NOVA SCOTIA COURT OF APPEAL

Citation: *J.H. v. Nova Scotia (Community Services)*, 2023 NSCA 17

Date: 20230323
Docket: CA 517873
Registry: Halifax

Between:

J.H.

Appellant

v.

Minister of Community Services

Respondent

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

Judge:	The Honourable Justice Cindy A. Bourgeois
Appeal Heard:	February 16, 2023, in Halifax, Nova Scotia
Subject:	*Children and Family Services Act* – permanent care and custody – misapprehension of evidence
Summary:	Following a hearing conducted at the end of the statutory period, two young children were placed in the permanent care and custody of the Minister of Community Services. The mother appealed, arguing the hearing judge did not properly consider the evidence, and improperly reversed the burden of proof onto her.
Issues:	1. Did the hearing judge misapprehend the evidence before her? 2. Did the hearing judge improperly reverse the burden of proof onto the appellant?
Result:	The Court was satisfied the hearing judge did not err as alleged. Appeal dismissed without costs.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 8 pages.

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s. 94(1) of the *Children and Family Services Act*

Judges:	Scanlan, Bourgeois, and Derrick, JJ.A.
Appeal Heard:	February 16, 2023, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs, per reasons for judgment of Bourgeois, J.A.; Scanlan and Derrick, JJ.A. concurring
Counsel:	Pavel Boubnov, for the appellant Sarah Lennerton, 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:

> Prohibition on publication
>
> 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:

[2] The appellant is the mother of three young children: E.H., now 5; E.B., now 3 and E.O., now 2. The two older children have the same father, G.T. The youngest child's father is G.O.

[3] In November 2020, the Minister of Community Services ("the Minister") took all three children into care pursuant to the *Children and Family Services Act*, S.N.S. 1990, as amended (the "*CFSA"*). The youngest child was eventually placed in the care of his father, and is not a subject of this proceeding.

[4] By order of the Honourable Cindy G. Cormier of the Supreme Court of Nova Scotia (Family Division) dated July 11, 2022, the two older children were placed in the permanent care and custody of the Minister. The appellant has appealed to this Court, and requests the Permanent Care and Custody Orders[1] be set aside, and the children returned to her care.

[5] For the reasons that follow, I would dismiss the appeal.

Background

[6] When taken into care, the children were residing with the appellant and her mother and brother. The protection concerns that prompted the Minister's involvement included the appellant's drug use, the unfit condition of the home, and medical and physical neglect. The children's father, G.T., was notified of the protection proceeding, but did not participate.

[7] At the conclusion of the Interim Hearing in November 2020, the two children were placed in the care of a maternal aunt subject to the supervision of the Minister. In January 2022, the Minister resumed day to day care of the children as the family placement was no longer feasible.

[8] During the course of the proceedings, the Minister expressed concerns regarding the negative influence of the appellant's mother given her mental health issues and erratic behaviour. The appellant, who had continued to live with her mother, was advised to find other suitable housing away from the chaotic environment of that home, and specifically encouraged to seek out a supportive housing placement.

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[1] A Permanent Care and Custody Order was issued in relation to each child.

[9] The appellant did engage in some services provided by the Minister, and eventually advised, very close to the final disposition hearing, that she had found an apartment where she and the children could reside.

[10] The children were found to be in need of protective services on February 5, 2021. A Disposition Hearing was concluded on June 24, 2021, and several Review hearings followed. The statutory deadline for all disposition orders was April 8, 2022.

[11] As the final statutory deadline approached, the Minister formed the view that the appellant had not made sufficient progress and the children would remain in need of protective services should they be returned to her care. As such, the Minister sought Permanent Care and Custody Orders in relation to each child.

[12] A contested hearing was held on April 5, May 3 and 5, 2022. The appellant was represented by legal counsel. The Minister called a number of witnesses and introduced a substantial amount of documentation. The appellant testified and also called a witness in support of her plan to have the children returned to her care.

[13] On July 11, 2022, the hearing judge released a lengthy written decision in which she concluded the children would be placed in the permanent care and custody of the Minister. The hearing judge's findings were set out as follows:

> [284] The underlying concern in this matter is not whether J.H. is smart enough or capable enough to care for her children – it is whether she will choose to care for them without exposing the children to the ongoing risk of physical and/or emotional harm or the risk of neglect. In counseling and family support work, J.H. refused to work on certain issues, suggesting the Minister had a "grudge" against her family and there was nothing wrong.
>
> [285] When required to leave her mother's home, J.H. insisted on finding her own apartment. She would not consider supportive housing, which would most likely have guaranteed the return of her children to her if she followed through. At trial, J.H. had not yet provided evidence that the apartment she presented to the Minister is actually her own to continue living in with the children. Her name was not on the lease.
>
> [286] J.H. has failed to abide by no contact orders in place after the Minister took the children into care. J.H. does not or she is unwilling to recognize the risk to the children posed by her mother or her brother and the ongoing conflict their behaviour generates. It is a question of choice for her. I do not necessarily see J.H. as a victim in this scenario. J.H. presents as capable of change but being perfectly comfortable the way things were before the Minister's involvement. J.H. will accept services on her terms only.

> [287] Despite the Minister's oversight and J.H.'s suggestion that she was prepared to do whatever was necessary, J.H. continued to create her own conflict: with her sister; with her sisters' ex-boyfriend; with her ex-boyfriend and father of two of the children, GT.
>
> [288] J.H. presents as extremely impulsive with limited self control and a clear desire to do things her way or no way. I am unclear whether J.H. truly knows how to create and maintain a stable safe place for her children. She does not or she is unwilling to recognize the risk to the children posed by her own behaviour. Her world view has been shaped by her experiences with her family of origin, and it is possible she has no true intention of trying to engage her family in change or ever engaging in changes prescribed by others.
>
> [289] J.H. has not proven to me that she can envision what the necessary changes are from anyone else's perspective. There is no evidence that J.H. values the idea of long-term change. She is crisis driven and does not appear to engage in long-term planning for her own future. She has not communicated any concrete plans for her future, any desire to address her educational or vocational needs, nor how she will support her children's special needs. J.H. could have advocated for herself and she could have obtained a bus pass. She chose not to do so. She chose to continue to have others drive her because it suited her, and she did not care about the Minister's discomfort or concerns about her mother.
>
> [290] There is little evidence that J.H. sees anything wrong with the way she was living, the way she was raised, or the way she has behaved. The issue from her perspective is that she "got caught," and she blames G.O. for "ratting" her out. J.H. has not used the time available to her since the first disposition order was granted to make any significant long-lasting changes, although she appears perfectly capable of doing so if she chose to do so. Further counseling is unlikely to be of any assistance unless J.H. decides it will, but in any event, the Court is out of time.
>
> [291] J.H. has not proven to me that she did what was necessary to give her children the chances she may not have had, in part because of the challenges her mother was facing, including mental health challenges. Every child, including [E.H. and E.B.], deserve the chance to be safe, to go to school, to make friends, and to have choices in their lives. I am entrusted to decide based on the children's best interests, not J.H's.
>
> [292] I cannot conclude that the risks have been mitigated. I find that the children continue to be at substantial risk of harm if returned to their mother's care.

[14] Orders for Permanent Care and Custody were subsequently issued on August 15, 2022.

Issues

[15] The appellant was originally self-represented when she filed her Notice of Appeal with the Court. Now represented, her counsel has helpfully narrowed her concerns. After considering the written and oral arguments, the issues before the Court can be stated as follows:

1. Did the hearing judge misapprehend the evidence?
2. Did the hearing judge improperly reverse the burden of proof onto the appellant?

Standard of Review

[16] The standard of review of a hearing judge's decision in a child protection matter is well-settled. The Court may only intervene if the hearing judge erred in law or has made a palpable and overriding error in her 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. ...

[17] To justify this Court's intervention, the appellant must satisfy us that in reaching her 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.

Analysis

Issue 1: Did the hearing judge misapprehend the evidence?

[18] In her written argument, the appellant says the hearing judge seriously misapprehended the evidence, alleging:

i. The judge misapprehended the evidence by failing to properly assess the Appellant's participation in services, her progress made during services and generally, her properly addressing the child protection concerns raised by the Respondent;

ii. The trial judge misapprehended evidence by rejecting the Appellant's parenting plan.

[19] In *R. v. J.C.*, 2018 NSCA 72, Justice Beveridge addressed when, in the context of a criminal proceeding, a misapprehension of evidence may give rise to appellate intervention:

> [49] This Court summarized the law with respect to misapprehension of evidence in *R. v. Izzard*, 2013 NSCA 88:
>
> > [40] To obtain a remedy on appeal based on an allegation that a trial judge misapprehended the evidence, the appellant must show two things: first, that the trial judge, in fact, misapprehended the evidence - that is, she failed to consider evidence relevant to a material issue, was mistaken as to the substance of the evidence, or failed to give proper effect to evidence; and second, that the judge's misapprehension was substantial, material and played an essential part in the decision to convict (see *R. v. Schrader*, 2001 NSCA 20; *R. v. Deviller*, 2005 NSCA 71; *R. v. D.D.S.*, 2006 NSCA 34).

[20] The same principles have been found to apply in family proceedings (*Novak v. Novak*, 2020 NSCA 26), and I will apply them here.

[21] In her written reasons, the hearing judge undertook a comprehensive review of the evidence before her. This included the evidence of service providers who testified to the appellant's participation in counselling and other programs. The Minister acknowledged the appellant had undertaken some services, and had shown a degree of progress. However, it was submitted the appellant had failed to

gain insight into the concerns which prompted the Minister's involvement with the family.

[22] The hearing judge did not overlook the evidence of the appellant's improvement in some areas, nor did she fail to consider the appellant had participated in services. Her reasons demonstrate she was attuned to these facts. However, she found that notwithstanding these factors, the appellant still had demonstrable deficits in her ability to safely parent the children. This conclusion was amply supported by the record. There is no basis to find the hearing judge misapprehended the evidence.

[23] Further, the hearing judge did not misapprehend evidence by rejecting the appellant's parenting plan. Again, as is clear from her written reasons, the hearing judge was cognizant of the appellant's position set out in her parenting plan. She did not overlook it. The appellant's parenting plan did not alleviate the hearing judge's concerns. Rather, having considered the evidence before her, the hearing judge found the children would be at substantial risk of harm should they be returned to the appellant's care. This finding was at the heart of the hearing judge's rejection of the appellant's parenting plan, and it was a conclusion open to her on this record.

[24] I would dismiss this ground of appeal.

Issue 2: Did the hearing judge improperly reverse the burden of proof onto the appellant?

[25] The appellant correctly submits the Minister bears the burden of proof in child protection proceedings, and was required to prove, on a balance of probabilities, the children remained in need of protective services prior to placing them into permanent care. (See *Nova Scotia (Community Services) v. C.K.Z.*, 2016 NSCA 61).

[26] Counsel for the appellant says the following paragraph demonstrates the hearing judge improperly shifted the burden of proof:

> [289] **J.H. has not proven to me** that she can envision what the necessary changes are from anyone else's perspective. There is no evidence that J.H. values the idea of long-term change. She is crisis driven and does not appear to engage in long-term planning for her own future. She has not communicated any concrete plans for her future, any desire to address her educational or vocational needs, nor how she will support her children's special needs. J.H. could have advocated for

> herself and she could have obtained a bus pass. She chose not to do so. She chose to continue to have others drive her because it suited her, and she did not care about the Minister's discomfort or concerns about her mother.
>
> (Emphasis added)

[27] Although the Minister acknowledges the hearing judge's choice of words could have been different, she says a review of the decision in its entirety demonstrates there was no error. In particular, counsel for the Minister submits the hearing judge fully grasped where the burden lay, citing from her reasons:

> [48] The Minister must prove its case on a balance of probabilities. I find that they have done so.
>
> [49] Section 22(2) of the *CFSA* defines a child in need of protective services. I made a finding that EI and EO were children in need of protective services under s. 22(2)(b) on October 13, 2020. That finding was confirmed at each stage of the proceeding thereafter. For purposes of this final disposition review, I must determine whether EI and EO are still children in need of protective services (*Catholic Children's Aid Society of Metropolitan Toronto v. CM*, 1994 CanLII 83 (SCC), [1994] SCJ No. 37 (SCC)). …

[28] The Minister argues the hearing judge's impugned words must be placed in context. Substantial evidence had been adduced by the Minister at the hearing demonstrating the concerns which had justified a finding the children were in need of protective services had not resolved. The appellant through her own evidence was unable to rebut the Minister's case. The hearing judge's words reflected that reality, not a shifting of the burden of proof.

[29] I agree with the Minister. The hearing judge identified the correct burden, and her reasons demonstrate her conclusion the children remained in need of protective services was because she found the Minister's evidence to be persuasive. I am satisfied the burden of proof was not inappropriately placed upon the appellant.

Disposition

[30] The appellant undoubtedly loves her children. However, her arguments on appeal amount to a request that this Court re-weigh and re-consider the evidence in hopes a different conclusion will be reached. That is not this Court's function.

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

Bourgeois, J.A.

Concurred in:

Scanlan, J.A.

Derrick, J.A.