NOVA SCOTIA COURT OF APPEAL

Citation: ***M.W. v. Nova Scotia (Community Services)***, 2014 NSCA 103

Date: 20141118
Docket: CA 426855
Registry: Halifax

Between:

M.W.

Appellant

v.

Minister of Community Services

Respondent

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

Judges:	Fichaud, Scanlan, Bourgeois, JJ.A.
Appeal Heard:	September 26, 2014, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs, per reasons for judgment of Bourgeois, J.A.; Fichaud and Scanlan, JJ.A. concurring
Counsel:	Arthur von Kursell, for the appellant Philip S. Gruchy, 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] This is an appeal from an order of the Honourable Judge William J. Dyer, placing an 18 month old girl in the permanent care and custody of the Minister of Community Services pursuant to the *Children and Family Services Act*, S.N.S. 1990, c. 5 ("the *Act*").

[2] At the final review disposition hearing, the appellant through her counsel indicated consent to the permanent care and custody order. She now argues that her consent was not valid due to the ineffective representation of her counsel, and seeks the introduction of fresh evidence in that regard.

[3] The appellant also raises issue with respect to whether she was provided with appropriate services by the Minister of Community Services (hereinafter the "Minister" or "Agency"), and further, that the family court judge failed to comply with statutory requirements contained within the *Act*.

Background

[4] Given the nature of the issues raised on appeal, a review of how the protection proceeding unfolded is warranted.

[5] This appeal concerns the child [M.E.M.W.], born September [*], 2012. The appellant, the child's mother, has been involved throughout the court process leading to the order for permanent care and custody. She is 26 years of age. The child's father, [A. E.], has not been involved in the court process, but for reasons which will become apparent, is one of the factors central to the outcome of this appeal.

[6] As the record before the Court discloses, no *viva voce* evidence was ever given in relation to any of the hearings statutorily mandated under the *Act*. At all hearings, and all other court appearances save one, the appellant was represented by legal counsel. At all hearings, the appellant chose not to oppose the orders being sought by the Minister.

[7] The procedural and factual background has been gleaned from the record, including the affidavit evidence of representatives of the Minister, which was unchallenged by the appellant. It is this same unchallenged evidence, covering a

span in excess of 17 months, that was before the family court judge when he rendered the order for permanent care and custody.

[8] On September 28, 2012 , the Minister filed a Protection Application and Notice of Hearing seeking temporary care and custody of the child, supported by the affidavit of social worker Joline Comeau sworn the same day. Ms. Comeau's affidavit outlined concerns held by the Minister prior to the child's birth, indicative that the appellant may struggle with the care of an infant. These concerns centered upon the potential involvement of the child's father, Mr. [A.E.] given his status as a convicted sex offender, concerns regarding the applicant's mental health, and her overall lack of preparedness for the demands of parenting an infant.

[9] Ms. Comeau's affidavit included the following references:

- That the appellant had first come to the attention of the Agency on February 6, 2012 when she had contacted the office to inquire "if the child she was expecting would be taken away from her by the Agency due to the fact that the child's father, Mr. [A.E.], had been previously charged and convicted of possessing child pornography";
- That on April 18, 2012 the affiant met with Mr. [A.E.] who confirmed he had been convicted on two separate occasions for the possession of child pornography, had received treatment at the East Coast Forensic Hospital, and had been placed on the Nova Scotia Sex Offender Registry;
- The Agency received information on May 19, 2012 from the RCMP that the appellant was recently involved in an incident of self-harm where she had cut her wrists;
- Various other identified professional community sources advised the Agency of concerns with the appellant's mental health, unstable living arrangements and general unpreparedness to parent.

[10] An interim hearing was commenced on October 1, 2012 pursuant to s. 39(1) of the *Act*, and completed on October 12, 2012. At that time the court found there were reasonable and probable grounds to believe the child was in need of protective services pursuant to s. 22(2) (b), (g) and (ja) of the *Act*.

[11] Those provisions provide:

22 (2) A child is in need of protective services where

…

> (b) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (a);
>
> …
>
> (g) there is a substantial risk that the child will suffer emotional harm of the kind described in clause (f), and the parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;
>
> …
>
> (ja) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (j);

[12] The interim order rendered on October 12, 2012 included terms as follows:

- The child would remain in the temporary care and custody of the Minister;
- The appellant, as well as her aunt and uncle whom she had identified as a possible family foster placement for the child were to have supervised access;
- The appellant would participate in individual counselling;
- The appellant would participate in the preparation of a parental capacity assessment with a psychological/psychiatric component; and
- The Agency was to provide other supportive and rehabilitative services to the appellant as determined to be in the child's best interests.

[13] As required by s. 40 of the *Act*, a Protection hearing was held December 18, 2012. No *viva voce* evidence was called. The appellant did not consent to a protection finding, nor did she oppose it. She was present and represented by counsel.

[14] The court determined that the child was in need of protective services pursuant to s. 22(2), paragraphs (b), (g) and (ja) of the *Act*. The terms of the order mirrored that of the interim order, with the addition of a term requiring the appellant to participate in the Agency's family support program.

[15] The Minister filed an Application for Disposition Order and Notice of Hearing dated February 21, 2013, supported by an affidavit sworn by protection worker Ms. Acton-Bond on February 25, 2013. Ms. Acton-Bond's affidavit noted:

- A paternity test had established Mr. [A.E.] was the child's father, but he had made no further contact with the Agency with respect to the protection proceeding or the child;
- The appellant was continuing supervised access with the child;
- The child had been placed and was settling well in the family foster placement, having been there since December 2012;
- According to information obtained from the Bridgewater Town Police, the appellant called 911 on January 27, 2013 after taking approximately 60 Tylenol pills;
- Social worker Jennifer van Kessel was in the process of completing a parental capacity assessment and the appellant was being co-operative with that process; and
- The appellant was continuing individual counselling.

[16] The disposition hearing was ultimately held on May 30, 2013. The appellant was represented by her counsel, Mr. Schnare. The family court judge directed:

> **THE COURT:** … I think Mr. Gruchy is here early afternoon.
>
> **MR. GRUCHY:** Yes.
>
> **THE COURT:** Could we do 2 o'clock?
>
> **MS. ROMNEY:** That would be fine.
>
> **THE COURT:** Monday, July 29th. That would be for review. So what I shall do, then, without opposition from Ms. [M.W.] but with consent as to process if I can put it that way, I will complete the disposition hearing. Mr. Gruchy, I think, has accurately recaptured the history.
>
> The Application for Disposition Order was accompanied by the written plan of care in a summary fashion. I can say that it is not only a roadmap for the Agency, but in a summary fashion does capture the evidence that is before the Court, the evidence itself flowing from - and I stand to be corrected on this - two Agency representatives or workers. There's nothing new by way of affidavit evidence. However, my understanding is that the background evidence essentially has not changed.

> As mentioned, we were waiting for an assessment, full-blown assessment, and that was received in late March. So that will form part of the evidentiary package as well. That reflects the work of Jennifer VanKessell. I'll reserve cross-examination rights on that report and the affidavits of the workers.
>
> I'm satisfied on the uncontradicted evidence before the Court that [M.E.M.W.] remains a child in need of protection as contemplated by Section 22(2)(b), (g), and (ja) respectively of the **CFSA**.
>
> In the child's best interests, I order that she remain in the care and custody of the Agency on the same terms and conditions as previously ordered with the exception of, as suggested by Mr. Gruchy, the reference to the assessment.
>
> Ms. [M.W.] has had the benefit of counsel throughout. I'm mindful that she is not consenting, but neither is she opposing. And I'm satisfied that the proposed disposition is the least intrusive in the circumstances, and more importantly in the best interests of the child at this stage. And I'm mindful there will be a review in late July. There is no alternate placement on the immediate horizon. And again, that only reinforces the proposed disposition.
>
> So in brief, I will authorize the proposed Disposition Order. I'll invite Mr. Gruchy to prepare an Order, and I'll schedule it for a docket review to Monday, July 29th, 2 p.m. here. Mr. Gruchy, is there anything else that needs to be said or done?
>
> **MR. GRUCHY:** No. Thank you, Your Honour.

[17] As noted earlier, the parental capacity assessment prepared by Ms. van Kessel had been received in late March of 2013. Given the arguments advanced by the appellant the contents of this report are particularly relevant. The appellant submits the key recommendation contained in the assessment – that she and the child be permitted to reside together in a 24/7 supervised environment – was ignored by the Agency, her counsel and the family court judge.

[18] The van Kessel assessment is thorough, containing a detailed review of the appellant's personal history, present circumstances, and strengths and weaknesses impacting upon her potential parenting. A number of observations and findings are particularly relevant. With respect to "*Relationship History*" the assessor notes as follows:

> Ms. [M.W.]' intimate relationships demonstrate significant evidence of an over-tolerance for poor treatment and a subsuming of her own needs and rights in the context of her relationships. Given that her first intimate relationships – with both her biological mother and her adoptive parents – were marred with negligence and abuse, it is not surprising that Ms. [M.W.] has a high tolerance for poor treatment in her close relationships. She demonstrates a willingness to tolerate physical

> assaults, verbal abuse, infidelity and anti-social or criminal behaviour. She under-prioritizes her basic need for safety from emotional and physical abuse in the context of her intimate relationships while over-valuing the desires and wishes of her partners.

[19] With respect to the appellant's relationship with Mr. [A.E.], the assessor observes:

> Ms. [M.W.] at times acknowledges that Mr. [A.E.] was not trustworthy and has not treated her with respect. She states that she cannot have contact with him since the assault last August given that there is a peace bond keeping him from having contact with her. She indicates that in the absence of a peace bond, she would not have contact with him because "he sends me mixed signals" and because if she allowed him to visit her, they would "end up having sex again". When presented with the scenario of Mr. [A.E.] expressing remorse and committing to a (sic) being a more respectful person toward her, she indicates mainly a concern that he would not follow through and that she would then be hurt again. She does not indicate a perspective that allows for her to understand his current or future behaviour in the context of past behaviour. Further, it appears that provided Ms. [M.W.]'(sic) believes that in-the-moment sincerity can be trusted as an indication of what is likely to follow. She further does not reflect on her own passivity in the relationship and her tolerance for his concurrent relationship with another woman. She does not explicitly reflect with concern on his continued pursuit of her sexually after it was clear that Ms. [M.W.] was emotionally vulnerable and wanting closeness and commitment from him and his physically assaultive and threatening behaviour toward her in the context of their arguments. Ms. [M.W.] demonstrates a high tolerance for abusive or exploitative treatment and a significant vulnerability to exploitation by people with whom she is offered even superficially intimate or close connection.
>
> Ms. [M.W.] is still clearly focused on her past relationship with Mr. [A.E.]. As recently as January 26th, she was in contact with him and arguing, immediately preceding another overdose. She indicates that Mr. [A.E.] was someone she could talk to and has been the only person over the past 2 years whom she has felt close to and counted on. Ms. [M.W.] has been questioned for prioritizing her relationship with Mr. [A.E.] over the safety of her child. Ms. [M.W.], on one occasion, acknowledged this on interview and commented that she feels like she is a "bad person" for wanting her daughter to know her father. She explained that some people have told her to simply tell her daughter the truth when she is older. Ms. [M.W.] does not find comfort in this advice and stated that she doesn't want to tell [M.E.M.W.] that her father did not want her because this will hurt her deeply. Her reaction to this advice suggests a personal belief that to discover you were not wanted by your biological father is, at minimum, on par with the harm of being sexually abused by that same father.

[20] When addressing the appellant's "*Mental Health*", Ms. van Kessel reviews the appellant's longstanding history of mental health involvement, commencing at the age of five. Sadly, it appears as if the appellant was the victim of sexual abuse at the hands of her adoptive father. This has had a negative and significant impact on the appellant. The assessor writes:

> Ms. [M.W.] advises that as an adult, she has struggled at times with overwhelming emotions that trigger urges to engage in impulsive and self-harming behaviour. She reports feeling that she has been depressed in the past and has had difficulty coping. She reports that she has felt lonely and that no one cares for her. She indicates that she has had many experiences of friends "turning on her" and telling people terrible things about her or slandering her and harassing her online. She indicates feeling that the bullying from her school experiences continued into her adulthood and reports few friends or healthy, supportive relationships. She indicates that she has had friends but they live in ... and she does not feel safe there given the history with her family as well as the conflicted relationship with her ex-partner and his current partner.
>
> . . .
>
> Of particular concern is Ms. [M.W.] (sic) emotional reaction to – and understanding of – situations where threat or otherwise unsafe events should be perceived. In the time that Ms. [M.W.] has been known to various professionals working with her, she has made several concerning decisions that put her at risk of harm. Ms. [M.W.] has invited an unknown, older man whom she met online, to her home. She extended this invitation after he made sexual comments about her breasts and breastfeeding in the context of her sharing the story of recently giving birth to her daughter which she did not perceive his comments as sufficiently inappropriate or worrisome to avoid inviting him to her home . . .Ms. [M.W.] has demonstrated a persistent focus on the father of her child, [A.E.], and has made repeated attempts to make contact with him and to engage his interest and involvement with their child. Ms. [M.W.] is aware of the concerns with regard to his past offences . . .
>
> Ms. [M.W.]' determination to maintain or resume a relationship with Mr. [A.E.] appears to have lessened to a degree, in the face of repeated, clear attempts by virtually every professional involved with Ms. [M.W.], that she must maintain distance from Mr. [A.E.] for her own sake and, more importantly, for the sake of her infant daughter. She appears, on interview, to have an understanding that the Agency and other professionals connected to her situation are unanimous in their concern and that failure to adopt a similar attitude toward Mr. [A.E.] will substantially increase doubts about her ability to adequately protect her daughter. Professionals involved with Ms. [M.W.] have been very concerned that she

> presents as rigid and fixated in her interest in Mr. [A.E.] and that she has prioritized his right to have contact with his daughter over her daughter's right to protection from risk of sexual harm. These professionals have expressed frustration and non-comprehension with regard to Ms. [M.W.]' persistent interest in Mr. [A.E.] at the potential expense of her daughter's safety or her daughter's return to her care.

[21] In terms of the appellant's need for therapeutic intervention, Ms. van Kessel notes:

> While Ms. [M.W.] appears to have made progress in some areas through psychotherapy, significant change with regard to goals of improved distress tolerance, emotional regulation, improved and healthier coping strategies and interpersonal skill development will require long term, engaged psychotherapy. Ms. [M.W.] may, eventually, also benefit from a more trauma-focused strategy that addresses the consequences of significant, prolonged physical, emotional and sexual abuse trauma. A comprehensive assessment of Ms. [M.W.]' mental and emotional health symptomatology combined with a systematic prioritization of clinical goals, based on the literature with regard to concurrent vs. consecutive treatment of these concerns as well was prioritization of clinical goals that increase Ms. [M.W.]' ability to meet her daughter's need safe, responsive care, would assist in meaningfully identifying and addressing both immediate as well as long term goals.

[22] With respect to the appellant's parenting capacity, Ms. van Kessel concludes as follows:

> While Ms. [M.W.] presents with significant strengths when considered in the context of her past history and current dearth of resources, both personal and environmental, her daughter faces significant risk if placed in her mother's care. In a context where Ms. [M.W.] could receive continual monitoring and mentoring as well as personal emotional support and interventions associated with personal healing as well as interventions directed toward the risks represented in the infant-parent dyad, Ms. [M.W.] may experience success in parenting her child. However, the level of support that would be appropriate to Ms. [M.W.] (sic) needs does not appear to be available to her.
>
> At the suggestion of this assessor, Ms. [M.W.] was introduced to the Supported Housing for Young Mother's program in Dartmouth, NS. The program provides on-site support and programming directed toward young women between the ages of 16 and 24 who are parenting young children who are at risk. Acceptance in this supervised independent living program is offered on the basis of meeting criteria of age and risk as well as agreement by the young mother to participate in programming addressing lifestyle and parenting as well as topics suggested or requested by the young women in the program. **Ms. [M.W.] declined to be**

> **involved in the program and the program suggested that her age at the time was a barrier to being accepted.** [Emphasis added]

[23] At the conclusion of her report, Ms. van Kessel sets out her recommendations. She supports the child being placed with the appellant only if the two could be placed with the appellant's aunt and uncle in the current foster placement, or if such was not possible, placed in another living arrangement whereby the appellant could be "supported on a 24 hour basis". In order for such an arrangement to alleviate the protection concerns, a number of other recommendations, including intensive mental health interventions, were made. The assessor recommended that the appellant refrain from all contact with Mr. [A.E.].

[24] As noted earlier, the parental capacity assessment was in the hands of the parties and court at the time the May 30, 2013 disposition order was rendered. That order was reviewed as required by the *Act*, resulting in further orders for temporary care and custody issued August 27, 2013; November 18, 2013; and February 11, 2014. The Minister filed affidavits in support of the above orders. The appellant did not challenge the orders sought by the Minister, but continued to reserve the right to cross-examine the affiants should the matter proceed to a permanent care and custody hearing.

[25] The evidence filed with the court and available to the appellant following receipt of the van Kessel report is significant. The affidavit of social worker Ms. Acton-Bond, sworn July 25, 2013 asserts:

- It came to the attention of the Agency in early July, 2013 that the appellant was staying with Mr. [A.E.];
- The affiant discussed with the appellant on July 17, 2013 the Agency's concerns surrounding her involvement with Mr. [A.E.], his risk to the child and that the appellant's "continued association with [A.E.] was not helpful to her plan to regain custody";
- On July 23, 2013, the affiant met with the appellant who acknowledged, contrary to the recommendation contained in the parental capacity assessment, that she continued to reside with Mr. [A.E.] and she was in a sexual relationship with him; and
- The appellant "also agreed to explore options for supportive living arrangements for herself and [M.E.M.W.] for the Agency to consider".

[26] The next affidavit filed with the court by the Agency was that of child protection worker Nancy Baker, sworn October 28, 2013. With respect to a supervised living arrangement, the affiant asserts:

> 5. Ms. [M.W.] attempted to explore options for a supervised care arrangement for herself and [M.E.M.W.], but was not successful. The Agency is not aware of any other options that could be made available to Ms. [M.W.] and [M.E.M.W.]. **Ms. [M.W.] has been encouraged to continue to explore this option and the Agency will assess any plans that she is able to come up with**. Ms. [M.W.] continues to live in her own apartment in Bridgewater. [Emphasis added]

[27] With respect to the Agency's concerns surrounding Mr. [A.E.], Ms. Baker asserts:

> 8. Ms. [M.W.] is attending the STOP group facilitated by Mary McGrath. This group allows participants to learn about the risks and triggers associated with sexual abuse. This program was considered to be appropriate in this situation because Ms. [M.W.] continues to be in a relationship with [A.E.]. Mr. [A.E.] has two prior convictions for possession of child pornography. Information recently received by the Agency as a result of an Order for Production for the records of the East Coast Forensic Hospital reveals that Mr. [A.E.] was assessed as posing a low to moderate risk for re-offending as of October of 2008. The risk to re-offend includes both accessing child pornography and sexual offences against children. The information received confirms Mr. [A.E.]'s attraction to underage children and it was recommended that he not have contact with persons under the age of 16 except in the presence of a responsible adult. Although it appears that Mr. [A.E.] completed the requirements of the sexual offender treatment program the risk that he may re-offend will remain a significant risk for the remainder of his life. **All efforts to persuade Ms. [M.W.] to discontinue pursuing her relationship with Mr. [A.E.] have been unsuccessful. Ms. [M.W.]' desire to maintain this relationship, despite the fact that it has been the source of considerable stress and upset for her, poses a significant and perhaps insurmountable barrier to Ms. [M.W.]' desire to parent her child.** [Emphasis added]

[28] In late November 2013, Mr. Blair Wilson undertook responsibility for the Agency's file in relation to the appellant. In his affidavit sworn January 13, 2014 he asserts:

- He first met with the appellant on November 28, 2013, who indicated she was no longer in contact with [A.E.] and "understood that having him in her life would impact her plan to parent" her child;

- The appellant confirmed on December 12, 2013 that she was six weeks pregnant, the father being identified as Mr. [A.E.];
- The affiant received correspondence from Ms. Dalzell, Clinical Therapist at Adult Addiction & Mental Health Services which indicated that the appellant declined further treatment beyond the initial consultation appointment;
- The affiant subsequently contacted the appellant and cautioned that undertaking mental health services was an important aspect of the Agency's plan. Following a case conference on January 8, 2014, the appellant agreed to return to see Ms. Dalzell for therapy.

[29] The Minster again filed an affidavit of Blair Wilson with the court, sworn February 11, 2014, in which he asserts:

- The child remained in the family foster placement;
- He had met with the appellant on January 17, 2014 and discussed her continued involvement with Mr. [A.E.]. The appellant reportedly asserted that "she understood that [A.E.] presents a risk to her child, and future children, but that [A.E.] is her primary source of support and it is difficult for her to let this relationship go";
- The appellant had completed the S.T.O.P. program;
- The Agency was mindful that the maximum time period for all disposition orders would conclude on May 30, 2014. Although a final decision had yet to be made, the affiant was not confident that the appellant would "be able to make the necessary changes and gain sufficient insight to be able to parent" the child within the remaining time period available.

[30] A final affidavit sworn by Mr. Wilson on March 11, 2014 was filed with the court, in which he notes:

- A meeting was held with the appellant on February 12, 2014 at which time her request for expanded access was declined, given concerning observations during visits that the appellant was not adequately prepared, lacked confidence and routinely left the child unattended. The appellant indicated the visit reports did not accurately reflect what was transpiring;

- The appellant indicated she had no intention of reconciling with [A.E.], but also indicated it was difficult for her to end that relationship;
- On February 13, 2014, a meeting was held with Ms. Dalzell, Clinical Therapist, at which time the affiant was made aware that given the complexity of the appellant's mental health issues it would take at least a year to form a therapeutic bond with a therapist and another two to three years to provide meaningful treatment. Mental Health advised it was not suited to provide the level of treatment required to address the appellant's complex history and diagnosis, and the appellant's level of distrust and forced participation with their services was a further barrier to being productively involved; and
- On March 5, 2014, the Agency reached a final decision to pursue an order for permanent care and custody which was communicated to the appellant in a meeting the following day.

[31] In response to the Minister's Review Application and Notice of Hearing dated March 11, 2014, the matter returned to court on March 17, 2014. Present were counsel for the Minister, Mr. Schnare for the appellant, Ms. Romney who had a watching brief for the foster parents, and the appellant. At that time the court was advised the Minister was seeking an order for permanent care and custody, but the required Plan of Care had yet to be finalized. Counsel for the Minister advised that he understood a hearing may not be required as the appellant was consenting to the order sought.

[32] The appellant's counsel responded:

> **MR. SCHNARE:** Thank you, Your Honour. My friend Mr. Gruchy's comments are correct. Part of the reason for the delay in having this matter heard today, and we thank the Court for its patients (sic), was that I've had lengthy discussions with my client.
>
> And I can advise that I have instructions from my client. She wishes to consent to the Order or the finding for permanent care and custody with the indication that she does not wish to take this to hearing and wishes to have the matter dealt with. I have those instructions.
>
> And one thing that I spoke about with Mr. Gruchy and with Ms. Romney was with regard to the fact, of course, that there had not been a plan of care yet filed, and that it would be perhaps best if we adjourned the matter so that that plan could be filed to give counsel and the Court an opportunity to review it before we crystallize things.

> But I did want to indicate that that is the direction that I've been given. That's the direction where we're headed as far as permanent care at this time.

[33] The matter was adjourned to March 24, 2014 to permit the preparation of a Plan of Care by the Minister. An original Plan of Care was before the court on that date. The appellant was present. Her counsel advised:

> **MR. SCHNARE:** Yes, Your Honour. I've had an opportunity to review the Agency's plan as well as the draft Order with my client. And as indicated last week at our last appearance, [M.W.] is consenting to the Order for permanent care and custody as applied for by the Agency. Certainly an unfortunate situation for my client, but she is consenting to the Order as indicated last day.

[34] Given the nature of the issues raised on appeal regarding alleged failures of the family court judge, the entirety of his oral decision is reproduced below:

> **THE COURT:** It is indeed an unfortunate situation, not one that anyone sitting on the bench takes any pleasure in performing. It is a very difficult set of circumstances. And I'm glad that time was taken by all the lawyers involved to carefully review the material, to give careful thought to what's involved and the implications.
>
> I'm sure it was extremely difficult for Mr. Schnare's client and of course Ms. Romney's as well. And although they're not parties technically speaking, as Ms. Romney has just pointed out, they've been active and faithful participants in the proceeding since the outset.
>
> I don't like to apologize in advance of doing much before the bench, but at this point I do have to wear my technical or put on my technical cap. There are some formalities which are very important that I touch on in these circumstances. And I regret that to some extent I'll have to resort to what I'll call legal jargon and some of the technicalities surrounding the legislation.
>
> I only do that because I have a duty, a legal duty to mention the relevant sections of the **Act** and the foundation for the decision that I'm making today, even though it's going ahead by consent. And I'll try to keep this relatively brief because I know again the circumstances are very difficult for all concerned.
>
> I did have a chance before coming into the courtroom, I did have a chance to look at the draft Order. Or perhaps more importantly I had an opportunity as well to read the Agency's plan for the child's care.
>
> It runs or spans the better part of nine pages. And I don't have to for our purposes regurgitate or summarize or re-state the contents. I will simply say that the content does reflect in a summary way the evidence which has been accumulating before the Court over the span of many months. In fact, it's a

convenient map to indicate where we have been, where we are now, and what the future likely holds.

If I recall correctly, and Mr. Schnare I'm sure will correct me if I'm wrong, the evidence has flowed entirely from the Agency's representatives which have included several lead workers as the matter has developed.

I have necessarily considered all of that evidence which as of today stands uncontradicted. I have necessarily as well reviewed the statute. I'm mindful of the preamble or what we ... sometimes is referred to as the declaration of principles at the beginning.

I'm also mindful that the paramount consideration at the end of the day is the child's best interests. And I'm aware that this legal concept of best interests is captured by Section 3(2) of the **Children and Family Services Act**. And that sub-section has a number of what we would call sub-sub-paragraphs spanning (a) through (n), I believe if I recall correctly.

But for today's purposes, and to the extent that it may be necessary, I would highlight or touch on (i), (k), (l) and (m) in particular.

The draft Order makes mention of a number of other sections in the **Act** including Section 42(1)(f) in its conclusion. But it mentions that the Court has been satisfied that the requirements of Section 42(2), (3) and (4) have been met. And on the record, I would reiterate I'm mindful of the sections, and indeed those requirements have been met.

I'm certainly mindful that Ms. [M.W.] has had the benefit of independent legal advice throughout most of this proceeding which, again, is reflected in my findings under Section 42.

This is what we call a Review of Disposition Hearing. And of course, I've had to direct my attention to Section 46 of the **Act**. In that regard, there are a number of considerations or factors. And lastly, Section 47 of the **Act**, in particular Section 47(2) which deals with the question of access in a permanent-care setting.

I've touched on the evidence which is entirely sourced to the Agency. I've mentioned there's no countervailing evidence and, after independent advice, there is consent to the proposed Order.

Albeit with what I'll call reluctance but nonetheless on the evidence and in law, I'm satisfied that the proposed Order is in [M.E.M.W.]' best interests. And I order that she be placed in the permanent care and custody of the Minister under Section 42(1)(f). I make no finding with respect to religious denomination. The Order will be silent as to access.

I don't think in the circumstances anything else needs to be said or done, Mr. Gruchy. But if I've overlooked anything, I'd welcome your comments.

MR. GRUCHY: No. Thank you, Your Honour.

<u>THE COURT</u>: Mr. Schnare?

<u>MR. SCHNARE</u>: Nothing further, Your Honour. Thank you.

<u>THE COURT</u>: I appreciate you coming in this afternoon. I'll endorse the Order now.

[35] The order for Permanent Care and Custody was issued on March 25, 2014. Along with others, it contained the following recitals:

> **UPON THE COURT HAVING DETERMINED** that the child, [**M.E.M.W.], born September [*], 2012**, was in need of protective services on December 18, 2012 pursuant to Section 22(2), paragraphs (b), (g) and (ja) of the *Children and Family Services Act*;
>
> **AND UPON READING** the Review Application and Notice of Hearing, dated March 11, 2014 the Affidavit of Blair Wilson and all other documents on file herein;
>
> . . .
>
> **AND UPON HEARING** Derek Schnare, counsel for the Respondent, [M.W.], consenting hereto;
>
> . . .
>
> **AND UPON** the Court being satisfied on the basis of the evidence and material on file herein that Section 42(2), Section 42(3) and Section 42(4) of the *Children and Family Services Act* have been complied with;

[36] On April 29, 2014, the appellant filed a Notice of Appeal to this Court. Self-represented at the time, the grounds of appeal are stated as follows:

> Council(sic) for [M.W.] failed to provide to the court any evidence or affidavits to support any plan of care for the said child, [M.E.M.W.]. Council(sic) also failed to provide adequate response to the court pertaining to the claims presented against [M.W.]. Council(sic) neglected to provide good legal advice and guidance to [M.W.] and allowed himself, and the agency to mislead [M.W.] into believing that placing [M.E.M.W.] into the permanent care and custody of the Minister of Community Services was in [M.W.]' best interest due to council's(sic) concerns for [M.W.]' mental health.

[37] Prior to the hearing of the appeal, the appellant was able to secure counsel who without filing an amended Notice of Appeal, expanded upon the grounds by written and oral submissions. Given the lateness of counsel's retention, and the importance of the issues raised in the context of a child protection matter, such was permitted, but should not be viewed as being an approach readily permitted or endorsed by this Court.

Issues

[38] From the Notice of Appeal and submissions made on behalf of the appellant, I frame the issues before the Court as follows:

(a) Was the appellant ineffectively assisted by her legal counsel, and if so, did this lead to a miscarriage of justice?

(b) Did the Minister fail to provide the appellant with the "middle" ground option as recommended by assessor van Kessel, and as such, breach its obligation to the appellant?

(c) Did the family court judge fail to abide by his statutory duties prior to granting the permanent care and custody order, most notably that contained in s. 41(4)(c) of the *Act*?

(d) If an error justifying appellate intervention is found, what is the appropriate remedy?

[39] Before considering the above issues, I will address the standard of review.

Standard of Review

[40] The parties agree that the standard of review is as set out recently by this Court in **Mi'kmaw Family and Children's Services of Nova Scotia v. H.O.**, 2013 NSCA 141. I agree. There, Saunders, J.A. for the Court 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."

Analysis

Issue #1 – Allegations regarding the ineffectiveness of counsel

[41] The Court often addresses allegations of ineffectiveness of counsel in criminal appeals. It has, however, been recognized that such can be advanced as a ground of appeal in "rare" civil matters. In **W.(D.) v. White**, 2004 O.J. No. 3441(C.A.)(leave to appeal refused at [2004] S.C.C.A. No. 486), the court noted as follows:

> Like Grange J.A., I would not be prepared to close the door to the viability of ineffective assistance of counsel as a ground for a new trial in a civil action. But, also like Grange, J.A., I would limit the availability of that ground of appeal to the rarest of cases, such as (and these are by way of example only) cases involving some overriding public interest or cases engaging the interests of vulnerable persons like children or persons under mental disability or cases in which one party to the litigation is somehow complicit in the failure of counsel opposite to attain a reasonable standard of representation. The present action is not such a case.

[42] Child protection proceedings fall within that category of civil matters where the ineffectiveness of counsel may be raised as a ground of appeal. As was done in the present matter, the approach established by this Court to advance such grounds

in criminal matters should be followed (**R. v. West**, 2009 NSCA 63; **R. v. Hobbs**, 2009 NSCA 90 and **R. v. Fraser**, 2011 NSCA 70).

[43] The appellant has brought a motion for fresh evidence as it relates to this ground of appeal. The appellant filed two affidavits, and Mr. Schnare filed an affidavit in response to the allegations surrounding the competency of his representation. Both provided *viva voce* evidence at the hearing. In my view, the fresh evidence is necessary to assess the allegations surrounding Mr. Schnare's representation, and should be admitted.

[44] The appellant bears the burden of not only establishing that Mr. Schnare's legal representation was ineffective, but further, that it resulted in a miscarriage of justice. Although in a criminal context, the comments of Saunders, J.A. in **R. v. Gogan**, 2011 NSCA 105, are equally applicable in the present instance:

> [31] Given the allegations in this case, we cannot assess the strengths of the appellant's complaint on the existing record. In my opinion, the fresh evidence ought to be admitted so that we will be able to properly address the merits of this appeal. Accordingly, I will admit Mr. Gogan's and Ms. Hillson's affidavits, together with their *viva voce* testimony as fresh evidence in this case. It will be taken into account when deciding the outcome of this appeal. See generally **R. v. Fraser, supra**; **R. v. West**, 2010 NSCA 16; and **R. v. Hobbs**, 2009 NSCA 90.

[45] For the reasons below, this ground of appeal has no merit. The appellant, based on the record, the proffered evidence and the circumstances before the court, has failed to establish that Mr. Schnare's representation was ineffective, or that it led to a miscarriage of justice.

[46] Mr. Schnare provided through his affidavit and *viva voce* evidence, a thorough description of the nature and rationale for the advice given to the appellant and her instructions in response. The appellant's *viva voce* evidence served to confirm that advice. Mr. Schnare was of the view that based upon the evidence being mounted by the Agency, the nature of the protection concerns, the appellant's failure to address those concerns, and the rapidly approaching deadline for all disposition orders, that the appellant had no reasonable chance of success in challenging the sought order for permanent care and custody.

[47] Mr. Schnare testified that the appellant instructed him to indicate her consent to the permanent care order at the March 17th hearing. He did so. The evidence discloses Mr. Schnare sent a detailed confirmatory letter dated March 19, 2014 to the appellant confirming his advice and the instructions received. The letter

confirmed the matter would be returning to court on March 24, 2014 for a final hearing. The letter contained the following acknowledgment, which was signed by the appellant:

> I hereby acknowledge my understanding of, and agreement with, the content of this letter; in particular, I confirm my consent to the Agency's Application for and Order for Permanent Care and Custody of [M.E.M.W.]. I further confirm that I am consenting to this Order voluntarily, of my own free will, and without any influence from anyone.

[48] Prior to the Court on March 24th, Mr. Schnare met with the appellant. Both agreed that she raised with him information she had recently received regarding the Agency having the ability to provide 24/7 supervision to her and the child. Mr. Schnare testified he explained to the appellant that such information did not change his previously expressed opinion as to her realistic prospects of success in the event she wished to challenge the Agency's Plan of Care. Mr. Schnare testified the appellant confirmed her wish to consent to the order for permanent care and custody. That instruction was followed.

[49] In her affidavit sworn September 8, 2014, the appellant states:

> 10. Also at that meeting, my counsel presented me with a letter he had written and asked me to sign it to confirm it was an accurate account of my meeting with him from the week before. My counsel told me I had to sign it and so I did. I did not then, and do not now agree that my counsel's letter to me dated March 19, 2014 is accurate.

[50] The above statement was put to the appellant in cross-examination. She was asked to identify what contents of the letter were inaccurate. The appellant could not identify any inaccuracies, rather she confirmed the letter was an accurate depiction of the exchanges between herself and former counsel. She further confirmed Mr. Schnare had reviewed the letter "word for word" with her prior to court on March 24, 2014, she fully understood the contents and she had instructed Mr. Schnare to indicate her consent to the order sought by the Agency. She signed the acknowledgment prior to proceeding into court.

[51] From the evidence and record, it is clear that Mr. Schnare's representation of the appellant was thoughtful, thorough, professional and effective. He understood, rightly, the uphill battle his client would have given the serious protection concerns the Agency alleged were outstanding and the looming disposition deadline.

Undoubtedly it was difficult advice to give, but it was appropriate and warranted in the circumstances.

[52] The criticism that Mr. Schnare failed to file a Plan of Care with the Court has no merit. I am satisfied the appellant had consented to a permanent care finding – as such, and in the absence of a contested hearing, there was no need for a plan to be filed. Similarly, the criticism that Mr. Schnare failed his client by not personally searching out a 24/7 supervised placement for her and the child must be rejected. There was nothing before this Court to suggest that such would be considered the "reasonable" function of counsel in such matters.

[53] The ineffective assistance of counsel as a ground of appeal is a serious allegation. It should not be used indiscriminately, but rather when the mishandling of the client's matter is reasonably supportable on the record, by admissible evidence on appeal, and where there is a clear miscarriage of justice. This case does not even come close.

Issue # 2 – Failure to pursue the "middle" ground

[54] The appellant alleges the Minister failed to pursue the "key" recommendation made by Ms. van Kessel that she and the child be placed together in a supervised placement. As such, she was not given the opportunity to demonstrate her ability to parent, nor was the "least intrusive" approach taken by the Agency.

[55] With respect, this proposition totally disregards the concerns highlighted by the assessor, which were also the same source of concern to the Agency – the appellant's serious and substantially unaddressed mental health issues and her ongoing insistence on being involved with Mr. [A.E.]. Further, it is premised on the view that the Agency was obligated to provide that level of intensive services to the appellant. I am not convinced that such is the case.

[56] Section 13(1) of the *Act* provides:

> 13(1) Where it appears to the Minister or an agency that services are necessary to promote the principle of using the least intrusive means of intervention and, in particular, to enable a child to remain with the child's parent or guardian or be returned to the care of the child's parent or guardian, the Minister and the agency shall take **reasonable measures** to provide services to families and children that promote the integrity of the family. [Emphasis added]

[57] The Agency is not obligated to provide every possible service which could conceivably alleviate risk of harm and enable a child to remain with its parent. The above provision directs the services are to be “reasonable” ones. Nothing before the Court on this appeal is indicative that the type of service the appellant complains was not offered to her, was one the Agency could be reasonably expected to provide.

[58] However, I am satisfied from the record that the Agency was open to considering the type of placement suggested by Ms. van Kessel and advised the appellant she should explore her options. It does not appear from the record that the appellant ever brought forward a proposed placement for the Agency’s consideration.

[59] In considering the van Kessel recommendations, it needs to be remembered that much time was devoted to highlighting the concerns surrounding the appellant’s insistence on maintaining contact with Mr. [A.E.]. The assessor clearly recommended the appellant discontinue all further contact. The Agency, in successive affidavits, repeated the same concern and raised a red-flag that continued contact would jeopardize the appellant’s stated wish to have the child returned to her care. Despite all the warnings, the appellant did not refrain from contact with Mr. [A.E.]. At the time of the final hearing, she was again pregnant with his child.

[60] The appellant’s argument that the Agency ignored the “middle” ground placement option, presuming such even existed, ignores the fact that this recommendation was superseded by the appellant’s own dogged insistence to maintain contact with a convicted sex offender, seemingly unable to appreciate the consequences of this behaviour in relation to advancing a plan to have the child returned to her care. It is meritless.

Issue #3 – Trial judge’s statutory obligations

[61] The appellant submits that the family court judge failed to abide by the mandatory obligations contained within s. 41 and 42 of the *Act*, but focuses in particular on the issue of consent.

[62] Section 41(4) provides:

> 41(4) Where a parent or guardian consents to a disposition order being made pursuant to Section 42 that would remove the child from the parent or guardian's care and custody, the court shall
>
> (a) ask whether the agency has offered the parent or guardian services that would enable the child to remain with the parent or guardian;
>
> (b) ask whether the parent or guardian has consulted and, where the child is twelve years of age or more, whether the child has consulted independent legal counsel in connection with the consent; and
>
> (c) satisfy itself that the parent or guardian understands and, where the child is twelve years of age or older, that the child understands the nature and consequences of the consent and consents to the order being sought and every consent is voluntary.

[63] The relevant provisions of s. 42 provide:

> 42(2) 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.
>
> (3) Where the court determines that it is necessary to remove the child from the care of a parent or guardian, the court shall, before making an order for temporary or permanent care and custody pursuant to clause (d), (e) or (f) of subsection (1), consider whether it is possible to place the child with a relative, neighbour or other member of the child's community or extended family pursuant to clause (c) of subsection (1), with the consent of the relative or other person.
>
> (4) The court shall not make an order for permanent care and custody pursuant to clause (f) of subsection (1), unless the court is satisfied that the circumstances justifying the order are unlikely to change within a reasonably foreseeable time not exceeding the maximum time limits, based upon the age of the child, set out in subsection (1) of Section 45, so that the child can be returned to the parent or guardian.

[64] In assessing whether the family court judge erred in relation to his statutory obligations, it is helpful to note the context in which he was acting. Several observations are important. Firstly, the family court judge had been involved in the proceedings from the outset, and had the opportunity to review the successive affidavits and other materials on file. The appellant had been present at every court appearance, and was represented on all occasions, save once where she was

in the process of changing lawyers. The court had received a final Plan of Care filed in support of the Minister's application for permanent care and custody, and he was advised the appellant had reviewed same with her counsel. On March 24, 2014, the court was presented with a draft order, and was advised the appellant had reviewed it with her counsel and was consenting to it. The final deadline for all disposition orders was May 30, 2014.

[65] The Plan of Care filed with the court included the following statements as to the services offered to the appellant and the continuing protection concerns:

> Various services have been offered to Ms. [M.W.] since July, 2012 to assist Ms. [M.W.] in ensuring that she is able to meet [M.E.M.W.]'s need for nutritious foods, routine/consistency, safety and protection from harm, and a secure bond (play, responsiveness to verbal/non-verbal cues, confidence, etc.). While Ms. [M.W.] participated in all services offered by the Agency, each provider reported that Ms. [M.W.] had significant difficulty applying what she has learned to achieve improved health and mental health, to protect [M.E.M.W.] from harm, to ensure supervision levels appropriate to [M.E.M.W.]'s developmental stage, and to provide nutritious/appropriate food especially given [M.E.M.W.]'s gluten/lactose intolerance and severe acid reflux.
>
> Ms. [M.W.] also reported having ongoing contact with Mr. [A.E.] on the premise that she believes that she and Mr. [A.E.] have been unfairly treated and have not been given an opportunity to have a family. Ms. [M.W.] self-reports not being able to "let go" of her relationship to Mr. [A.E.]. Ms. [M.W.] also minimized the seriousness of Mr. [A.E.]'s convictions of child pornography.
>
> The Agency obtained an Order for Production of Mr. [A.E.]'s Forensic Assessment from the East Coast Forensic Hospital, which indicated that Mr. [A.E.] is not only aroused by sexually explicit images of children and young adolescents, but in past has solicited sexual contact from a 12 year old girl. Mr. [A.E.]'s assessment indicated that should he fail to engage in ongoing maintenance and treatment that the level of risk for recidivism will increase to moderate. Moreover, Mr. [A.E.] will likely sexually offend against a known child regardless of gender. Mr. [A.E.] is not engaging in ongoing services and reports to Ms. [M.W.] having no intention to do so.
>
> . . .
>
> Ms. [M.W.] has reported to the agency on February 12, 2014, that she continues to "chat" with Mr. [A.E.] via text message and/or phone calls. Ms. [M.W.] also considered moving down the street from Mr. [A.E.], but reports not doing so "because she knows the Agency will disapprove," which suggests that Ms. [M.W.] would otherwise move to be close to Mr. [A.E.] if were not for the Agency's involvement.

. . .

> To date the Agency and other service providers have not seen meaningful change in Ms. [M.W.] in regards to her insight into the ongoing safety concerns or commitment to meaningfully engage in the Agency's case plan. Ms. [M.W.]' has engaged in completing many of the tasks of the Agency case plan, but has not demonstrated that there has been development or insight or skills regarding the original concerns which brought [M.E.M.W.] into care. Given Ms. [M.W.]' mental health, the timeline for engaging her and eliciting change is 3-4 years according to her clinical therapist, and the fact that this timeline would not be in the best interests of her daughter, it is in [M.E.M.W.]'s best interests given her young age to pursue a permanent placement.

[66] In my view, the family court judge's compliance with the statutory duties contained in s. 42 is the easiest point to address. From the recital on the face of the order, the court signifies it was "satisfied on the basis of the evidence and material on file herein that Section 42(2), Section 42(3) and Section 42(4) of the *Children and Family Services Act* have been complied with". This is clearly indicative that the court was aware of the requirement to turn its mind to the considerations contained in those provisions, and did so. The transcript of the family court judge's oral decision supports this unequivocally.

[67] There was ample material before the court for the family court judge to be satisfied of the requirements noted above. The appellant's argument that the court erred by failing to recognized the "middle" ground proposed by assessor van Kessel is rejected based upon the reasoning outlined above.

[68] The appellant's submission that the statutory obligations contained within s. 41(4)(a) and (b) were not met also can be summarily addressed. In my view, if the court specifically acknowledges that it is satisfied that the obligations in s. 42(2) have been met, it is implicit that the court has turned its mind to s. 41(4)(a) – both being concerned with insuring services have been offered. In the circumstances before him, including the filed evidence and other materials, it was not necessary for the family court judge to make inquiry as to whether the services stated to have been provided in the affidavits and Plan of Care had in fact been provided, nor was he obligated to engage in an inquiry as to what other possible services could have been offered to the appellant.

[69] Nor, in my view, was the family court judge obligated in order to comply with s. 41(4)(b) to ask whether the appellant had "consulted independent legal counsel in connection with the consent". Where a parent is unrepresented, such an inquiry should be made, but where counsel is standing before the court who has

identified themselves as representing the party, absent clearly unusual circumstances, there would be no obligation to inquire further.

[70] The statutory obligation for the court to satisfy itself that consent is being given, and it is voluntary, has been considered by this Court. The appellant argues that it is clear in the present instance that the family court judge failed to meet the obligation contained within s. 41(4)(c) of the *Act*, and relies upon this Court's decision in **Family and Children's Service of Lunenburg County v. G.D.** [1997] N.S.J. No. 272.

[71] In **G.D.**, the appellant who had been represented by counsel, submitted that the consent she provided to an order for permanent care and custody in relation to her young child, was not fully informed. She asserted she understood that her child would, following such order, be placed for adoption within her extended family, and as such, she would have continued contact. That did not take place. There, the appellant was described as being of "borderline level of intelligence". It was argued that the trial judge breached the statutory duty in s. 41(4)(c) as he made no inquiry as to whether she was consenting or its voluntariness.

[72] The Court ultimately agreed with the appellant. Writing for the Court, Pugsley, J.A. noted:

> **39** The key question is whether the Court is required, in the course of satisfying itself, of the issues raised in s. 41(4)(c) to direct questions in Court (as well as obtain responses) to the parent or guardian, or where the child is 12 or more, to the child. (By expressing the question in this manner, I do not mean to imply that the Court, in the course of satisfying itself, should limit itself to inquiries of this nature.)
>
> **40** In my opinion, unless there are exceptional circumstances, which do not appear in this case, the Court should conduct such an in court inquiry.
>
> **41** I concede there may be exceptional circumstances, in a case where:
>
> 1. The parties are represented by counsel, and counsel specifically addresses the issues raised in s. 41(4)(c);
> 2. The client is present in Court to hear the exchange between the judge and his, or her, counsel. (Although Ms. D. was present in Court, the issues raised in s. 41(4)(c) were not specifically addressed in Ms. D.'s presence.)
> 3. There is nothing in the evidence previously heard by the Court to affect the issues.

> **42** Even in the exceptional circumstances postulated, I would suggest the better practice is for the Court to directly question the parties involved.

[73] Justice Pugsley noted the assessor's observations regarding the appellant's level of intelligence, and that even at age 26 was still viewed "as a child in the home, even when of adult age". He indicated such was "cogent indicia" that a direct inquiry by the trial judge respecting the issues raised in s. 41(4)(c) was warranted.

[74] From the transcript, it is clear the family court judge did not directly ask the appellant whether she was consenting, nor whether the consent was voluntary. The appellant asserts that the present case is on all fours with **G.D.** and the result – remitting the matter back to the family court for a permanent care and custody hearing, should also be the same.

[75] Although it would have been preferable for the family court judge to confirm directly with the appellant that her consent was being voluntarily given, his failure to do so in this case does not justify appellate intervention. Here, there is no suggestion the appellant was intellectually impaired. She had been present at every court proceeding and had the opportunity to hear the exchanges between counsel and the court, specifically on March 17th and 24th when the matter of consent had been raised. Further, she had received the Plan of Care which clearly set out the consequences of consenting to the permanent care and custody order. In my view, such falls within the "exceptional circumstances" as contemplated by this Court in **G.D.**

Issue #4 – Remedy

[76] Having found no grounds for intervention, the appeal should be dismissed. That being the case, it is still worthy to note that s. 49(6) of the *Act* provides this Court with the following powers:

> 49 (6) The Court of Appeal shall
>
> (a) confirm the order appealed;
>
> (b) rescind or vary the order; or
>
> (c) make any order the court could have made.

[77] From the evidence submitted to this Court, I conclude that the appellant on March 24th did in fact consent to the permanent care and custody order, and

understood its consequences. She changed her mind following that, perhaps on her own volition or by virtue of the influence of others.

[78] Being satisfied of the appellant's actual consent, having reviewed the materials on file, and being mindful of the timeframes within the *Act*, even if the Court had found the family court judge had breached the statutory obligation within s. 41(4)(c), I would confirm the order appealed.

Conclusion

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

Bourgeois, J.A.

Concurred in:

Fichaud, J.A.

Scanlan, J.A.