible.

[45] He also found, as in *S.G.*, that the less intrusive option of a *PSA* order would be inconsistent with the best interests of the children because the mother's adversarial nature could lead to future litigation, resulting in the delay of providing the children with a stable permanent placement:

> [373] I find that the evidence before me supports and justifies the conclusion that there would be significant risk of further litigation associated with any order that might be made in favor of L.B. under the *PSA* given the Respondent mother's well-established propensity to be adversarial. This conclusion is also supported and justified based upon consideration of the history of the relationship between the Respondent mother and the paternal grandmother.
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> [374] I am satisfied that any potential order under the *PSA* would potentially destabilize the children's placement with the paternal grandmother. The potential for conflict between the paternal grandmother and the Respondent mother and the associated negative impact upon the emotional well-being of the children and the stability of their placement is significant and inconsistent with the best interests of the children.
>
> [375] The children have done extremely well in their current placement with the paternal grandmother. Their behaviors have improved. They are less anxious. They have responded well to the safety, stability, security and consistency they have experienced since being placed in the day-to-day care of the paternal grandmother. The court is satisfied based upon the evidence that a *PSA* order would jeopardize the gains that have been made by the children and expose them to a very real and substantial risk of further harm.
>
> [376] I find, therefore, that the less intrusive option of a *PSA* order would be inconsistent with the best interests of the children.
>
> [377] Furthermore, I am satisfied that an order for permanent care and custody premised upon adoption by the paternal grandmother, as approved by the Minister, will best ensure the children's needs are consistently and adequately met in a safe, stable and nurturing home environment.

[46] The judge took into account the fact that a permanent care order, as opposed to a *PSA* order, would result in only the father having contact with the children post-adoption:

> [378] I acknowledge that the evidence indicates that the Respondent father has continued to have contact with the children subject to appropriate supervision, including supervision provided by the paternal grandmother. This contact is likely to continue following adoption by the paternal grandmother. I acknowledge that the mother sees this as an unconscionable result given the fact that an order for permanent care and custody will effectively terminate her parental rights and that the existing negative relationship between her and the paternal grandmother

> suggests that it is unlikely the grandmother will permit or encourage contact between the mother and the children post-adoption. The mother also points out that the father received a conditional discharge in relation to a criminal proceeding arising from the father's inappropriate physical discipline of the oldest child.
>
> [379] Ultimately, as I have emphasized throughout this decision, it is the best interests of the children that is the paramount consideration as opposed to the concerns or preferences of either of the parents.
>
> [380] In the event of adoption, the paternal grandmother will assume parental responsibility for the children. She will have to exercise this responsibility in a manner consistent with the best interests of the children. Her parental responsibility to protect the children will include ensuring that any contact between the children and their biological father is subject to appropriate terms and conditions, including supervision, as long as such conditions are consistent with the best interests of the children.
>
> [381] The evidence of the paternal grandmother indicates that she has not totally closed the door on the possibility of future contact between the mother and the children. Whether or not the mother is able to have future contact, as well as the nature and extent of any such contact, will obviously be a decision made by the paternal grandmother having regard to the children's best interests. The nature of any interaction between L.B. and C.R. will no doubt also play a critical role in determining future events.

[47] The mother's main argument is that the judge erred by following *S.G.*, where permanent care was ordered pursuant to the *CFSA* instead of custody under the *Family Maintenance Act*, ("*FMA*"), R.S.N.S. 1989, c. 160. She says the judge should have followed *Nova Scotia (Minister of Community Services) v. N.F.A.P.* (1994), 131 N.S.R. (2d) 100 (Fam. Ct.), where the Minister's application for permanent care and custody was dismissed in favour of a custody order pursuant to the *FMA*.

[48] In *N.F.A.P.*, the maternal grandmother and her common-law husband applied for custody of the child under the *FMA* and the Minister applied for permanent care and custody under the *CFSA*, planning to place the child with the same grandmother for adoption. Both applications were before the court. In her reasons for dismissing the permanent care application the judge found:

> 34 In this instance, the less intrusive measure of placing L. with her grandparents as a long-term proposition became apparent during the course of these proceedings. In the context of the spirit of the legislation, it would have been appropriate for the Minister to withdraw and allow this matter to proceed as a private custody matter between the mother and grandmother pursuant to the

> provisions of the *Family Maintenance Act*, which has as its governing principle in custody matters, the best interests of the child.
>
> …
>
> 37 The court is being asked to consider the unique circumstances of this plan for adoption within the family. The grandparents by the same token, have expressed strong reservations about custody, perhaps to some extent because of a lack of understanding and implications of a custody order.
>
> 38 I do not think the very stringent standards for making a permanent care order can be altered because the plan happens to involve a family member. This specific scenario was contemplated by s. 42(3), the implication being that where such an option is available it must be considered, presumably as being less intrusive than the most dramatic of alternatives which has the effect of stripping the mother of all legal rights.

[49] To the extent the judge in *N.F.A.P.* was suggesting that permanent care and custody under the *CFSA* is not available to achieve an extended family adoption placement if the less intrusive alternative of a private custody order is also available, I disagree.

[50] I am of the view the judge here did not err in not following *N.F.A.P.*, which does not appear to have been followed in any other case.

[51] Once a protection proceeding has reached its legislated time limit, s. 42(3) does not provide a statutory preference for a custody order under the *PSA* as a less intrusive alternative in all cases. Section 42(3) must be read in the context of the whole of the *CFSA* and its paramount purpose of having decisions made that meet the needs of the children and are in their best interests, as explained in *Nova Scotia (Minister of Community Services) v. S.B.*, [1999] N.S.J. No. 144 (Fam Ct), adopted in *B.D. v. Family & Children's Services of Kings County*, 1999 NSCA 180:

> [19] Sections 42(2), 42(3) and 46(4)(c), like all others in the *Act*, must be interpreted and applied in the context of the *Act* as a whole and in light of its paramount purpose. They must also be interpreted in a way that recognizes that the *Act* must be applied through a process of adjudication in a court which, while flexible, requires due regard for fair and orderly procedure. I would respectfully adopt the following words of Williams F.C.J. (as he then was) in *Nova Scotia (Minister of Community Services) v. S.B.*, [1999] N.S.J. No. 144 (Fam Ct) at para 225 - 227:
>
> > The word "possible" [in section 42(3)] must be read in the context of the whole of the *Act* and in a fashion consistent with the stated purpose of the Act, Section 2(1).

> Extended family is a placement alternative that is desirable and consistent with the *Act*, as is support for families and alternatives that minimize the intrusiveness of these actions. Any placement alternative, however, must be considered in the context of the needs and best interests of the child.
>
> Section 3(2) defines family security and relationships as a consideration in determining the child's best interests not an overriding trump to the child's best interests.
>
> [Emphasis added in original]

[52] I am satisfied the judge did not err in applying the principles set out in *S.G.* to the evidence before him.

[53] He found it was in the children's best interests to be in a stable and permanent care arrangement as soon as possible. There was evidence supporting his finding. As set out in *S.G.*, this is a proper consideration given the reference in the *CFSA* to children having a different sense of time than adults, the statutory time limits for the completion of protection proceedings and the fact that delay in the disposition of a case is a factor to be considered under s. 3(2)(k) in determining a child's best interests.

[54] He also found the mother had an adversarial attitude generally and was hostile to L.B. The record is replete with evidence of the mother's adversarial attitude in general, including her threats to sue and lay complaints against Agency workers and police officers for actions taken by them during the protection proceeding. There was also evidence of the mother's hostility towards L.B., which the mother admitted. In light of this evidence, the judge did not err in his concern that further litigation could be expected if L.B. was granted custody under the *PSA* and that such litigation would delay and destabilize the children's placement.

[55] Contrary to other arguments of the mother, the judge's reasons make it clear he adequately considered what would be the least intrusive alternative, but properly recognized that it was just one factor in determining what was in the best interests of the children. His reasons also show he appropriately considered the fact that a permanent care order would result in T.C., the father, having an ongoing relationship with the children that the mother may not have (paragraphs 378 to 381).

[56] The judge was best placed, having seen and heard the witnesses, to make the findings he did and to determine the outcome that would best serve and protect the best interests of the children.

[57] I would dismiss this ground of appeal.

[58] I would dismiss the appeal without costs.

Hamilton, J.A.

Concurred in:

Beaton, J.A.

Scanlan, J.A.