NOVA SCOTIA COURT OF APPEAL

Citation: *A.M. v. Nova Scotia (Community Services)*, 2020 NSCA 29

Date: 20200319
Docket: CA 490171
Registry: Halifax

Between:

A.M.

Appellant

v.

Minister of Community Services, H.O. and H.M.

Respondents

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

Judge:	The Honourable Justice Carole A. Beaton
Appeal Heard:	November 29, 2019, in Halifax, Nova Scotia
Subject:	*Children and Family Services Act*; Family; Family—access to children; Family—child custody; *Parenting and Support Act*;
Legislation:	*Children and Family Services Act*, 1990, c. 5; *Parenting and Support Act*, 2015, c. 44
Cases Considered:	*G.R. v. Nova Scotia (Community Services)*, 2019 NSCA 49; *C.R. v. Nova Scotia (Community Services)*, 2020 NSCA 4; *Hryniak v. Mauldin*, 2014 SCC 7; *Oelbaum v. Oelbaum*, 2011 ONCA 300; *Godin v. Godin*, 2012 NSCA 54; *Catholic Children's Aid Society of Metropolitan Toronto v. L.O.*, [1997] O.J. No. 3041 (Ont. C.A.); *Nova Scotia (Community Services) v. T.G.*, 2012 NSCA 43; *S.R. v. Nova Scotia (Community Services)*, 2012 NSCA 46; *Awalt v. Blanchard*, 2013 NSCA 11; *P.H. v. Nova Scotia (Community Services)*, 2013 NSCA 83; *A.M. v. C.H.*, 2019 ONCA 764;

Summary: The mother sought to overturn the hearing judge's dismissal of a permanent care hearing in favour of a parenting order. The parenting order placed the child out-of-province in the care of an extended family member. The mother sought a custody order in her favour.

Issues: (1) Did the hearing judge err in law in failing to find or permitting a breach of the respondent Minister's legislative mandate?

(2) Did the hearing judge provide sufficient reasons for the decision reached?

(3) Did the hearing judge err in misapprehending evidence?

(4) Did the hearing judge err in law in failing to consider all relevant factors in assessing the child's best interests?

Result: The record could not support any conclusion the Minister had breached her legislative mandate to promote reunification of the family or ignored her statutory obligations under the *CFSA*. The Court has no authority to conduct an inquiry into the Minister's actions. The hearing judge's reasons were sufficient to permit appellate review, and did not reveal any error in the reasoning process used. There was no misapprehension of evidence by the hearing judge. The hearing judge did not fail to consider all relevant factors in assessing the best interests of the child.

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Judges:	Beveridge, Bryson and Beaton, JJ.A.
Appeal Heard:	November 29, 2019, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Beaton, J.A.; Beveridge and Bryson, JJ.A. concurring
Counsel:	Rosanne M. Skoke, for the appellant Peter McVey, Q.C. and Sarah Lennerton, for the respondent Minister of Community Services H.O., respondent on her own behalf H.M., respondent, not participating

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 Ms. M. ("the mother") challenges a decision made by the Honourable Judge James Wilson of the Family Court of Nova Scotia ordering dismissal of a proceeding under the *Children and Family Services Act*, 1990, c. 5, s. 1 ("the *CFSA*") in favour of a parenting order under the *Parenting and Support Act*, 2015, c. 44, s. 2 ("the *PSA*"). The *PSA* order directed the placement of her child with an extended family member.

[2] The mother asks this Court to order the child placed in her custody. Curiously, the mother advocated before the hearing judge for a dismissal of the *CFSA* proceeding, and although she achieved that result, she now appeals both orders. For the reasons that follow, I would dismiss the appeal.

[3] The numerous grounds of appeal can be condensed into the following issues:

1. Did the hearing judge err in law in failing to find or permitting a breach of the respondent Minister's ("the Minister") legislative mandate?
2. Did the hearing judge provide sufficient reasons for the decision reached?
3. Did the hearing judge err in misapprehending evidence?
4. Did the hearing judge err in law in failing to consider all relevant factors in assessing the child's best interests?

Background

[4] The mother had a history of interventions by child welfare agencies in Nova Scotia and Alberta. At various times she and her partner had been offered services to assist either or both of them with mental health challenges, addictions, partner violence and inadequate parenting. After the couple's relationship broke down, the Minister received various referrals regarding a renewed deterioration in the mother's mental health and ability to parent her child. Eventually the Minister made an application to the Family Court of Nova Scotia under s. 22(2) of the *CFSA* seeking to have the child placed in the Minister's temporary care and custody. That action progressed pursuant to the statutory timeline set out in the *CFSA*, and eventually the court consolidated the *CFSA* proceeding with an action filed under the *PSA* by extended family member H.O.

[5] Following multiple days of evidence, the judge rendered an oral decision. He was persuaded it was appropriate to dismiss the *CFSA* proceeding. Given the mother's mental health difficulties, and her slow progress in having those issues resolved to a point where she could resume parenting, the judge determined it to be in the best interests of the child to relocate to Saskatchewan, to reside with the respondent H.O., who had some history of caring for the child. The judge's decision preferred that placement over one with the respondent H.M., whom the mother had supported in seeking to assume care of the child. Nevertheless, an important feature of the decision was that it recognized the potential for the mother to play a greater role in the care of her child at some future date:

> A placement with H.O. should provide stability in the near term and maintain the family connection. It does not prelude (*sic*) a future role for A.M. There are still variables at play; how E.M. transitions to day to day care with H.O. and how stable A.M. remains over the longer term are but two factors that will impact the ultimate long term care of E.M. While E.M. will be moving to Saskatchewan in the care of H.O. under a PSA order, because of the issues and evidence located here, Nova Scotia will maintain jurisdiction on the PSA file for a 12 month period.

Standard of Review

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

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

Issue No. 1: Did the hearing judge err in law in failing to find or permitting a breach of the Minister's legislative mandate?

[7] The mother asserts the apprehension of the child and her subsequent efforts to engage in services, both independently and as provided by the Minister, were subverted or thwarted by the actions of the Minister's agents in their various interventions and decisions made over the duration of the case. Those included the Minister: having shared confidential information with H.O., having permitted

contact between the child and H.O., and having promoted the placement of the child with H.O. contrary to the Minister's statutory duty to promote the reunification of the child and the mother.

[8] The record reveals that at each statutory milestone in the course of the *CFSA* proceeding the Minister's agents were fulfilling their mandate to "… develop and provide services to families to promote the integrity of families …" as set out in s. 9(e) of the *Act*. Transcripts of appearances and the record of filings reflect the court and the mother were kept informed of the Minister's engagement with the family. The court was alive to the impact on both the mother and the child of the decisions made and services offered by the Minister over the timeline of the litigation, as reflected in comments made by the presiding judge at various appearances. There is nothing to support any suggestion, much less a conclusion, that the Minister was in any way attempting to or actually ignoring her obligations under the *Act* to the detriment of the mother or the child.

[9] Throughout the time services were being offered to the mother and the child, the Minister also permitted contact between the child and H.O. Despite the mother's allegations, the record does not demonstrate any sinister agenda in the Minister's discretionary decision to provide the child with continuity of contact with a family member who was also a former caregiver. Again, the mother and the court were kept informed about the nature of that contact. Based on the record, there is no support for the mother's contention that any information was inappropriately shared with H.O. or anyone else.

[10] The mother asserts the Minister shirked her statutory obligation to emphasize reunification of the family by instead promoting H.O. as a caregiver of the child, over the mother. The Minister was, at various points, alive to the potential for H.O. to be an alternative placement. I am not persuaded that the Minister's actions in remaining abreast of potential alternatives, should the mother ultimately not be in a position to parent by the time of final disposition of the case, somehow ran afoul of the Minister's statutory obligations or demonstrated the Minister failed to promote a relationship between the mother and the child.

[11] Section 41(3) of the *CFSA* provides:

> The court shall, before making a disposition order, obtain and consider a plan for the child's care, prepared in writing by the agency and including

> (a) a description of the services to be provided to remedy the condition or situation on the basis of which the child was found in need of protective services;
>
> (b) a statement of the criteria by which the agency will determine when its care and custody or supervision is no longer required;
>
> (c) repealed 2015, c. 37, s. 31.
>
> (d) where the agency proposes to remove the child from the care of a parent or guardian,
>
> > (i) an explanation of why the child cannot be adequately protected while in the care of the parent or guardian, and a description of any past efforts to do so, and
> >
> > (ii) a statement of what efforts, if any, are planned to maintain the child's contact with the parent or guardian; and
>
> (e) where the agency proposes to remove the child permanently from the care or custody of the parent or guardian, a description of the arrangements made or being made for the child's longterm stable placement.

[12] The Minister has an obligation to exercise a degree of malleability in refining her Plan of Care over time to respond appropriately to the best interests of a child within the context of the often fluid and evolving circumstances of children and families. This may include adjustments made closer to the end of the statutory timeline when certain events, combined with the effect of the "ticking clock" lead to a refocusing of the Plan of Care.

[13] Sections 46(4) and (5) also require an assessment of the child's best interests at each review conducted by the court along the litigation timeline:

> (4) Before making an order pursuant to subsection (5), the court shall consider
>
> > (a) whether the circumstances have changed since the previous disposition order was made;
> >
> > (b) whether the plan for the child's care that the court applied in its decision is being carried out;
> >
> > (c) what is the least intrusive alternative that is in the child's best interests; and
> >
> > (d) whether the requirements of subsection (6) have been met.
>
> (5) On the hearing of an application for review, the court may, in the child's best interests,

> (a) vary or terminate the disposition order made pursuant to subsection (1) of Section 42, including any term or condition that is part of that order;
>
> (b) order that the disposition order terminate on a specified future date; or
>
> (c) make a further or another order pursuant to subsection (1) of Section 42, subject to the time limits specified in Section 45.

[14] Each review hearing held and order generated met these statutory requirements, both as it pertained to the obligations of the Minister and to the role of the court.

[15] There is nothing in the Minister's actions throughout this case or her various filings that could support the mother's assertion, much less a conclusion by this Court, that the Minister's intention was always for the child to reside with H.O., contrary to the mother's interests. I am not persuaded there was a predetermined agenda on the part of the Minister that the court somehow failed to detect or ignored as the case progressed.

[16] While H.O. ultimately became the child's caregiver under the *PSA* order, I am not persuaded anything nefarious may be read into the reasons for the evolution of the Minister's position as the case made its way through the court.

[17] The mother also argues that she was prejudiced by not being "… afforded the continuity of Judge Daley who presided over the child protection proceedings from February 2018 until June 2019 when Judge Wilson presided as judge at the trial" (pp. 17-18, Appellant's Factum). The mother maintains this unfairness must be considered through the lens of the issue at stake—that she stood to be deprived of the opportunity to parent her child.

[18] Judge Daley, who conducted the entire *CFSA* proceeding up to the point of setting the final hearing dates, discussed with the parties his concern about the approaching statutory deadline and the need to schedule the final hearing. As argued before us by the Minister, at the time Judge Daley made the arrangement for Judge Wilson to assume carriage of the final disposition hearing within the statutory timeline, no party objected to that solution. It is not appropriate for the mother to now complain about that to which she was agreeable in the court below.

[19] It is important to note that even had the mother objected at the time the decision to transfer the matter to another judge was made, the court had the right to control its own processes (*Hryniak v. Mauldin*, 2014 SCC 7 at para. 28; *Oelbaum v. Oelbaum*, 2011 ONCA 300 at para. 9; *Godin v. Godin*, 2012 NSCA 54 at para.

85). Here, that common law right was also informed by the practical need to adhere to the statutory deadline for final determination of the *CFSA* proceeding. Finding another judge to conduct the hearing, given the first judge was not going to be available, recognized and emphasized the unique concerns of child welfare proceedings (*Catholic Children's Aid Society of Metropolitan Toronto v. L.O.*, [1997] O.J. No. 3041 (Ont. C.A.) at para. 63; *Nova Scotia (Community Services) v. T.G.*, 2012 NSCA 43 at para. 201).

[20] While the "one judge-one file" approach may be preferable in family law matters, and particularly in child welfare proceedings, the reality is that for many reasons it is not always possible to achieve. The proper administration of the courts, litigants' access to timely justice, and the best interests of children should not be held hostage to an ideal that may, in certain situations or for certain cases, become impractical if not impossible.

[21] Finally, I note the argument advanced by the mother that the Minister's conduct throughout the litigation "… exceeded its jurisdiction and authority and implemented rule by law rather than adhering to the principles relevant to rule of law" (Appellant's Factum, para. 8). With respect, there is nothing in the record to support such an assertion. Furthermore, this Court has no authority to grant the mother's requested remedy that it conduct an inquiry into the Minister's actions.

[22] In relation to this ground of appeal, no errors of law or palpable and overriding errors of fact have been established by the mother.

Issue No. 2: Did the hearing judge provide sufficient reasons for the decision reached?

[23] The mother argues the reasons provided by the judge were inadequate, first on the basis that he did not address mobility in his decision. However, the decision made by the judge did not in any way trigger the mobility provisions of s. 18 of the *PSA*. Section 18D speaks to a change of residence by a party under the *Act* and the notice provisions required to be communicated to the party(ies) to the order. The mobility provisions of the *PSA* were not yet in play before the judge, as there was no existing *PSA* order in place. Section 18E of the *PSA* also addresses relocation, however the party receiving the child, H.O., resided in Saskatchewan throughout and was not relocating; rather, the child was being relocated to the home of H.O., a decision made in what the judge determined to be in the best interests of the child. Best interests determinations are findings of fact; there was no palpable and overriding error made by the judge in that regard.

[24] The mother's second argument regarding sufficiency of reasons asserted an absence of reasoning reflected in the judge's decision. *S.R. v. Nova Scotia (Community Services)*, 2012 NSCA 46 discussed the ability to exercise meaningful appellate review as key to the question of adequacy of reasons:

> [17] In a series of cases, the Supreme Court of Canada has recognized the importance of reasons in various settings: e.g., *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39; *R. v. Sheppard*, 2002 SCC 26; *R. v. Braich*, 2002 SCC 27; *R. v. Walker*, 2008 SCC 34; *F.H. v. McDougall*, 2008 SCC 53; *R. v. R.E.M.*, 2008 SCC 51. Their import can be summarized thusly:
>
> > (a) the need for, and adequacy of reasons, is contextual and depends upon the adjudicative setting, (*Sheppard*, para. 19);
> >
> > (b) reasons inform the parties – and especially the losing party – of why the result came about, (*R.E.M.*, para. 11);
> >
> > (c) reasons inform the public, facilitating compliance with the rules thereby established, (*Sheppard*, para. 22);
> >
> > (d) reasons provide guidance for courts in the future in accordance with the principle of stare decisis, (*R.E.M.*, para. 12);
> >
> > (e) reasons allow both the parties and the public to see that justice is done and thereby enhance the confidence of both in the judicial process, (*Baker*, para. 39);
> >
> > (f) reasons foster and improve decision-making by ensuring that issues are addressed and reasoning is made explicit, (*Baker*, para. 39; *Sheppard*, para. 23; *R.E.M.*, para. 12);
> >
> > (g) reasons facilitate consideration of judicial review or appeal by the parties, (*Baker*, para. 39);
> >
> > (h) reasons enhance or permit meaningful appeal or judicial review, (*Sheppard*, para. 25; *R.E.M.*, para. 11).
>
> […]
>
> [19] At common law, the inadequacy of reasons does not automatically trigger appellate intervention. "Poor reasons may coincide with a just result" (*Sheppard*, para. 22). As Chief Justice MacDonald said in *McAleer v. Farnell*, 2009 NSCA 14, citing *R.E.M.*:
>
> > [15] For this reason, our role on appeal is not to criticize the level of detail or expression. Instead it is to determine if the functions noted above have been fulfilled to the point where a meaningful appeal is available:
> >
> > > [53] However, the Court in *Sheppard* also stated: "The appellate court is not given the power to intervene simply because it thinks

> the trial court did a poor job of expressing itself" (para. 26). To justify appellate intervention, the Court makes clear, there must be a functional failing in the reasons. ***More precisely, the reasons, read in the context of the evidentiary record and the live issues on which the trial focussed, must fail to disclose an intelligible basis for the verdict, capable of permitting meaningful appellate review.***

[25] A review of the judge's oral decision reflects that he canvassed the history of the matter, identified why it was being heard when it was heard, and considered that both applications—the child welfare proceeding and the private custody proceeding—would be considered. He then granted standing to the respondents H.O. and H.M., considered the possible conclusions that might be reached under the *CFSA* and reminded himself of the burdens of proof and the purpose of the legislation.

[26] Next, the judge identified the chief issue as being the mother's mental health and undertook an analysis of the history and evidence offered to the court in relation to that issue. (I note the judge's recounting of the evidence he heard and its impact upon his analysis constitutes a considerable portion of the decision.)

[27] Having made certain conclusions, the judge then went on to explain his consideration of the plans put forward by H.M. and H.O. He set out the reasons why he was able to conclude the plan put forward by H.O. was a viable one , which could allow him to consider a less intrusive option under the *PSA* than a permanent care finding under the *CFSA*. As mentioned earlier, in making the *PSA* decision the judge recognized there was potential for a future role for the mother in the parenting of her child, subject to what might happen over the longer term with respect to the mother's health.

[28] I am satisfied the judge's oral decision provides an identifiable reasoning process that sets out the basis for the decision he reached. I am not persuaded this is a case where the right to meaningful appellate review is frustrated by any insufficiency in the reasons, or that there is an inability to appreciate fully the process of reasoning the judge used to arrive at his decision.

[29] As stated in *Awalt v. Blanchard*, 2013 NSCA 11:

> [38] The need and rationale for reasons has been variously described. In *F.H. v. McDougall*, 2008 SCC 53, ¶ 98, the Supreme Court listed four explanations for the duty to give reasons. In *Sable Mary Seismic v. Geophysical Services Inc.*,

> 2012 NSCA 33 (¶ 74) and *S.R. v. Nova Scotia (Community Services)*, 2012 NSCA 46 (¶ 17) this Court lists five and eight explanations respectively. But the absence or paucity of reasons is not a free standing ground of appeal (*R. v. Walker*, 2008 SCC 34, ¶ 20; *F.H.*, ¶ 99). Reasons must be assessed in the context of the active issues at trial. Do the reasons fail to disclose an intelligible basis for the result; do they allow meaningful appellate review? (*R. v. R.E.M.*, 2008 SCC 51, ¶ 53.)
>
> […]
>
> [46] While it can be disappointing for counsel when a judge does not address all his arguments, that does not automatically become "inadequacy of reasons". The evidence supports the trial judge's conclusion, even though that conclusion could have been more articulate. But he committed no error of law or fact in arriving at his conclusion.

[30] I am not persuaded the judge failed to appreciate or consider relevant evidence or that he disregarded evidence. While his oral decision might be described as economical, his reasons are not structured in such a way that they prevent meaningful appellate review, and in my view, they do not reveal any error.

Issue No. 3: Did the hearing judge err in misapprehending evidence?

[31] The mother asserts errors were committed by the judge in misapprehending evidence, chief among them being evidence concerning the mother's mental health, her medications, and a home assessment report in relation to H.O.

Evidence regarding the mother's mental health

[32] The mother asserts an error in law and in fact when the judge accepted the evidence of expert witness psychiatrist Dr. Pogosyan that further time was needed in which to monitor and reassess the mother's mental health vis-à-vis her ability to parent. The mother says the judge then appropriated the time approximation testified to by the witness into his consideration of the legal test of "substantial risk" in s. 22(1) of the *CFSA*.

[33] The judge accepted Dr. Pogosyan's evidence that a "substantial" period of time would be needed to continue to follow the mother's progress with respect to efforts to treat her mental health. It does not suggest that the judge in any way conflated the evidence of the expert witness with the applicable legal test regarding substantial risk found in s. 22(1), where it is defined as meaning "a real chance of danger that is apparent on the evidence". Furthermore, simply because the judge adopted a one-year period of time in which to retain jurisdiction over the *PSA* matter, I am not persuaded that was related to his assessment under s. 22(1) of the

CFSA, which analysis was done prior to turning his attention to the contents of a *PSA* order. Clearly the judge was not persuaded it was necessary to make any disposition other than an order of dismissal under s. 42(1) of the *CFSA* given the availability of a sound plan, in the child's best interests, under the *PSA* proceeding.

[34] The mother also objects to the judge's refusal to permit her to call evidence from her dialectical behaviour therapist, Ms. Tree. The record confirms the judge was not prepared to allow Ms. Tree to provide expert evidence in the absence of any report having been being generated by her in advance of testifying. However, the judge did allow time for that to occur. During the hearing, the following exchange occurred:

> **MS. LENNERTON:** With respect to Rachel Tree, Your Honour, I just want to place on the record, certainly the Minister understands why Ms. Tree would have information to provide to the Court, however, there were filing deadlines set ---
>
> **THE COURT:** Yeah.
>
> **MS. LENNERTON:** --- in this matter. I have no reports from Rachel Tree. I think there's already been evidence that the agency had a hard time getting information from Rachel Tree. Ms. Skoke has advised me that Ms. Tree told her that she had disclosed information to the agency, and I note there was a medical file provided to the agency in -- it looks like September -- if this is what Ms. Tree is referring to. But other than that medical file, the Minister has nothing else, and I really don't know what Ms. Tree is going to say.
>
> **THE COURT:** Ms. Skoke?
>
> **MS. SKOKE:** Well, Your Honour, I think it is very important. It goes to the therapy that she's received. And I'm not sure I have a copy of that medical file, and I spoke with Ms. Tree, and she said that she had provided that. And through the Capital Health Authority, the way they have their new disclosure policies now, it's either done by way of order of productions or by subpoenas, so, she can take records, and she can also speak to the fact that when Ms. Cowan had asked for information, she asked for the Tearmann file from Rachel Tree and not that. I don't want to get into evidence ---
>
> **THE COURT:** No.
>
> **MS. SKOKE:** --- but I think it's very important that she give evidence. She is available tomorrow morning. Everyone is saying they couldn't track her down ---
>
> **THE COURT:** More to the point -- and I understand why she would be a relevant witness -- but she has to produce a report. If she's going to be called as an expert witness, we have to have -- we, the other side, the Court, has to have

some information about what she's going to say. Otherwise, this becomes a farce. I want to be very clear about that. There seems to have been, if I accept the evidence of the agency witness, that there's been a reluctance of Ms. Tree to do anything more than acknowledge that she's seeing [Ms. M.] She has to produce a written report. I'm prepared to abridge, maybe, given where we are with the hearing, but certainly abridge -- you know, the filing time -- I think the rules require a minimum of five days for an expert's report, so, I don't think that she's going to be able to say very much if she turns up here tomorrow without a report. Those are simply the rules. And if -- so ---

MS. SKOKE: So, the request, then, would be that she would come in on our next day, on Tuesday, if she can prepare a report.

THE COURT: That would appear to -- well, we've got nothing now. I can't see her going and ---

MS. SKOKE: Well, I did -- I made my best efforts to try to get her here, but I don't have a report, and the agency's evidence or information is they tried to get a report and they couldn't get it, so -- but ---

THE COURT: Yeah. No, I'm -- I'm not supposed to get frustrated, but these professionals know what the rules are, you know, in terms of presenting reports. Every other person who's come in here and testified has produced a report so that all sides fairly know what it is they're going to testify about and give people an opportunity to prepare for a meaningful cross-examination. For somebody to waltz in here as an expert with no report just makes a farce out of the rules, and I'm not prepared to allow that. I see no basis to allow that in this case. So, if you can get a report from her that'll indicate the substance of what she's prepared to testify to, then we're perhaps prepared to accommodate her next week. But, no, an expert needs to file a report. Simple as that.

(Appeal Book, Vol 2, Tab J, pp. 505-508)

[35] Contrary to the arguments put forward by the mother, the judge gave ample opportunity for a report to be generated, and he was as flexible as possible in doing so. That he did so was again emphasized later in the hearing when the following exchange ensued, again regarding securing a report from Ms. Tree:

MS. LENNERTON: … if she is coming on Tuesday, I would appreciate it if the Minister -- sorry, if the Court could set a filing deadline for the report, like how far in advance we can receive it. I wouldn't want to receive it Tuesday morning and have no opportunity to prepare.

MS. SKOKE: I'd like to have a court order ordering the report because -- I spoke with Ms. Tree directly at my lunch hour, and she was certainly willing to come tomorrow morning, and she could bring what she could, but she needed approval in order to -- it's this privacy rule that they have through the Capital Health Authority, so -- but she now knows she has to do a report within 24 hours,

but even then, she said a report then has to be approved. She can't take any records without a formal subpoena. But we're working it. We're trying to get around it, but I just want to make sure everybody knows that that's what we're dealing with in Capital Health Authority.

MS. LENNERTON: And, Your Honour, if I could be clear. The filing deadlines in this matter were an extremely long time ago. The Minister filed their material at least a month ago, and the filing deadline for the Respondents was May 17th, and I did not receive any materials until last week. We proceeded anyway, despite having received a lot of material, which, frankly, it really stretches the bounds of reasonableness to receive materials Friday morning for a five-day trial starting the following Tuesday. There was ample opportunity to get a report from Rachel Tree. And I appreciate that Rachel Tree has been a significant service provider, whose name is coming up a lot, so I don't want to be too obstructive in that sense, but there was lots of time to get this done, and now we're doing it at -- past the 11th hour. The trial has already started.

MS. SKOKE: I just want to say kindly in response that part of my case is saying that any decisions that the agency made with respect to [A] and her mother or the viability of the placement of the child with her mother should have been predicated upon the mother's progress and that they had a duty and an onus and a responsibility to get that information. And if they didn't have the information, how could they be properly informed to make a decision. So, it cuts both ways.

THE COURT: Well, I think, in fairness, they got reports from the people that they sent [Ms. M.] to. [Ms. M.], I think -- my understanding is that she connected with mental health of her own volition, and she now wants to rely on their evidence for her case, so it's her responsibility to get her report here. I'm going to be -- I'm not issuing orders to some third party. I don't have the capacity to do that in terms of a report. What I'm going to say about it is that, Ms. Lennerton, if she doesn't have a report by close of business on Friday, there will be no opinion coming from Rachel Tree. And whatever she produces, you know, I want to be clear that it's in the form of an expert's report. I don't think these notes are -- and I'm not sure that I've seen those notes, but the file itself doesn't constitute an expert's report, I don't think. Anyway, if it can be gotten through the red tape, then I'm prepared to try to accommodate it, but -- and I think I would just add one further caveat to that. If there's something contained in that report, Ms. Lennerton, that is grossly unfair to the Minister, I would consider a further adjournment for you to deal with it. That's the best I can do.

(Appeal Book, Vol 2, Tab J, pp. 547-550)

[36] It was not the judge's responsibility to direct the production of materials midway through a hearing, as the mother asserts. Likewise, it was not the Minister's responsibility to try to assist the process by securing the records of Ms.

Tree, given the therapist was a third party service provider not under the Minister's purview.

[37] The judge took an eminently reasonable approach to try to give time and opportunity for the mother to call the evidence of Ms. Tree, while remaining within the boundaries of procedure, the rules concerning expert evidence, and effective trial management.

The pharmacist's evidence

[38] The mother asserts the judge erred both in his interpretation of the expert evidence of pharmacist Mr. MacLean regarding gaps in the mother's adherence to the schedule of medication prescribed for her, and in his treatment of that evidence, all contrary to the mother's interests. The witness spoke to two instances in which there were interruptions in the mother's consumption of prescribed medication over a certain period of time. The mother now complains the judge did not rely on or apply that evidence so as to agree with her explanations for those interruptions.

[39] The judge made specific findings regarding this aspect of the evidence:

> [13] I want to comment briefly on both the October 18th and February 19th incidents. Ms. Skoke argues that the October presentation at emergency was entirely predictable due to the medication change. Similarly, the February incident was a result of stopping meds for surgery or perhaps being unable to keep meds down due to illness. In both cases, the occurrence caused the Minister, in the October incident, to suspend access for a while and then reinstate access on a fully supported basis. And I think it was the February incident that caused the agency to alter its long term plan.
>
> [14] Counsel for the Minister counters Ms. Skoke's argument that even if you accept that explanation, A.M. lacked insight into her conditions by not having safety plans in place. ***Whatever explanation is correct***, the Minister cannot ignore a period of instability when its mandate is to protect the child from harm.
>
> [Emphasis added]

[40] There is nothing in his analysis of the pharmacist's evidence that suggests the judge rejected it. Furthermore, later in his decision (para. 16) the judge referenced an event "… in February during a medication interruption". Clearly, the judge was not discounting the possibility of a medication "interruption" as maintained by the mother, versus the medication cessation argued by the Minister. I do not discern from the record that any aspect of the judge's interpretation or use

of the pharmacist's evidence was a mistake of fact or constituted a misapprehension of the evidence.

Evidence regarding a home assessment

[41] The mother objects to the use made at the hearing of an assessment conducted by one Mr. McCarthy in the province of Saskatchewan regarding the home environment of H.O. She asserts the report was limited in its utility because it relied on self-reporting by H.O. without any further follow-up. I agree with the submissions of counsel for the Minister that the report of Mr. McCarthy was before the hearing judge to provide some information, in the context of the *PSA* proceeding, about the suitability of H.O.'s home environment. The judge then conducted the appropriate assessment on the ultimate question of the child's best interests. There is nothing to suggest the report of Mr. McCarthy was improperly, inappropriately or unfairly used by the court.

[42] In summary, it was well within the hearing judge's discretion to accept or reject evidence, or to place greater emphasis on certain evidence in formulating his conclusions. There was no error by the judge in relation to any of the evidence. The record reflects the proper application of that evidence which the judge accepted to the legal test(s) in play. I cannot discern any errors were committed, nor any evidence misapprehended in the judge's approach or reasoning.

Issue No. 4: Did the hearing judge err in law in failing to consider all relevant factors in assessing the child's best interests?

[43] There is no dispute between the parties that the judge was correct in law in ultimately applying the best interests test in assessing which parenting plan being put forward would be preferable for the child. Rather, the mother argues the hearing judge failed to consider all factors that were relevant to assessing the child's best interests, including but not limited to the mother's plan of care for the child. With respect, I see nothing in the record nor the decision of the judge which could support this contention.

[44] It would seem that the mother's complaint is really that the judge, having distilled all of the evidence, reached a decision which was not her preferred outcome. That alone does not permit appellate interference. There were no palpable and overriding errors made by the judge in determining the child's best interests.

[45] There is no small irony in the mother having appealed the *CFSA* decision to this Court, given the hearing judge's conclusions resulted in the best possible outcome for the mother—the dismissal of the Minister's action. There is no merit in the mother's assertion she could have benefitted from the court permitting the *CFSA* proceeding to run until the last day of the statutory deadline. That position runs contrary to the principles regarding timelines articulated in *P.H. v. Nova Scotia (Community Services)*, 2013 NSCA 83, paras. 82-90.

[46] The timeline does not "belong" to a parent in child welfare litigation, and the court can set a final disposition hearing at any time after the first disposition order is made, as and when it deems doing so to be in the child's best interests. In this case there were mere weeks left in the timeline when the final hearing was concluded.

[47] Ultimately, the mother ended up better placed operating under a *PSA* order than the results possible under the *CFSA*, in any order short of dismissal, which she also achieved.

[48] The *PSA* order provides for contact between the mother and child, and makes real the potential that, in time, the mother might resume a greater parenting role. In assessing the child's best interests, although the judge did not accept the mother was then in a position to parent the child, the order imposed was a preferable outcome for the mother under all of the circumstances.

[49] I see nothing that constitutes an error or misapprehension in the hearing judge's determination that the plan which most closely aligned with the child's best interests was that put forward by H.O. Although the mother objected to it before this Court, practically speaking, it was to the mother's advantage that the decision by the judge included retaining jurisdiction over the matter for the first year of the *PSA* order, which was within his discretion to do, in maintaining continuity in the best interests of the child.

[50] A passage from the recent decision in *A.M. v. C.H.*, 2019 ONCA 764, although written in the context of a discussion about the making of therapeutic orders, resonates here. There, Pardu J.A. reminds us:

> [74] Each case must be determined on its own specific facts. The trial judge hears from all the witnesses and as such, is in the best position to assess the child's best interests. If there is no error in law, no palpable and overriding error of fact, and no misapprehension of evidence, appeal courts should not interfere.

[51] In conclusion, for the foregoing reasons, I would dismiss the appeal. No costs were sought, and none are ordered.

Beaton, J.A.

Concurred in:

Beveridge, J.A.

Bryson, J.A.