<u>NOVA SCOTIA COURT OF APPEAL</u>

Citation: *T.Z. v. Nova Scotia (Community Services)*, 2020 NSCA 40

Date: 20200508
Docket: CA 493308
Registry: Halifax

Between:

T.Z.

Appellant

v.

Minister of Community Services

Respondent

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

Judge:	The Honourable Justice Jamie W.S. Saunders
Appeal Heard:	By written submissions, in Halifax, Nova Scotia
Subject:	**Child Protection. Children and Family Services Act, S.N.S. 1994-95, c. 5. Permanent Order for Care and Custody. Standard of Review.**

Summary: The day after her birth, the child was taken into care on the basis of the Minister's belief that she was at substantial risk of physical harm if left in her mother's care.

After several appearances in the Family Court, various interim orders maintained that status quo. Ultimately, the Minister sought permanent care and custody of the young child.. After a 3-day trial the judge allowed the Minister's application and granted an order for permanent care and custody. The mother appealed alleging a variety of errors in the judge's analysis and disposition.

Held: Appeal dismissed. In a thoughtful and comprehensive analysis the judge satisfied all relevant statutory requirements under the *Act*. Her evaluation of both the facts, and credibility, is unassailable. She correctly applied the law to all of the issues before her. Her reasoning and disposition find ample support in the record. There is no basis to intervene. The judge's decision granting the Minister permanent care and custody is affirmed.

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Judges: Van den Eynden, Saunders and Fichaud, JJ.A.

Appeal Heard: By written submissions, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Saunders, J.A.; Van den Eynden and Fichaud, JJ.A. concurring.

Counsel: Linda M. Tippett-Leary, for the appellant
Peter McVey, Q.C., for the respondent

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

Publishers of this case please take note that s. 94(1) of the *Children and Family Services Act* applies and may require editing of this judgment or its heading before publication.

SECTION 94(1) PROVIDES:

> 94(1) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.

Reasons for judgment:

[1] The appellant T.Z., is the mother of E.A.Z., now 2 years of age, who was taken into the Minister's care the day after her birth.

[2] A culmination of applications, appearances, and interim orders in the Family Court ultimately led to a 3-day trial before the Honourable Judge Marci Lin Melvin, following which she granted an order for permanent care and custody, dated August 14, 2019.

[3] The appellant, who was represented by various counsel throughout these proceedings, appealed Judge Melvin's order, alleging a variety of errors in her analysis and disposition.

[4] The appeal hearing was scheduled to be heard on April 6, 2020. Owing to the COVID-19 crisis, counsel for the appellant and the Minister consented to have the appeal heard and decided, based solely on the written record.

[5] After carefully considering the record and the parties' comprehensive and helpful written submissions, the panel comprised of Justices Van den Eynden, Saunders and Fichaud issued an order dated April 7, 2020 announcing our unanimous decision that the appeal was dismissed, with reasons to follow. These are the reasons.

[6] I will start by providing a brief summary of the background, adding such further detail as may be required in my analysis of the principal issues that arise in this appeal.

Background

[7] E.A.Z. was born March *, 2018, the daughter of the appellant and an unidentified father.

[8] On March *, 2018 (in other words, the day after her birth), E.A.Z. was taken into care under s. 33(1) of the *Children and Family Services Act* (the *Act*) on the basis of the Minister's belief that she was at substantial risk of physical harm if left in her mother's care pursuant to s. 22(2)(b) of the *Act*.

[9] After several appearances in the Family Court, various interim orders were granted or reaffirmed.

[10] On December 12, 2018, a disposition hearing was completed by Judge Melvin and an order for temporary care and custody was issued pursuant to s. 42(1)(d) of the *Act*, thereby triggering the 12-month maximum permitted under the legislation for disposition review.

[11] The appellant consented to the preparation of a Parental Capacity Assessment (PCA) as well as the order for temporary care and custody.

[12] A further order for temporary care and custody was issued in June 2019.

[13] On June 19, 2019, the appellant filed an affidavit setting out her plan for her daughter's care. The Minister's updated plans were also filed with the court.

[14] A 3-day trial was held in late June 2019. Nine people testified during the course of the trial. Six were called on behalf of the Minister. The appellant testified on her own behalf, as did her sister, and her sister-in-law.

[15] Post-trial briefs were filed in July.

[16] On August 7, 2019, Judge Melvin rendered a written decision (reported as 2019 NSFC 13) granting the Minister's application seeking permanent care and custody of the child. Judge Melvin's confirmatory order was issued on August 14, 2019.

[17] As noted earlier, E.A.Z. has been in the care and custody of the Minister since the day following her birth.

[18] The little girl's several medical developmental challenges are conveniently summarized in the respondent's factum at ¶63-68:

> 63. While she was still quite young (less than five months), she was noted to have a small head size, her left eye focused toward the left, and the left side of her face "dropped". She began to receive specialized pediatric medical care shortly after her birth.
>
> 64. Abnormalities in the child and heightened developmental needs were noted by the child's foster mother. For example, [E.A.Z.] did not begin to crawl until she was fourteen months of age.

> 65. Descriptions of the child's medical needs were admitted by consent before the Court below.
>
> 66. [E.A.Z.] requires follow up in her primary medical care, by pediatric medicine, and even within several pediatric sub-specialties, as follows:
>
> a. She is followed by Dr. Andrew Lynk, Chief of Pediatrics, IWK Health Centre;
>
> b. She had been seen by Pediatric Ophthalmology prior to trial and required follow up;
>
> c. She had been seen twice by Pediatric Orthopedics but did not require follow up;
>
> d. Pediatric Neurology was consulted regarding [E.A.Z.]'s presentation with left lower facial weakness and microcephaly;
>
> e. [E.A.Z.] was in receipt of Early Childhood Intervention Services as of the trial dates;
>
> f. [E.A.Z.] was also receiving physiotherapy treatment at that time;
>
> g. She was followed by her physician for primary care, growth and immunizations.
>
> 67. [E.A.Z.] has a medical history of Gastroesophageal Reflux Disease (GERD); Microcephalus [a smaller than normal head circumference], Torticollis Unspecified [abnormal, asymmetrical head or neck positioning]; Alternating Exotropia [both eyes turn outwards or fail to converge normally]; and left lower facial weakness. She has received treatment for her conditions.
>
> 68. She was seen for Microcephaly on June 12, 2019, and the conditions were found likely familial.

[19] Regarding E.A.Z.'s future medical and care needs, her family physician, Dr. Diane E. Edmonds proposed the following:

> It is difficult to predict the level of ongoing intervention and treatment that [E.A.Z.] will require, as this will evolve as she grows and develops. In my professional opinion, however, a home environment that is nurturing and cognizant of potential difficulties/developmental delays is of paramount importance, as is close, ongoing, consistent medical follow-up.

[20] Experts at trial noted the appellant T.Z.'s cognitive and adaptive function deficits and how difficult it is for her to grasp, understand and interpret very basic information.

[21] Apparently the appellant was not even aware she was pregnant when she went to the hospital and delivered E.A.Z. She only went to the hospital thinking she had the flu and believed her "belly" had gotten larger because she had been eating "too much canned food". E.A.Z. had no idea how she had gotten pregnant, telling a social worker that she had not had sex with anyone.

[22] A psychoeducational assessment was prepared by psychologist, Ms. Antonia Campagnoni who, with the consent of both parties, was qualified and testified as an expert on behalf of the Minister. Ms. Campagnoni opined that T.Z.'s low level of functioning was all-encompassing, and that her highest level of functioning in certain categories was comparable to a child aged 8. Judge Melvin accepted the evidence of Ms. Campagnoni describing it as "credible and compelling".

[23] Mr. Neil Kennedy, the court-appointed parental capacity assessor, was also qualified, with the consent of both parties, as an expert witness and testified on behalf of the Minister. In his opinion, based on his expertise and personal contact with T.Z., Mr. Kennedy concluded:

> … I would have serious concerns in relation to [T.Z.]'s ability now or in the future to meet [E.A.Z.]'s most basic needs for food, hygiene and safety. She simply does not appear to possess the intellectual capacity required to parent this most vulnerable child. This is after 200 hours of direct hands-on support and modeling from a very experienced Family Support Worker.

[24] Mr. Mitch Baker, the child protection worker, also testified to the reasons why, in his opinion, E.A.Z. was believed to be at substantial risk of physical harm, if left in the care of her mother. Judge Melvin also described Mr. Baker's evidence as "credible and compelling".

[25] The appellant was provided with extensive family support worker services throughout these proceedings. Details of those services are accurately summarized at ¶86-87 of the respondent's factum:

> 86. The evidence regarding this service included the following:
>
> a. The decision was made March 21, 2018 to put in place an interim services plan including three, ninety-minute access visits each week, one in the foster home and two at the Agency offices. All visits were to be fully supervised by Julie Nickerson, the Family

Support Worker, who was tasked with aiding the Appellant in meeting the child's basic needs;

b. The service began on March 26, 2018 and continued until at least June 20, 2019;

c. Detailed information was provided at each subsequent court appearance of the Appellant's need for prompting, assistance to identify cues, and reminders respecting [E.A.Z.]'s needs;

d. The Family Support Worker provided direct evidence by means of several affidavits filed in the proceeding, and by oral evidence, including cross-examination;

e. Julie Nickerson has 23 years' experience as a Family Support Worker, in addition to her experience as a hospital and child protection social worker, has a Bachelor of Arts, a Bachelor of Social Work and a Certificate of Counseling. Her skills, training and experience were established by her *curriculum vitae* filed at trial;

f. Before trial, Julie Nickerson noted that she had provided more than 235 hours of family support, but the Appellant appeared unable to master the skills needed to meet [E.A.Z.]'s basic needs and demonstrated understanding of [E.A.Z.]'s changing needs. She expressed concern that the Appellant would not be able to safely parent [E.A.Z.] in the future.

g. Summarizing her concerns at the end of her services, Julie Nickerson testified as follows:

Q. And based on that experience, what concerns do you have about [T.Z.]'s ability to parent?

A. Her ability to meet [E.A.Z.]'s needs on an ongoing continuous basis, not only meeting them but being able to recognize them and act on them in a prompt and consistent manner.

Q. And what risks do arise as a result of that observation to [E.A.Z.]?

A. My understanding is, if you don't understand the ages and stages of development, you're not able to meet their needs; and therefore, that would affect [E.AZ.]'s development with the ongoing stimulation that she'd need and just recognizing her – her needs.

Q. What risks are there to [E.A.Z.]'s safety?

A. Safety?

Q. Safety. Physical safety.

A. Safety. Physical safety. I've had many conversations with [T.Z.] about safety. She's often able to tell me what she needs to do. Like, what safety risks would be in a room. She's able to tell me that. Not necessarily - - she's not able to always respond to those safety concerns.

87. The Trial Judge said as follows regarding the evidence of Julie Nickerson:

> The Family Support worker, Julie Nickerson, worked tirelessly with TZ, spending hundreds of hours attempting to tech her parenting skills.
>
> Although TZ would every now and again have a breakthrough and remember to do something, she had difficulties in all aspects of child care.
>
> The Court finds the evidence of the Family Support worker credible, and commends her for her patience throughout this journey to try to teach TZ to become a parent.

[26] The essence of the appellant's appeal is contained in ¶45 of her factum:

> 45. It is the submission of the Appellant that she was never given an opportunity to parent this child in anything that came close to a normal setting, that she was never even able to do so independently without people looking over her shoulder all the time, and that the evidence as to her skills and ability to learn were even misunderstood, misstated or taken out of context.

[27] The appellant asks that the appeal be allowed, the permanent care order set aside, and the child be returned to her care. Further, she says at ¶123 of her factum that she:

> 123. …would be open to any other involvement that the agency may deem necessary.

[28] For its part, the respondent asks that the appeal be dismissed, without costs.

Issues

[29] I would distill the appellant's submissions into four principal grounds of appeal, which I have framed as discrete questions:

(i) Did the trial judge err by failing to give due weight to the appellant's evidence?

(ii) Did the trial judge err by failing to follow the legislated time line for disposition?

(iii) Did the trial judge err by failing to comply with her statutory obligations mandated by ss. 41(3), 41(5) and 42(2) of the *Act*?

(iv) Did the trial judge err by failing to consider the best interest factors listed in s. 3(2) of the *Act*?

Standard of Review

[30] The proper standard of review to be applied when addressing these issues is settled law, and was most recently canvassed by my colleague, Justice Beaton, in *G.E.M. v. Nova Scotia (Community Services)*, 2020 NSCA 37 at ¶15:

> [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] <u>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.</u>
>
> [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).

[31] I will now apply those principles to the four discrete questions I have posed.

Analysis

(i) Did the trial judge err by failing to give due weight to the appellant's evidence?

[32] The appellant provides examples of what she says demonstrate a failure by both Agency officials and the trial judge to address her evidence that she:

> 54. … was capable of taking directions and following instructions, had been improving in her dealings with the child had been meeting her daughter's

> needs in the extent (sic) that she was able given the limited time that she had and the conditions that she was under.

[33] The appellant claims that both "the Agency and the court made her feel useless", that she "felt pre-judged" and that despite the favourable evidence she and her witnesses provided "none of this evidence was taken into account by the court."

[34] Respectfully, there is no merit to the appellant's complaint.

[35] In a thoughtful and carefully considered analysis, Judge Melvin provided a detailed review of the evidence, as well as her reasons for accepting or rejecting it.

[36] Simply to illustrate, I will provide excerpts from Judge Melvin's decision. In this first extract, her strong and unambiguous findings of fact and credibility are obvious:

> …documentary evidence, confirmed by the witnesses during the hearing, show TZ's inability to learn basic "baby skills" despite repeated demonstrations and instructions, for instance, learning to complete a satisfactory diaper change took more than a year, and feeding and bathing the child remain a challenge.
>
> The Minister's evidence is that TZ continuously failed to identify the child's needs and does not recognize or appreciate the cues she gets from the child. The foster mother testified on behalf of the Minister that the child was usually lively and engaged, but when with TZ, had very little affect at all. The foster mother also testified that at times TZ's personal hygiene was unbearable, and she had to open windows and doors to air out her house while TZ was there and after she had left.
>
> The Family Support worker, Julie Nickerson, worked tirelessly with TZ, spending hundreds of hours attempting to teach her parenting skills. Although TZ would every now and again have a breakthrough and remember to do something, she had difficulties in all aspects of child care.
>
> The Court finds the evidence of the Family Support worker credible, and commends her for her patience throughout this journey to try to teach TZ to become a parent.
>
> A Psychoeducational assessment was prepared by Tony Campagnoni who, on consent of both parties, was qualified and testified as an expert witness on behalf of the Minister. The Court finds Ms. Campagnoni's evidence was credible and compelling. It is clear from the report that TZ's low level of functioning is all-encompassing. TZ's highest level of functioning in a couple of categories, based on her psychological testing, was comparable to a child aged eight.

Ms. Campagnoni testified that TZ's psychoeducational testing was below the first percentile. Her evidence is:

> ***"Standard scores of 85 to 115 are within the broad range of average with 100 being exactly average … Percentiles reflect a ranking and what number of people of the same age would score lower. In all areas, 1% or fewer of individuals [TZ's] age would score lower academically when considering the general population."***

Ms. Campagnoni further testified that although TZ has a good heart, TZ has difficulty picking up on cues, difficulty with hands-on situations, difficulty seeing patterns and details, difficulty "putting things together", has a very slow learning curve, and all together this would be a dangerous situation for a child. Ms. Campagnoni's evidence was that the things TZ can do are extremely limited. Her evidence of TZ was that TZ has difficulty understanding why the Minister took the child, and thought it was because she had food on her shirt.

…

Under the heading of "Maladaptive Behaviours", Ms. Campagnoni states:

> ***"When asked about potential difficulties, it was discussed that [TZ] finds it challenging to interact with others, that she prefers to be alone, and that she lacks interest in life. She reported that she sometimes has temper tantrums where she will sit down, scream, and holler until mom gives in to her. She said she lies sometimes and can be stubborn. Also, she has some behaviours which could be linked to anxiety such as nail biting and eye twitching."***

Ms. Campagnoni concludes in her report:

> ***"Lack of strong reasoning abilities can make decision making difficult. She lacks the mental flexibility to make quick decisions in an informed way. Weighing pros and cons as well as foreseeing problems places [TZ] in a situation where the outcomes of her decisions may be less than desirable … In terms of parent training and skills work [TZ] would need a highly supervised situation with a "senior parent" who could provide full-time modelling and feedback. [TZ] unfortunately, does not have a parent who would be well enough to take on such a role."***

Neil Kennedy was also qualified, on consent of both parties, as an expert witness and testified on behalf of the Minister. His evidence is that TZ does not possess the requisite skills to parent a child. His recommendation for the permanent care of the child, based on his observations of TZ's abilities, was unequivocal.

Child Protection worker, Mitch Baker, testified to the risk of physical harm to the child in relation to TZ's inadequate parenting skills, her lack of ability to pick up on the child's cues to meet her needs, her ability to meet those needs, and her ability to ask appropriate questions. He noted although TZ has demonstrated commitment to the visits with her child, after having intensive parenting support three times a week for 90 minutes a time for over 250 hours, TZ is still not capable of doing even the most basic tasks for her child.

The Court finds Mr. Baker's evidence was credible and compelling. He was not shaken on cross-examination, was forthright and respectful of TZ's limited abilities, at one point explaining his hesitancy with respect to the psychoeducational report: ***"I sensed it was a very sensitive topic and my instinct was not to push the matter any further to cause harm to her."***

Further evidence before the Court included a letter from Dr. Diane E. Edmonds, marked as Exhibit 3, with an attached letter from Dr. Andrew Lynk, Chief of Pediatrics at the IWK Children's Hospital. The child has some difficulties, requiring multiple medical follow-ups, including GERD, torticollis unspecified, alternating ecotopia, left lower facial weakness and microcephaly, which Dr. Lynk describes as "likely familial."

Dr. Edmonds noted:

> ***"It is difficult to predict the level of ongoing intervention and treatment that EAZ will require, as this will evolve as she grows and develops. In my professional opinion, however, a home environment that is nurturing and cognizant of potential difficulties/developmental delays is of paramount importance, as is close, ongoing consistent medical follow-up."***

[Emphasis in original]

[37] Judge Melvin's careful evaluation of the evidence provided by the appellant and her witnesses is equally apparent:

> The Court observed TZ frequently during the proceedings. Throughout, she sat in the Courtroom with a smile on her face.
>
> The Court noted counsel for the Minister and for the Respondent ensured all evidence presented was kind and genteel, so as not to hurt TZ with the obviously difficult subject matter. Clearly, all involved – with the possible exception of TZ – were very aware of the challenges faced on a daily basis by TZ. It could not have been easy to hear that one is in the lowest percentile of intellectual functioning. Yet the Court observed it did not seem to bother her. The only evidence that clearly caused her upset was that of her personal hygiene and emanating odour as a result.
>
> …
>
> TZ's position is also unequivocal. She wants her child returned. She has no qualms about parenting the child. Her evidence is that there is no risk of harm to

> the child if the child were to be returned to her care. She did not believe she was given a proper opportunity to prove her parenting abilities in her own home. Her evidence is that the workers for the Minister and the child's foster parent describe her unfairly. She believes she does have the required skills to care for the child now and would arrange for a family doctor, school placement, food, clothing and toys for the child.
>
> On cross-examination, the Court finds TZ presented by times as a petulant young child. She was quick to find a response, even when the response was contradictory.
>
> TZ's evidence was that the worker lied about TZ's abilities on everything, and all observations of the family skills worker and the foster mother were wrong, "especially about the smell," and they were not nice to her.
>
> …
>
> TZ's sister-in-law – CW – testified on TZ's behalf and although there is no evidence of TZ's parenting abilities with her own child, CW testified that TZ has had appropriate interactions with her children (being TZ's nieces and nephews). Both CW and TZ's sister, AZ, support TZ having the care of her own child.
>
> AZ's evidence is that TZ has looked after AZ's children and there have been no difficulties. The Court had concerns about AZ's testimony, and found it to be disingenuous, not only with her demeanor and the manner in which she responded to questions, but also for example, on direct she gave one version of the custody of her son who now lives with his father in another country, and on cross-examination the story changed. Her evidence lacked credibility. The court could not rely on it.
>
> …
>
> Not only are there issues of reliability and credibility, but also, the expert testimony of TZ's limitations could not be refuted by any of the Respondent witnesses, including the Respondent and in the face of the overwhelming evidence to the contrary, TZ's evidence as to her ability to care for the child is simply not plausible.
>
> Finally, there was no compelling evidence to allow the Court to find there is any bond between the child and TZ. There was no evidence to show the child may have a bond with TZ, in fact quite the contrary. And certainly nothing to show TZ cared for, loved, or adored this baby.

[38] I am satisfied Judge Melvin thoroughly considered all of the evidence. A trial judge's assessment of the facts, and credibility, is entitled to deference. Such findings cannot be disturbed, absent palpable and overriding error. Nothing of the sort arose here. What weight, if any, Judge Melvin chose to attach to the evidence

was her decision to make. It is not our role on appeal to second guess her or substitute our view for hers. There is no reason to intervene. I would therefore dismiss this first ground of appeal.

(ii) Did the trial judge err by failing to follow the legislated time line for disposition?

[39] In her factum the appellant says:

> 80. **The Learned Trial Judge erred in law in failing to ensure the best interests of the child were met in the proceeding pursuant to the *Children and Family Services Act,* when the Learned trial Judge failed to follow the legislative time line for the total period of duration of all disposition orders for this proceeding as determined by section 45(2) of the *Children and Family Services Act*.**
>
> 81. At the time of (sic) the Permanent Care and Custody decision was rendered there was five (5) months left.
>
> 82. At the time the trial was completed there was six (6) months left.
>
> 83. At the time my client requested the hearing in the first place in December of 2018 there was a year left. While it is acknowledged that the court is not obligated to follow the time lines to the letter when it considers it not in the best interests of the child, they are there for a reason. It is not expected that people are going to make changes overnight, especially young first-time parents, who are shy and not vocal and have some challenges.
>
> 84. However, when they have a proven ability, in our submission, to be able to follow directions on other key areas, such as detailed and necessary medical care, the court must be mindful of this.

[Emphasis in original]

[40] From this extract, as well as other assertions contained in her factum, it would appear the appellant is complaining that she pressed for a decision regarding placement of her daughter by trial in December, 2018, but that her request to have her plan considered in a timely manner was ignored.

[41] Respectfully, that allegation is not supported by the record.

[42] The trial was ready to proceed on November 7, 2018, but the appellant sought an adjournment.

[43] The trial was again ready to proceed on December 12, 2018, but the appellant entered a consent, both through her counsel and personally.

[44] The appellant did not seek anything other than a dismissal of the Minister's application. Her position was only ever to have E.A.Z. returned to her care and custody.

[45] She never protested the time lines followed by the trial judge during these proceedings.

[46] Even if one were to conclude that a time limit may possibly have been exceeded for one interim temporary care and custody order, that would not be fatal to the judge's ultimate disposition, nor cause her to lose jurisdiction over the matter. See for example, *Nova Scotia (Community Services) v. B.F.*, 2003 NSCA 119 at ¶57-58, leave to appeal denied by SCC [2003] S.C.C.A. No. 531.

[47] Neither did the appellant's trial counsel ever voice an objection to the judge's authority in deciding the outcome.

[48] Judge Melvin was well aware of her responsibility to monitor the statutory time clock, while at the same time instructing herself as to the child's unique sense of time and that in every case the best interests of the child are always the paramount consideration. She said:

> **<u>Law</u>**
>
> As the matter before the Court is a Disposition Review, the Court confirms that all previous orders on file were correctly made on the consent of or with no opposition by the parties.
>
> Getting to this final stage has taken considerably more time than usual, time stretched to the breaking point, in the hopes that the best interests of this child might be met by an order returning the child to TZ, after TZ had learned how to properly parent. Given that this matter has gone well beyond the usual timelines, the Court has but two options: dismiss or make an order for Permanent Care.
>
> Section 42(1) of the *Children and Family Services Act* sets out:
>
>> ***At the conclusion of the disposition hearing, the court shall make one of the following orders, in the child's best interests:***
>>
>> ***(a) dismiss the matter; …***
>>
>> ***(f) the child shall be placed in the permanent care and custody of the agency, in accordance with Section 47.***

> As a sidebar, however, even if there were other options available to the Court for the placement of EAZ, given the evidence, and the child's sense of time and need for finality in a safe and loving home environment/developmental delays based on the child's limitations, the conclusion would remain the same.
>
> The Court must determine whether the circumstances that allowed the Court to find the child in need of protective services still exist, or whether changes or new circumstances have arisen, which may allow the Court to find that EAZ is no longer a child in need of protective services.
>
> In all matters involving the welfare of a child, the Court must be mindful of the best interests of the child at all times using a child-centric approach. I have often described this as the star on the top of the tree, but it could be any analogy that allows the parties to understand that it is the paramount, most important aspect of the case. This is set out in section 2(2) of the *Children and Family Services Act*.
>
> The Court is also mindful of other legislative factors which highlight the best interest of the child, as set out in section 2(1) of the *Act* and include protecting children from harm, and promoting the integrity of the family. The *Act* as well must be interpreted using a child-centric approach.

[Emphasis in original]

[49] Having carefully considered Judge Melvin's reasons as a whole I am not persuaded her decision dated August 7, 2019 and her confirmatory order dated August 14, 2019, directing that E.A.Z. be placed in the permanent care and custody of the Minister, failed to comply with the time lines for disposition prescribed in the *Act*.

[50] Accordingly I would dismiss this second ground of appeal.

(iii) Did the trial judge err by failing to comply with her statutory obligations mandated by ss. 41(3), 41(5) and 42(2) of the *Act*?

[51] In her factum the appellant says:

> 48. The Learned Trial Judge erred in law failing to abide by her statutory duty contained within sections 41(3), 41(5) and 42.

[52] The errors particularized by the appellant concerned, respectively, the requirement that the court obtain and consider the agency plan for the child's care (s. 41(3)); that the court give reasons, identify the plan, and state the evidence on which the court bases its decision (s. 41(5)); and that the court not grant a

temporary or permanent care order unless satisfied less intrusive alternative measures have been attempted and failed, or were refused, or would be inadequate, to protect the child (s. 42(2)).

[53] There is no merit to any of the appellant's complaints. I will address each in turn.

[54] With respect to s. 41(3), the appellant's factum does not advance any argument to support her criticism of the judge's decision. She merely recites the statutory provision singled out in her grounds of appeal. The record in this case clearly establishes that the Minister filed with the court an updated Agency plan dated May 24, 2019, one month prior to trial. The social worker who authored the updated plan as well as the Agency's earlier plans, testified with respect to their content at the trial. Based on the record, there can be no doubt the court "obtained" and "considered" the Agency plan(s) as required by s. 41(3).

[55] With respect to s. 41(5) the appellant once again simply recites the impugned statutory provision without articulating any basis for challenging the judge's analysis. It cannot be seriously suggested Judge Melvin failed to give sufficient reasons so as to enable meaningful appellate review, or that those reasons do not identify the plan or the evidence upon which her disposition was based.

[56] Finally, the complaint the judge failed to comply with s. 42(2) by first ensuring that less intrusive measures had been attempted before granting the Minister's application, can be summarily dismissed. Judge Melvin dealt with this requirement explicitly when she said:

> When the Minister seeks to remove a child from a parent in favour of an order for permanent care, the Court must ensure that all provisions of section 42(2) of the *Act*, have been met:
>
> > ***The court shall not make an order removing the child from the care of a parent or guardian unless the court is satisfied that less intrusive alternatives, including services to promote the integrity of the family pursuant to Section 13,***
> >
> > ***(a) have been attempted and have failed;***
> >
> > ***(b) have been refused by the parent or guardian; or***
> >
> > ***(c) would be inadequate to protect the child.***

> On review of the evidence, the Court is satisfied that less intrusive alternatives to promote the integrity of the family have been attempted and failed, and further, would be inadequate to protect the child.

[Emphasis in original]

[57] In conclusion, Judge Melvin's thorough and carefully considered analysis satisfied all the requirements of the *Act*.

[58] Accordingly, I would dismiss this third ground of appeal.

(iv) Did the trial judge err by failing to consider the best interest factors listed in s. 3(2) of the *Act*?

[59] This assertion can also be summarily dismissed. The judge's decision is replete with passages where she correctly instructs herself regarding the law. Simply to illustrate, Judge Melvin said:

> In all matters involving the welfare of a child, the Court must be mindful of the best interests of the child at all times using a child-centric approach. I have often described this as the star on the top of the tree, but it could be any analogy that allows the parties to understand that it is the paramount, most important aspect of the case. This is set out in section 2(2) of the *Children and Family Services Act*.
>
> The Court is also mindful of other legislative factors which highlight the best interest of the child, as set out in section 2(1) of the *Act* and include protecting children from harm, and promoting the integrity of the family. The *Act* as well must be interpreted using a child-centric approach.
>
> …
>
> The Court finds that TZ has no ability to safely parent a child or protect the child from harm, given these concerns.
>
> The Court finds that the child would be in danger if placed in the care of TZ.
>
> The Court does this in the best interests of the child, EAZ, but also with a sincere appreciation for TZ's wish to parent this child. In any and all instances, if it is possible, this Court tries to ensure children and parents can be together as a family. Regrettably, it is simply not within the realm of judicial possibility for this to happen.

[60] Judge Melvin obviously recognized her statutory responsibility to treat the best interests of E.A.Z. as the paramount consideration when deciding the outcome of the Minister's application.

[61] I would dismiss this fourth ground of appeal.

Conclusion

[62] Judge Melvin fulfilled all relevant statutory requirements under the *Act*. Her evaluation of both the facts, and credibility, is unassailable. She correctly applied the law to all of the issues she was required to decide. Her reasoning and disposition find ample support in the record. I see nothing here which would warrant our intervention. Judge Melvin's decision granting the Minister's application for permanent care and custody of E.A.Z. is affirmed. The appeal is dismissed, without costs.

Saunders, J.A.

Concurred in:

Van den Eynden, J.A.

Fichaud, J.A.