NOVA SCOTIA COURT OF APPEAL

Citation: *G.E.M. v. Nova Scotia (Community Services)*, 2020 NSCA 37

Date: 20200423
Docket: CA 493469
Registry: Halifax

Between:

G.E.M.

Appellant

v.

Minister of Community Services and C.P.

Respondents

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

Judge:	The Honourable Justice Carole A. Beaton
Appeal Heard:	March 26, 2020, in Halifax, Nova Scotia
Legislation:	*Children and Family Services Act*, SNS 1990, c. 5, s. 1
Cases Considered:	*C.R. v. Nova Scotia (Community Services)*, 2020 NSCA 4; *S.G. v. Children's Aid Society of Cape Breton*, 1995 NSCA 107; *G.R. v. Nova Scotia (Community Services)*, 2019 NSCA 49; *A.M. v. Nova Scotia (Community Services)*, 2020 NSCA 29
Subject:	Appeal; *Children and Family Services Act*; Family; Evidence—fresh; Evidence—agreed statement of fact; Permanent care order
Summary:	The father sought to overturn the hearing judge's decision granting permanent care of his child to the Minister. The judge was satisfied the continuing substantial risk of physical harm, emotional abuse and neglect to the child could not be addressed in the Plan of Care put forward by either parent. The father also made a motion to adduce fresh evidence from

his pharmacist and from the toxicologist who had testified before the judge.

Issues:

(1) Should fresh evidence be admitted?

(2) Did the judge err in law or in fact in making findings pursuant to ss. 22(2)(b), (g), and (k) of the *Act*?

(3) Did the judge err in law in qualifying an expert witness and relying upon two agreed statements of fact submitted as the evidence of that witness?

(4) Did the judge err in law in failing to find a breach of the Minister's legislative mandate?

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

Result:

The motion for fresh evidence is dismissed. The pharmacist's evidence would not have changed the outcome of the hearing. The toxicologist's evidence correcting data would not have changed the outcome of the hearing.

The judge's findings under ss. 22(2)(b), (g) and (k) of the *Act* did not reflect any errors in law or in fact, nor any misapprehension of the evidence. The judge did not err in qualifying the toxicologist as an expert witness, nor in relying upon agreed statements of fact, which have a utility in the efficient operation of hearings. The record did not support the judge erred in finding no breach of the Minister's legislative mandate. The judge properly considered all relevant factors in assessing the child's best interests. The order appealed from is confirmed.

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Judges:	Bryson, Van den Eynden and Beaton, JJ.A.
Appeal Heard:	March 26, 2020, in Halifax, Nova Scotia
Held:	Motion to adduce fresh evidence dismissed and appeal dismissed, per reasons for judgment of Beaton, J.A.; Bryson and Van den Eynden, JJ.A. concurring
Counsel:	Allison Kouzovnikov, for the appellant Peter McVey, Q.C. and Andrew Melvin, for the respondent

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 Mr. M. ("the father") appeals a decision made by the Honourable Judge Timothy Daley of the Family Court of Nova Scotia ordering his child into the permanent care of the Minister of Community Services ("the Minister"). That order was made under s. 42(1)(f) of the *Children and Family Services Act*, SNS 1990, c. 5, s. 1 ("the *Act*"), following a contested final disposition hearing ("the hearing") involving the Minister, the father, and C.P. ("the mother", who did not participate in this proceeding).

[2] The father asks this Court to order the child placed in his custody. For the reasons that follow, I would dismiss the appeal.

[3] The mother had a history of involvement by the Minister concerning her other children. The child who is the subject of this case was taken into care at birth and several months later was returned to the parents, who were then in a relationship. At age ten-and-a-half months the child was again taken into care, and so remained to the end of the proceeding. The Minister provided services to each parent throughout the litigation. The parents contested the final disposition hearing, in which the Minister sought permanent care of the child. As they were then no longer in a relationship, each parent put forward separate plans for the judge's consideration. The judge was not persuaded on either plan. He concluded under the *Act* there was substantial risk of physical harm (s. 22(2)(b)), emotional harm (s. 22(2)(g)), and neglect (s. 22(2)(k)) to the child and granted the Minister permanent care in September 2019.

[4] In an Amended Notice of Appeal the father asserted numerous grounds, later reduced in written and oral arguments to the following issues:

1. Did the judge err in law or in fact in making findings pursuant to ss. 22(2)(b), (g), and (k) of the *Act*?
2. Did the judge err in law in qualifying an expert witness and relying upon two agreed statements of facts submitted as the evidence of that witness?
3. Did the judge err in law in failing to find a breach of the Minister's legislative mandate?
4. Did the judge err in law in failing to consider all relevant factors in assessing the child's best interests?

Fresh Evidence Motion

[5] The father seeks to adduce fresh evidence from his pharmacist Mr. MacLean and from toxicologist Dr. Kenneth Fryatt. The affidavits were admitted provisionally in the hearing before us, on the understanding the Court reserved its decision on the merits of the motion.

[6] The test for the admission of fresh evidence was discussed in *C.R. v. Nova Scotia (Community Services)*, 2020 NSCA 4:

> [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.
>
> *(S.G. v. Children's Aid Society of Cape Breton*, 1995 NSCA 107)

[7] Mr. MacLean's evidence concerned his continuing contact with the father, who has been in a methadone program for several years. As per the *Palmer* criteria, I do not accept the affidavit of Mr. MacLean has potentially decisive impact, nor that, as it relates to matters which arose after the hearing, it would have changed the result reached regarding the best interests of the child. There was no dispute before the judge that the father was engaged in a methadone program. The evidence of Mr. MacLean simply augments and updates what has been the father's ongoing involvement in that program.

[8] In his affidavit, Dr. Fryatt, who was qualified as an expert in toxicology at the hearing, addressed an error in certain data submitted to the judge in an agreed

statement of fact. The essence of Dr. Fryatt's evidence before this Court is that data regarding the father's drug test needs to be corrected, specifically, the number of days following ingestion of valium that valium metabolites could be detected in a person's urine.

[9] The appellant asserts that evidence must be admitted "to provide more valid and reliable evidence". Despite the agreed statement of fact having been put before the judge concerning the father's urinalysis results, in his *viva voce* evidence during the hearing, the father disagreed with a conclusion found in one of the two statements as to the dates of the father's consumption of valium.

[10] The evidence of Dr. Fryatt could arguably meet the *Palmer* test and be admitted to correct an inaccuracy. However, I am not persuaded the hearing judge would have arrived at a different result if that corrected evidence had been adduced at the hearing.

[11] Cast in its very best light the fresh evidence of Dr. Fryatt would change only the timing of the father's consumption of medications which were not prescribed for him. The father readily acknowledged before the judge that he had consumed his mother's valium on two separate occasions during the history of the proceeding and that he also consumed marijuana regularly, both ostensibly to control his anxiety about the case. The evidence of Dr. Fryatt was tendered to establish a timeframe of when the father consumed the drugs, and what types, during the litigation. Adjusting that timeframe would change nothing with respect to the judge's ultimate findings.

[12] It was never in dispute by the father or any other party that he had consumed medication not prescribed for him; what was in dispute was <u>when</u> he took that medication. I agree with the observation by the father that the error arguably impacted upon the judge's assessment of his credibility, but only to the limited extent the judge rejected his *viva voce* evidence of the timing of his consumption of valium. Ultimately, the judge's concern was with the father having taken valium not prescribed for him, given both his history of substance abuse and his evidence he did so to try to "cope" with events.

[13] The hearing judge made findings under s. 22(2) of the *Act* with respect to substantial risk of physical harm, emotional abuse and neglect. The drug use by the father was but one aspect of the findings of fact the judge made and the conclusions he reached in coming to the ultimate determination on the best interests of the child. Changing by mere days the timing of consumption of valium

on one of two occasions does not negate the broader impact of the whole of the evidence on those findings.

[14] For the foregoing reasons, I would decline to exercise this Court's jurisdiction under s. 49(5) of the *Act* to admit the evidence.

Standard of Review

[15] 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 at para. 22; *A.M. v. Nova Scotia (Community Services)*, 2020 NSCA 29 at para. 6).

Issue No. 1: Did the trial judge err in law or in fact in making findings pursuant to ss. 22(2)(b), (g), and (k) of the *Act*?

[16] The father asserts the judge erred in relying on certain evidence in reaching conclusions relating to domestic violence, substance abuse and the nature of his parenting. He says the trial judge misapprehended the evidence and applied the law incorrectly in making findings under ss. 22(2)(b), (g) and (k) of the *Act*.

[17] The father asks this Court to find the judge erred in relying on historical evidence of domestic violence, as there was no evidence of him having physically or emotionally abused the mother in the 2.5 years prior the hearing. The father asserts there was no "history of violence". Furthermore, he maintains that his past emotional abuse of the mother was no longer of any relevance as it was caused by and arose as a result of his previous drug use. There was no evidentiary basis established during the hearing to permit a causal link to be made as between the father's drug use and his emotional abuse of the mother, nor did the judge make any such finding.

[18] The father maintains the judge erred in basing findings about the father's drug abuse on "historic" evidence prior to July 2016, given that the father later

attended detox and a relapse prevention program, and had participated in a methadone program since July 2017. It was open to the judge to consider relevant and fairly recent (relative to the time the proceeding commenced) evidence of the father's drug use.

[19] The father also takes issue with "third hand" evidence given to the judge that the father was labeled as being at a "high risk of lethality", as testified to by the Minister's witness, Ms. Miller. Her evidence was that she was relying on information received through a police officer. In written argument before this Court the father objected to not having had an opportunity to cross-examine that officer, who had not testified. However, the record does not support the father was at any point deprived of any opportunity to call any witness, which could have included the officer.

[20] In oral argument the father suggested the same witness's evidence, that a "high risk of lethality" label can be downgraded if a person passes one year without an incident of violence, was information not properly considered by the judge. In addition, the father says that the judge's expression of concern about his "seeming obsession" with the mother was an error as several of the Minister's own witnesses validated some of the father's concerns about the mother in their evidence. These expressions of concern by the judge go to the weight placed by him on certain aspects of the evidence. As the trier of fact, the judge was entitled to do so, and I see no error in how the judge chose to treat any of the evidence.

[21] I agree with the Minister's submission that the judge, in dismissing s. 22(2)(i) as plead by the Minister, rejected a finding of exposure of the child to violence. The record reflects the judge's discussion of his concerns were in the context of the father's recent history, which included incidents of violence. It was not an error for the judge to consider that history in applying the legal test(s) to that evidence which he accepted.

[22] The father says the judge could not properly have concluded a substantial risk of physical harm to the child while in the father's care on the basis the father had been emotionally abusive to the mother at an earlier time. The father asserts this required reliance on stale-dated information which did not reflect current circumstances (para. 59, appellant's factum). He also contests the judge's risk of physical harm finding on the basis that there was no evidence before the judge of him ever having lost his temper with the child. As to the former, the judge was entitled to rely on credible and relevant evidence in making his findings, and I am

satisfied he weighed the evidence properly. As to the latter, the absence of a certain type of evidence cannot disqualify or negate evidence which it was open to the judge to accept, and which he did accept. We cannot speculate on the impact on the judge's decision-making process of evidence not before him.

[23] The father maintains the judge misapprehended the evidence by failing to take into account certain details of incidents referenced by several of the Minister's witnesses concerning the father's access time with the child. The father has parsed out particular incidents and suggests that because they occurred during family support sessions or supervised access sessions, or because a particular incident was not recorded in writing by a worker who later testified to it in *viva voce* evidence, the judge therefore erred in finding the father engaged in distracted or friend-like parenting. I cannot agree. The judge explained the evidence he accepted and applied in making his findings. I interpret the judge's comments as reflecting his concern that observers of those sessions repeatedly reported about the father's inattentiveness and parenting techniques, which raised issues of risk for the child outside of a supervised setting.

[24] The father also argues errors in law and findings of fact pertaining to the judge's findings under s. 22(2)(g) of the *Act* regarding substantial risk of emotional abuse. Again, I am not persuaded that such errors were made. The record does not indicate, as the father suggests, that the judge somehow failed to consider his participation in domestic violence programming or addiction services, or that the judge made erroneous conclusions about his drug use based on the evidence concerning valium.

[25] In his decision the judge said:

> [252] In the end, I find that the Minister has proven, and [*sic*] a balance of probabilities, that the father was consuming Valium at times outside those he described in his evidence and a [*sic*] more recent times and then [*sic*] he admitted. On the other hand, I do not find that the Minister has proven on a balance of probabilities that the father was consuming a benzodiazepine without a prescription. I find that it is [sic] been proven on a balance of probabilities that he was in fact consuming a benzodiazepine, specifically Clonazepam, in accordance with a prescription at the time of the testing.
>
> [253] Having considered this evidence, which includes his recent abuse of Valium, I do not find that the minister has proven on a balance or probabilities that the father would cause deliberate physical harm to the child.

[254] Despite this, there is evidence, which I accept, that the father has demonstrated that he is easily distracted in his parenting, exposes the child to risks including swallowing objects, holding or having access to sharp objects such as screwdrivers or knives and climbing into a refrigerator. I do not find his explanations for each to be adequate or convincing. Distraction in parenting is a common challenge. Much is always happening. And children do get their hands on things which may be a danger to them.

[255] But I find that, even in a controlled environment of supervised access for limited time he was incapable of recognizing the risk or dealing with them. I accept the Agency evidence that he was at times able to agree that something was a risk but could not put an action in place to deal with it.

[256] When I combine this troubling behavior of using access time to complain about others, distracted parenting during access, his inability to recognize or address risks which are obvious and the description of several workers that the father appeared to want to be a friend rather than a parent, I am left with concerns. Layering onto that his past and recent history of substance abuse, his violent act in the apartment and his assessment of a high risk of lethality, I do find the Minister has proven on a balance of probability that there is substantial risk that the child would suffer physical harm caused by the father's failure to adequately supervise and protect him.

...

[260] Truing [*sic*] to the father, I again adopt and consider all the evidence and reasons set out above respecting the substantial risk of physical harm. This includes historic substance abuse problems, recent use of non-prescribed Valium, history of violence in the apartment and his distracted parenting, risks associated with his inability to identify risks to the child in his parenting and his focus on the behaviors of those around him including workers, the Agency and the mother.

[261] This evidence leads me to conclude that there is substantial risk that the child would be exposed to emotional abuse in the case of the father. I do so in particular noting that the mother described him as verbally abusive in their relationship and there is little in the evidence to suggest that he has obtain [*sic*] any services to remedy those behaviors and, if they are related in substance abuse, I have already found that he continued to abuse at least Valium.

...

[263] The father has, I find, made some progress in his parenting but far too little and has yet to deal with his substance abuse problems. I accept that he has an underlying pain conditions [sic] which calls for treatment but his use of non-prescription marijuana, Valium and history of other drug use without prescription indicates that he has yet to obtain the services to alleviate a [*sic*] remedy the substantial risk of emotional abuse.

...

> [270] With respect to [*sic*] father, I have reviewed above the concerns respecting his parenting, substance abuse, both historic and recent, his violence and high risk of lethality and in particular the evidence, which I accept, of his distracted parenting and inability to recognize risk or deal with such risk for the child. Considering that evidence, I do find that the Minister has proven on a balance of probabilities that there is a substantial risk that the child will experience neglect by the father.

[26] These passages, and the reference to both "historic and recent" matters, demonstrate the judge was alive to and concerned with the cumulative effect of all the evidence which he was prepared to accept, as opposed to any single or particular challenge that informed the father's ability to parent consistent with the child's best interests. In reaching his conclusions the judge was not only looking at the past but also looking forward in assessing whether there was substantial risk to the child. It was within the judge's purview to consider the relevance (if any) of the father's parenting history and attach such weight as in his discretion he deemed appropriate.

[27] The judge conducted an exhaustive review of the background and history of the parties and the evidence before embarking on the legal analysis and application of the legal test(s) in play. All of this was done prior to the final step of assessing the question of the best interests of the child. In conducting the best interests test the judge said:

> [272] The *Act* confirms that the best interest of the child is the paramount consideration in determining this application. In determining the child's best interests, I have considered the applicable circumstances is [sic] referred to in s.3 (2) of the *Act* in light of the evidence presented. I summarize those findings as follows:
>
> a. While it is important for the child to develop a positive relationship with the parent and a secure place as a member of the family and I must consider the child's relationship with relatives, in this case the protection concerns are such that placement with either parent is not in the child's best interests due to the significant risks to the child as described earlier.
>
> b. I have similarly considered the importance of continuity in the child's care the effective disruption of that continuity as well as the bond that exists between the child and each of his parents. In this case, this child has been in the care of the Minister for a substantial portion of his life. It is important to acknowledge that, given the risks faced if returned to his parents, that would be a significant disruption to him as well. Thus, though there is importance in continuity to be considered, that continuity is found, at least in part, in the temporary care with the

> Minister. I accept that there is a loving bond between each parent and the child, but I do not find that these bonds outweigh the substantial risks identified.
>
> c. Considering the child's physical, mental and emotional needs and the appropriate care or treatment to meet those needs, I find that they cannot be met in the care of either of his parents. For most of his life he has been exposed to risk, whether physical, emotional or psychological, as well is [*sic*] the risk of neglect. The parents are [*sic*] unable to provide the appropriate care or treatment to meet those needs and they can best be met in the care of the Minister.
>
> d. Respecting the child's physical, mental and emotional level of development, there is little evidence of this except that he is young, will shortly attend school. I find that his parents are unable to provide that or to adequately provide for his physical, mental and emotional needs.
>
> e. There are no issues raised with respect to this child's cultural, racial or linguistic heritage or his sexual orientation, gender identity or gender expression. Similarly, there are no issues raised with respect to religious faith.
>
> f. With respect to the merits of the plan for the child's care by the Agency compared with the merits of the child remaining with or returning to a parent, though permanent care should be avoided wherever possible, I find that the merits of the Agency's plan outweigh the merits of the parents. The risk of returning the child to the care of either parent, given the findings made in this decision, are too great. The plan for the child in permanent care is for adoption and I find that has merit given the particular circumstances for this child.
>
> g. The child's views and wishes could not be obtained because of his young age. I also find for the delay in the disposition of the case is not possible given the end of the timeline nor in the child's best interest.
>
> h. I have likewise considered the risk to the child of harm by being kept away from verses [*sic*] returned to the care of either of his parents. For the reasons set out in this decision regarding risk, I cannot find that it would be in his best interests to expose him to the risk of returning to either of his parents notwithstanding the risk of him remaining in permanent care. I find that the degree of risk that which justified the finding that he remains in need of protective services is significant and outweighs the risk of failure to return him to either of his parents.

[28] There were numerous pieces of evidence that led to the judge making the findings under ss. 22(2)(b), (g) and (k). Removing any one aspect of the body of evidence the judge relied upon would not permit the reversal of any one finding. In effect, the father is asking this Court to repeat the judge's weighing of the evidence, assessments of credibility, findings, analyses, and conclusions, but to now reach a different result. Those functions belonged to the judge, not to this Court. I see nothing in the record which could lead to a conclusion there was any

error in law or palpable and overriding error of fact, nor any misapprehension of the evidence.

Issue No. 2: Did the trial judge err in law in qualifying an expert witness and relying upon two agreed statements of facts in relation to the witness?

[29] The father raised the matter of his disagreement at the time of the hearing with certain information contained in one of the agreed statements of fact put before the judge regarding how long valium would remain in a person's system (also being the subject matter of the fresh evidence application discussed earlier). The father argues that he did not have an opportunity to review that statement before it was entered into evidence and he disagreed with the conclusions drawn from it. If the father was deprived of that opportunity, his complaint would go to an argument concerning ineffective assistance of counsel, which has not been advanced in this appeal. Furthermore, the record clearly demonstrates that despite the consent of counsel to having the court qualify the witness as an expert in forensic toxicology, the judge posed additional questions to satisfy himself that the witness could in fact be so qualified.

[30] The judge did not, as suggested by the father, require the parties to utilize an agreed statement of facts; rather, he suggested it as a possible solution to some of the challenges presented in the case due to having an out-of-province witness. Counsel were not required to seize on the judge's practical suggestion, but ultimately they did so. I see nothing in the record that could support a suggestion the parties or their counsel were forced to submit to the use of an agreed statement(s) of facts.

[31] The father also asserted that agreed statements of fact are objectionable as a litigation tool in child welfare matters, given the nature of the issues at stake. With respect, I am unable to agree. The father's objection to the use of agreed statements of fact is unfounded. These are a useful tool to permit the efficient conduct of a matter, including in the child welfare realm (*Catholic Children's Aid Society of Metropolitan Toronto v. M.(C.)*, 99 DLR (4th) 77 at para. 63). In this case, the judge was not being asked to accept the evidence as being dispositive of the issues to be determined by him as to whether the Minister had met her burden or as to what was in the best interests of the child. Rather, the parties were able to agree on the significance of Dr. Fryatt's evidence and use an efficient method of demonstrating their agreement.

Issue No. 3: Did the hearing judge err in law in failing to find a breach of the Minister's legislative mandate?

[32] The father asserts the judge erred in not concluding the Minister had ignored or breached her statutory obligations to the father under the *Act*. The father says there were aspects of the Minister's carriage of the case that bear scrutiny, specifically that the Minister prejudged the outcome of the case and failed to identify and provide proper services to him, all of which violated the principles of fairness and natural justice, to his prejudice.

[33] I am not persuaded the Minister failed to adhere to her legislative mandate. Section 41(3) of the *Act* provides:

> (3) 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.

[34] The record does not support that there was anything untoward or prejudicial in the Minister having determined early in the proceeding that she would seek permanent care and custody of the child.

[35] The Minister has a statutory discretion, informed by the best interests of the child, to develop and determine a Plan of Care for a child in anticipation of moving for a first disposition order. There is nothing to prevent that Plan from changing

over time, as a further exercise of the Minister's discretion, in order to respond to changes in circumstances (*A.M. v. Nova Scotia (Community Services)*, *supra* at paras. 12-13). There is also no requirement for the Minister to change an early position as the matter moves along the statutory timeline. What the Minister must do is remain open and responsive to considering any changes, or lack thereof, viewed through the lens of the best interests of the child. The Minister's position did not change over the life of this case. It was open to the judge to reject any perceived rigidity in the Minister's approach to the family and the progression of the litigation. He did not do so.

[36] The record does not contain anything which could support a conclusion that the Minister somehow "gave up" and only pursued one course of action as the case progressed. It was always open to the Minister to amend her Plan of Care after the first disposition hearing, to respond to any changes in the child's or the parents' circumstances. That this was not done speaks to the Minister's assessment of the best interests of the child.

[37] That said, the ultimate assessment of the best interests of the child was placed in the hands of the judge at the permanent care hearing. It was open to the judge to assess critically the Minister's actions, and to ultimately determine whether there was merit in the Minister's application for permanent care. Clearly, the judge was persuaded of the Minister's position.

[38] The father maintains there was a failing on the part of the Minister by not offering him substance abuse services during the proceeding. I cannot agree. The judge was alive to the father's consumption of drugs, concurrent with his participation in a methadone program, as the case progressed toward final hearing. As noted by the Minister, the father had been provided services for substance abuse in the first proceeding involving the child. Furthermore, despite the father's multiple criticisms about the Minister not having provided services other than family support work, throughout the life of the case it was open to the trial judge to assess the Minister's actions, and suggest or request certain interventions.

[39] I see nothing in the way of any error of law or material fact, nor any misapprehension of evidence, which could support a conclusion by this Court that the judge somehow failed in not concluding the Minister did not adhere to her legislative mandate. There was no unfairness or violation of natural justice to the prejudice of the father at any step in the proceeding.

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

[40] For the father to succeed on this issue, I must be persuaded the judge failed in his application of the law regarding the best interests of the child to the evidence before him. The judge's analysis and decision make it abundantly clear that, in his assessment, the child remained at substantial risk of physical harm, emotional abuse and neglect and as a result he was unable to dismiss the Minister's motion for permanent care. The best interests of the child could not, according to the judge, be met on the plan put forward by either parent, as considered in the final step in the judge's analysis.

[41] The father argues that "the evidence on the whole demonstrates that he is able to provide "good enough parenting" [...]" (para. 81, appellant's factum). However, the task of the judge was not to measure the quality of his parenting and then, if persuaded it was "good enough", accept that the father could assume custody. Such a parent-centric approach would turn on its head the overriding test of the best interests of the child.

[42] For the foregoing reasons, the motion to adduce fresh evidence is dismissed. The appeal is dismissed and the order appealed from is confirmed, pursuant to s. 49(6)(a) of the *Act*. No order of costs was sought and none is made.

Beaton, J.A.

Concurred in:

Bryson, J.A.

Van den Eynden, J.A.