C.A. No. 02886

NOVA SCOTIA COURT OF APPEAL

Jones, Freeman and Pugsley, JJ.A.
Cite as: M.A. v. A.A., 1993 NSCA 205

BETWEEN:

M.A.	)	Donna D. Franey	
	)	for the Appellant	
	)		Appellant
	)		)
- and -	)		)
	)		
A.A.	)	Kathleen J. Hall	
	)	for the Respondent	Respondent
	)		)
	)		)
	)		
	)		
	)		
	)	Appeal Heard:	
	)	September 29, 1993	
	)		
	)	Judgment Delivered:	
	)	November 12, 1993	
	)		

Editorial Notice: Identifying information has been removed from this electronic version of the judgment.

THE COURT: Appeal allowed without costs, decision of judge on appeal set aside and decision of trial judge restored, per reasons for judgment of Pugsley, J.A.; Jones and Freeman, JJ.A. concurring.

PUGSLEY, J.A.:

This appeal arises from a father's application for supervised access to his children. The mother applied to terminate all access by the father.

The Family Court judge concluded, after a lengthy hearing, that even supervised access, arranged pursuant to an earlier consent order, should be terminated, as it would not be in the best interests of the children.

The Supreme Court judge, in allowing the appeal, concluded that the trial judge:

1) acted "on a wrong principle of law by failing to give effect to the presumption that access by both parents is beneficial to their children" and

2) failed to place the evidentiary burden on the wife, to prove access by the husband, would be harmful to the children.

FACTUAL BACKGROUND

M.F., the appellant, (hereinafter referred to as Mrs. A.), after completing the first year of an M.A. program at university in Nova Scotia, moved to M. in the late 1970's. She taught English at a private school. Her first child, T., was born in M. on November [„„], 1979.

In 1984 she met the respondent, A. A., [...]. He had completed an M.B.A. degree at the University of M., and was working as the head of a [...] for a [„„] mill, in the city of [...] , to which Mrs. A. had moved.

They commenced a relationship. On May [...], 1986 she gave birth to their first child, N,.

Mrs. A. testified that her husband was physically abusive from the outset. On one occasion she was hospitalized as a result of his beatings. She testified he was also abusive to T,. Mr. A. denied all the allegations, except for one occasion, when he admitted he struck T. at Mrs. A.'s request, and on two other occasions, he admitted he "shoved"

his wife, and "prodded" her with his foot.

While they were not formally married in M., steps were arranged to obtain a "Certificate of Marriage" to enable the family to obtain health benefits.

Mrs. A.'s mother, A.F., residing in [...], Nova Scotia, forwarded funds to the family to travel to Nova Scotia to spend the 1986 Christmas season in [„„]. Shortly after arriving in Nova Scotia, Mrs. A. concluded that it would be best for the family to remain in Nova Scotia. Mr. A. opposed her decision to remain in Canada but the family nevertheless continued to reside with Ms. F. after the New Year.

The parties were married in [„„] on January 12, 1987. While living with Ms. F., Mrs. A. testified that her husband's abusive conduct ceased.

In January, 1987, Mr. A. commenced taking English lessons daily in Halifax, some seventy miles away. He and his wife subsequently decided to take up accommodation in that city. The move was accomplished in June of 1987.

Once in Halifax, Mrs. A. testified that her husband renewed his pattern of abusive behaviour towards her, as well as towards both children. She stated that her husband had no relationship with the children, except to act as a disciplinarian or to punish them, and that he regularly beat T., with his belt.

She testified that Mr. A., while very proud of N., kicked N. and hit him with his hands.

She was very concerned about the effect this would have on the child. She testified:

> "He beat N. and I would stop him. N. would go into a corner and he would sit in a corner and he wouldn't talk to me."

Mr. A. denied these allegations.

He secured employment at the [„] Hotel in Halifax working initially six nights a week, but subsequently securing a day job.

While pregnant in the summer of July of 1987, Mrs. A. testified that her husband would beat her "where the baby was and I would double up in pain". After their second child, S., was born on March 28, 1988, she testified that he would often hit her while she was holding S.. He denied these allegations.

Mrs. A. stated that she was virtually a prisoner in their apartment. Mr. A. controlled all the money, intercepted all mail addressed to her, and would not permit her to talk on the telephone without listening. She testified that all his leisure time was spent drinking with his friends.

She stated that he ordered her to study tarot cards so she could make additional income at home. He insisted that any money she earned was to be handed over to him.

She was asked why she did not leave him and she responded:

"A. Because he threatened he would kill us."

Q. Did you believe those threats?

A. Yes I did."

In February 1989, neighbours telephoned the police out of concern for her safety. The police took her and the children to Bryony House, a transitional shelter in Halifax for abused women. She remained there for a period of three weeks. After receiving counselling, she made up her mind that "I would never go back to him because there was a way out and I didn't have to put up with that, he couldn't get at us."

On February 27, 1989, a consent order was issued by the Family Court wherein custody of the three children was granted to Mrs. A., the matter of access was described as "being negotiated".

On March 28, 1989, the parties entered into a further consent order wherein Mr. A. was granted access to the three children on the following terms and conditions:

> "(1) The respondent shall have reasonable access to the children, at reasonable times, upon reasonable notice;
>
> (2) Access by the respondent is to be supervised by some person agreeable to both parties except at such times as the respondent visits the children at the applicant's residence, at which time, the applicant shall supervise;
>
> (3) The above-mentioned requirement for supervised access shall be reviewable by the parties in three months time."

On April 7, 1989, while assisting a male friend seeking the services of a prostitute, Mr. A. testified he was attacked by her female companion. She seized his wallet and stabbed him with a knife about his eyes, causing blindness. Mr. A. was taken to a hospital where he remained for three weeks.

Mrs. A. stated that she went to the hospital to stay with her husband and remained overnight in a separate bed in his room. She testified:

> "I felt it was my duty, compassion . . . I made him promise in the hospital that he would not hurt the children ever again and that then I would accept him back . . . and also that he would have to seek help to change the way that he was".

Mr. A. denied this exchange took place.

Upon discharge from the hospital, Mr. A. returned to live with his wife and children. In the early summer, and again in October, 1989, he travelled to [...] for operations to attempt to restore his sight. Both operations were unsuccessful. Mrs. A. accompanied him on each occasion and stayed with him in his hospital room. Matters, however, did not work out between the parties, and in October of 1989 he moved to his own apartment.

The parties have not cohabited since October 1989.

Between October, 1989 and April, 1990, Mr. A. visited with the children on a regular basis, two or three times a week. Matters, however, were not stabilized between the parents, and Mrs. A. returned to court in March, 1990, seeking further restrictions on the supervised access previously agreed. She also laid an information pursuant to s. 810 of the **Criminal Code** requesting that Mr. A. be required to enter into a recognizance to keep the peace. The order was granted in April, 1990 and, in addition to the usual restrictions, provided that Mr. A. shall have "no contact directly or indirectly with his wife."

Mr. A.'s assailant was convicted of criminal assault. He made application for compensation to the Criminal Injuries Compensation Board of Nova Scotia. He requested Mrs. A. to testify on his behalf before the Board. She refused to do so because she considered that "he wanted to use her and the children as additional claims for himself". This was a further source of friction between the parties.

On September 7, 1990, the Board concluded that his claim was a proper matter for a pain and suffering award to the maximum amount of $30,000.00, but reduced the award by one-third because "the applicant is of mature age and well understood that he was dealing in an unsavory environment in which injury might well occur."

On April 11, 1990, the parties entered into a new consent order before the Family Court. The provisions were changed from the first order of February 27, 1989 in that Mr. A. was granted access to the three children of the marriage only on Sundays from 2:00 to 5:00 p.m. and on the following terms:

> "(1) That the access shall be supervised by a representative of the applicant.
>
> (2) That the children of the marriage shall be taken to the home of the respondent for the access visit and returned to the home of the applicant by the person designated to supervise access.
>
> (3) That the respondent shall have no contact with the applicant either directly

> or indirectly and all arrangements with respect to access shall be made through a third party, Victims of Crime."

On April 22 and April 25, 1990, Mr. A. visited with the three children. The visits were supervised by his mother-in-law, A. F..

Mr. A. travelled to M. to visit his own relatives from April 26 to June 7, 1990.

Upon his return to Nova Scotia, he met with the children on June 10 and July 8, 1990, both visits again being supervised by Ms. F..

Mrs. A. testified that shortly after April 11, 1990, she received phone calls of an abusive nature from her husband. In the week of June 8 after he returned from M., the calls resumed and were so upsetting that she phoned "Victims of Crime" to see if they would intervene. In addition, her mother reported to her that during an access visit Mr. A. poured green liquid onto the eyes, heads and necks of the children. There was an altercation between Ms. F. and Mr. A.. He testified that the liquid he poured was holy water blessed by the Pope which he had obtained while he was in M..

On July 6, 1990, Mrs. A. brought an application that her husband had breached the recognizance of April 11, 1990 by making "harassing" telephone calls to her in June and July, 1990 in breach of s. 811 of the **Code**.

On July 8, 1990, she unilaterally terminated access and applied to Family Court to "specify access", in the mistaken belief that such an application would terminate Mr. A.'s access to the children. On August 30, 1990, the application was amended to request a termination of the supervised access granted in the order of April 11, 1990.

On November 28, 1990, Mr. A. was found guilty of breaching his recognizance. He was ordered to spend one day in jail, which time was substituted for the day he spent in court. He was placed on probation for one year.

The court order further specified that he was to have "no contact with his wife or children unless

otherwise ordered by the court".

Shortly thereafter, Mr. A. brought an interim application for unsupervised access. This application was abandoned by him on December 18, 1990. An application for supervised access, of the two youngest children, N. and S. was substituted.

On December 18, 1990, the trial judge, with the consent of counsel for both parties, appointed Francine McIntyre, a lawyer who is also a clinical psychologist, to act as **guardian ad litem** at the forthcoming hearing to ensure the "interest of the children would be thoroughly canvassed and presented to the court". The **guardian ad litem** was represented by counsel who attended throughout the trial, but did not attend the first appeal or the appeal to this court.

Mr. A. had contacted Blind Sport Nova Scotia in September of 1990 to seek a guide runner. Through that agency he became involved in "goal ball", an activity, somewhat similar to hockey, played on a gym floor. He [...]

He also [...]

L.T., a married woman, employed by Blind Sport Nova Scotia, has two young children. She testified that after viewing the relationship between Mr. A. and visually impaired children, she would trust Mr. A. with her own children. She considers it beneficial for any child to be involved with blind athletes.

The evidence discloses that in order to prepare for the trial of this matter, Mr. A. [...]

Mr. A. was [...]

At the time of trial he planned to apply to Dalhousie University to enrol in a program leading to a degree in International Commerce.

Ms. McIntyre, the **guardian ad litem**, in addition to filing a lengthy report, testified at trial.

While T., the oldest child of Mrs. A., did not give evidence before the trial judge, he met and was interviewed by Ms. McIntyre on a number of occasions. His statements to her confirmed that Mr. A. was physically abusive in his treatment of Mrs. A. and the children.

T. advised Ms. McIntyre that he did not wish to have any communication, of any kind, with Mr. A.. He further confirmed that the other children did not wish to visit their father, but if they were obliged to do so by court order, then he would accompany them because the other two children are "really young and they would need someone to care for them".

On March 27, 1991, Ms. McIntyre met with Mr. A., N. and S. in her office.

Her report provides:

> "I observed the children to be shy and somewhat apprehensive about interacting with their father, but were not demonstrably fearful. It was my impression that they were more curious about him then anything. Both children responded to his request to kiss and hug him, but did not initiate contact nor show overt affection for him . . . I did not observe any problems in the interaction between A. and the children. However, I believe the visit was more of a visit and a pleasure for A. then it was for the children. While the children were not afraid of him, they were not particularly interested in interacting with him. Rather, as mentioned previously, I believe these are very obedient children and do what is requested of them . . ."

Ms. McIntyre commented on her observations of Mrs. A.:

> "I have no doubt that the children have a very positive, strong bond with their mother. M. demonstrated a great deal of affection, attention and nurturing towards the children . . . M. admits that she is terrified to go to court or to be in the same room with A., consequently she will not pursue any maintenance or child support from him . . . M.'s allegations of abuse are of particular concern to me. She maintains that not only was she physically, verbally and psychologically abused, but so were her two sons . . . I have tried to take into consideration what effect visits with A. will have on the children if the allegations made by M. of abuse are valid. Research has shown that children who have been exposed to inter

> parental violence suffer both short term and long term effects . . . it could be argued that supervised access visits would ensure that the children maintain contact with their father and yet be protected from any physical abuse. However, as mentioned previously, this may have a detrimental effect on their psychological development and their relationship with the custodial parent. For the children, they will believe that M. cannot be trusted and is powerless to protect them . . ."
>
> The report concludes:
>
> "This has been a very difficult situation to assess. I am aware that my recommendation will not be looked on favourably by Mr. A., however it is my belief that this recommendation is one that takes into consideration the best interests of the children at this stage of their life. Recommendation for them to not have access with their father I think is the least detrimental alternative available."

The hearing of Mrs. A.'s application to terminate access, and Mr. A.'s application for supervised access of N. and S., commenced on July 24, 1991 and continued for a period of 14 days over the next seven months.

The trial judge concluded, in allowing Mrs. A.'s application and dismissing her husband's application, that supervised access should not be granted as it was not "in the best interests of these children".

The matter was appealed to a judge of the Supreme Court who allowed the appeal and concluded that Mr. A. should have access on a supervised basis by some person other than his mother-in-law, Ms. F..

CONCLUSIONS OF THE JUDGE ON APPEAL

An examination of the appeal judgment reveals the following matters primarily influenced the judge on appeal:

1. The trial judge ignored a presumption in family law that contact with both parents is in the best interests of the child.

2. The trial judge failed to place the evidentiary burden on the wife to prove

access by the husband would be harmful to the children. The wife in addition has failed to establish that a change in circumstances has occurred since the order of April 11, 1990 which would disentitle the father to access.

3. The trial judge placed too much emphasis on the possible adverse effect on the mother, if the children were to have contact with the father, rather "it is the mother who must exercise self-control in order to eliminate that risk".

4. The trial judge erred in concluding the wife was a credible witness, because the evidence "leads to the belief that the wife is prone to exaggeration, if not worse, in her complaints of physical abuse by the husband".

5. The trial judge erred in relying on the recommendation of the **guardian ad litem** to terminate access, since there were no valid reasons advanced by the **guardian ad litem** for the recommendation.

SCOPE OF REVIEW

The judge on appeal referred to the test set forth by Chief Justice Clarke in **Routledge v. Routledge** (1986), 75 N.S.R. (2d) 103 at 104:

> "Competing claims for custody create difficult cases for trial judges. They are equally vexing on appeal. Of necessity, much weight must be given to the conclusions reached by the trial judge. In doing so, an appeal court must ascertain that he had not acted upon wrong principles and that there is evidence at trial to support the conclusions that he has reached. In 1951, Lord Simonds in **McKee, supra,** put it this way at 360:
>
> > 'Further, it was not, and could not, be disputed that the question of custody of an infant is a matter which peculiarly lies within the discretion of the judge who hears the case and has the opportunity generally denied to an appellate tribunal of seeing the parties and investigating the infant's circumstances, and that his decision should not be disturbed unless he has clearly acted on some wrong principle or disregarded material evidence.'"

Lord Simond's words are particularly pertinent in this case because Mr. A. and Ms. F. used English only as a second language. Mr. A. commenced taking English lessons in January, 1987. Ms. F. had available the services of a translator throughout trial. She elected to use the services of the translator only on occasion.

It is evident from the reading of the transcript that both Mr. A. and Ms. F. had difficulty in understanding some questions addressed to them, as well as difficulty in expressing their thoughts in their responses.

At one point, the trial judge cautioned counsel for Mrs. A.:

> "I would just remind you Mr. Kaizer, I'm sure that you are well aware, that Mr. A. has limited English speech so please try not to use big words, if you can avoid that."

Although dealing with a somewhat different situation, the comments of Mr. Justice deGrandpré in **Metivier and Metivier**, [1977] 1 S.C.R. 371 at 380 are relevant:

> "On reading the evidence it becomes apparent that they are people who are not accustomed to speaking in public. Experience has shown that such witnesses express themselves not only through their words, but also through their gestures, attitudes and silences. Attempts to recreate the atmosphere of the courtroom merely by reading the translation of the shorthand notes are difficult if not impossible."

Mr. A. and Ms. F. were critical witnesses. The findings of the trial judge with respect to their evidence are entitled to great respect.

REASONING OF THE JUDGE ON APPEAL

I will deal, in turn, with each of the matters that influenced the decision of the judge on appeal:

(1) The trial judge ignored a presumption in family law that contact with both parents is in the best interests of the children.

While contact with each parent will usually promote the balanced development of the child, it is a

consideration that must be subordinate to the determination of the best interests of the child.

Section 18(5) of the **Family Maintenance Act**, R.S.N.S. 1989, c. 160, under the heading "Welfare of Child is Paramount" provides:

> "At any proceeding under this **Act** concerning care and custody or access and visiting privileges in relation to a child, the court shall apply the principle that the welfare of the child is the paramount consideration."

This subordination is clearly recognized by McIntyre, J., on behalf of the court in **King v. Low and Low**, [1985] 1 S.C.R. 87 at 101:

> "I would therefore hold that in the case at bar the dominant consideration to which all other considerations must remain subordinate must be the welfare of the child . . .Parental claims must not be lightly set aside, and they are entitled to serious consideration in reaching any conclusion. Where it is clear that the welfare of the child requires it, however, they must be set aside."

The court, in that case, was dealing with a question of custody, however, the comments, in my opinion, are applicable to access matters as well.

The trial judge, while acknowledging, the importance of exposing children to the influence of both parents during their formative years, clearly recognized that the predominant guiding principle was the determination of the best interests of the children. In so doing, the trial judge was not in error.

(2) The trial judge failed to place the evidentiary burden on the wife to prove access by the husband would be harmful to the children. The wife in addition has failed to establish that a change in circumstances has occurred since the order of April 11, 1990 which would disentitle the father to supervised access.

It is evident that the trial judge was mindful of the importance of the burden of proof. She wrote:

> "Determination of the evidentiary burden, in this case, is necessary. The mother argues that it must be proven that the children will benefit from access visits. While the father submits that access is a presumed right of the child (see **Michel v. Hanley** (1988), 12 R.F.L. (3d) 372 Sask. Q.B.) and it rests with the mother to prove the harmful effects of access . . . After reviewing the legal authorities submitted to the court, I must agree with the approach suggested by the father, which is that the evidentiary burden is squarely placed upon the mother to prove, on the balance of probabilities, how access would be harmful to the children . . . Evidence is weighed on the civil standard, on the balance of probabilities . . . to inject an element of instability by introducing supervised access by their father may be harmful given the unhappy home which the father created when they all lived together . . . I am satisfied on the balance of probabilities that access at this time should not be granted as it would not be in the best interest of these children."
>
> (emphasis added)

The foregoing comments of the trial judge suggest that while she was satisfied that the burden rested on Mrs. A. to establish that it was in the best interests of the children to eliminate supervised access (a burden that Mrs. A. did satisfy), the use of the word may in the phrase (supervised access may be harmful . . .) suggests that Mrs. A. may not have established on the balance of probabilities that supervised access would be harmful.

The "best interest" test adopted by the trial judge is consistent with the decision of the majority of the court in **Young v. Young**, a case recently decided by the Supreme Court of Canada (File No. 22227, October 21, 1993).

While considering the "best interests" of the child test in the context of the provisions of **The Divorce Act**, R.S.C. 1985 (2nd Supp.) c. 3, McLachlin, J. determined that risk of harm is not a "condition precedent for limitations on access" (para. 21).

L'Heureux-Dube, J. while dissenting, reflected the opinion of the majority when she stated:

> "The best interests of the child remain the prism through which all other considerations are refractable." (para. 125)

It was not, therefore, necessary for Mrs. A. to establish that supervised access would be harmful to the children.

It is helpful to examine the reasons advanced by the trial judge to determine the test she employed.

It is important to recognize that the trial judge did not terminate Mr. A.'s access because of the physical abuse he visited upon his wife.

There was ample evidence of this abuse, not only from Mrs. A., but also from other witnesses as well.

The trial judge concluded that it was "not imperative to rule respecting whether there was an abusive relationship between the parties", although she did make findings that supported Mrs. A.'s allegations:

> "On the basis of the frightened demeanour in evidence of M. A., the observation of the oldest son T., the evidence of P. F., J. F. and others, there is little doubt in my mind that the parties had an unhappy marriage for a significant period of time. And this unhappy relationship was marred with verbal and violent outbursts by A. A. towards his wife. . . On the balance of probabilities, the evidence shows A. A. as a domineering, selfish, argumentative and at times cruel spouse . . ."

The trial judge acknowledged, however, that abusive husbands do not necessarily make abusive parents.

It was not submitted, on behalf of Mr. A., that the attack of April 7, 1989, wherein he was blinded, resulted in a cathartic release, that brought about a conversion in a personality, (up to that point violent and abusive), to one of gentleness and consideration of others; nor was it submitted that the subsequent activities with [...]s, was a continuation and natural progression of a reformed nonviolent character.

Rather, Mr. A. consistently denied virtually all allegations of physical abuse with respect to his wife and

children. This is a factor which the trial judge was entitled to take into account in considering his evidence and the submissions on his behalf.

The trial judge reviewed the evidence to determine if there was support for a finding of physical cruelty by Mr. A. towards his children.

She stated:

> ". . . On the balance of probabilities, the evidence shows A. A. as a domineering, selfish, argumentative and at times cruel spouse and father ."
>
> (emphasis added)

She continued:

> "This unhappy relationship was marred by verbal and violent outbursts by A. A. towards his wife, and these outbursts, on occasion, took place in front of the children and the children were physically and emotionally abused."
>
> (emphasis added)

It is unclear whether the trial judge, by this paragraph, intended to make a finding that Mr. A. physically abused the children or whether the paragraph was meant to describe the effect on the children of Mr. A.'s abuse of his wife.

Even if it was conceded (which it was not), that the children might be in danger of physical abuse from their father in a situation of unsupervised access, it could be argued, on his behalf, that an appropriate supervisor would ensure that no physical abuse would occur.

That submission ignores the finding of the trial judge that Mr. A. has a "history of violence" and has an "unpredictable and uncontrollable" side to his character which would not "serve the best interests of the children".

No supervisor could be expected, or prepared, to regulate access visits of a person of such disposition.

Mr. A. as noted was found to be "at times a cruel . . . father".

Cruelty may take many forms, of which physical abuse is only one.

No supervisor could be expected to detect the subtleties, or areas, in which non-physical cruelty might be practiced.

While Mr. A.'s physical treatment of the children was obviously a factor in the conclusions reached by the trial judge, an examination of the decision reveals that the following matters were decisive:

> (1) "I find that A. A., even when not employed, seemed to lead a life separate from his family. This was asserted by M. A. and this I accept. He attended many parties without his wife and children and eventually got involved with the procurement of prostitution services. All of which, in my view, demonstrate a life style at odds with his spousal and parental responsibilities. He elected to spend his leisure time engaged in non-family activities. Therefore, I can only conclude that these pursuits rated extremely high in his gratification hierarchy. And although A. A. financially provided for his family, this, in large measures, was the extent of his marital commitment . . . It seems when children are involved, it seems to me that a parent has to subjugate many of their own personal pursuits to ensure that their children are given a good start on life. It is my opinion that A. A. was never able to do this, even during supervised access visits."
>
> (2) "Mr. A.'s notion of parenting seems to spring from a divine right to do whatever he feels is beneficial for the children without due regard for the wishes of the children and their mother."
>
> (3) The children had not visited with their father in a regular supervised manner since July of 1990, at a time when the children were two and four years of age respectively.
>
> (4) The previously supervised access visits were subject to conflict between Mr. A. and the supervisor (although it should be noted that the presence of Mrs. F. as supervisor may have contributed to an unstable situation).

> (5) Mr. A. created an unhappy home until he finally left the family in October of 1989. The relationship between Mr. and Mrs. A. from October 1989 until July 1990 (when Mrs. A. unilaterally terminated access) was characterized by conflict and emotional upheaval which affected the children. Since that time, the children lived in a stable environment and adjusted remarkably well as a consequence of the efforts of a "loving, nurturing and committed mother".
>
> To place the children again in an environment with their father may in the words of the trial judge "be harmful".

The trial judge considered the proper test, namely the best interests of the children, and determined that Mrs. A. had satisfied that burden.

It is a fair inference from reading the decision of the trial judge as a whole, that she was mindful that the mother had the burden under s. 37 of the **Family Maintenance Act,** to establish that the circumstances had changed, in the brief interval that occurred between April 11, 1990 when the supervised access order was granted, and July 8, 1990 when Mrs. A. applied for an amended order eliminating access altogether.

Section 37 provides:

> "37 Where an order for the payment of maintenance or expenses or respecting care and custody or access and visiting privileges have been made pursuant to this **Act**, an applicant or a respondent may apply to the court to have the order varied, rescinded or suspended, and a judge may vary, rescind or suspend the order **on the basis that the circumstances have changed**." (emphasis added)

Mr. A. had entered into a recognizance on April 8, 1990 to refrain from having any contact with his wife or children unless otherwise approved by the court. As a consequence of a complaint filed in early July 1990, the trial judge on November 28, 1990, (after hearing **viva voce** evidence from Mrs. A., Mr. A. and Ms. F.), determined that Mr. A. was guilty of breaching his recognizance and he was ordered to serve one day in jail and placed on probation for one year.

Mrs. A. testified in addition that between early April 1990 and July 6, 1990, she was concerned that the

children would be hurt both emotionally and physically if supervised visits continued.

Mr. A. submits that supervised access had not been given a fair opportunity to work since it has only existed for a period of three months, and for half of that time he was in M. visiting his relatives. Further, he submits that access was under supervision of his mother-in-law who had a strong bias in favour of Mrs. A.'s position.

Mrs. A. explained:

> "A. The emotional was due to the rituals he was performing on them and they were very upset about. And the physical was that he threatened to discipline, to beat T. . . . while the two younger ones when the visits took place, the supervised visits without me, each time before going they would come to me and plead with me not to make them go, that they wanted to stay with me, to please not make them go, and they didn't even know how to come about and say they were so afraid and please, and kept on insisting that they didn't want to go . . . because I have compassion for my children just as I have compassion for him with what happened to him, and he has never been a father figure to them, and he poses a threat to their well being more than anything, to their safety. That is why I am fighting through this. That is why I am going through as far as it will take, how long it will take, so that nothing will happen to them. If I had no reason to fear, I would let them go - with supervised access but I know what he has threatened and I know he is capable . . .
>
> Q. What do you think would occur in your relationship with your children if you had to tell them to go and see their father? Would it be disruptive to them or not?
>
> A. They would probably stop trusting me because they come to me for . . . that there is anything they would need help from. Like when he . . . if I might take the court's time, when he beats N., and I would stop him, N. would go into a corner, and he would sit in a corner and he wouldn't talk to me. No he wouldn't because he blamed Mommy from not stopping Daddy from hitting him and it has taken me a long time to make him come out of his shyness and to not be afraid and to not go sit in a corner."

The trial judge made the following determination on this aspect of the evidence:

> "It is significant that during the period of supervised access, above mentioned, the children's material grandmother, A. F., oversaw the visits. After a number of these visits, the mother suspended all access visits. A. F. testified that she observed the father mixing water which he obtained in M. during a papal visit, after his blinding. The water was sprinkled over the three children and was referred to as "witches water" in the form of "voodoo" by A. F.. As well, during these visits, the father wanted to take the children into his bedroom and close the door. A. F., quite correctly in my view, interpreted this as an attempt to thwart her supervisory role, and therefore she objected to this request. The father did not agree and as a result a heated verbal exchange took place with the father screaming in front of the children which culminated with A. F. being pushed by the father. After this altercation, she left with the children. With respect to the "holy water", A. F. testified that she did not care for the father sprinkling this water on the children and also perhaps most importantly, the children did not like it either."
>
> (emphasis added)

The foregoing evidence, in my opinion, illustrates that a change in circumstances had occurred between April 11 and July 8, 1990.

(3) The trial judge placed too much emphasis on the possible adverse effect on the mother, if the children were to have contact with the father, rather "it is the mother who must exercise self-control in order to eliminate that risk".

The **guardian ad litem** commented in her report:

> "As long as there is the anxiety that exists today, I think that would be extremely destructive to those children . . . I don't think that it would be a particularly meaningful event for them, and I think we would be asking them too, and I mentioned that earlier, to leave a secure setting where they trust their mother and go into a situation where quite clearly, the parent that is responsible for them does not want them to go. They are going to know that, and I think it is going to destroy the relationship between the custodial parent and them."

Mrs. A.'s evidence clearly supports the trial judge's conclusion that Mr. A. was a domineering, selfish,

argumentative and at times cruel spouse and father. Mrs. A. was, and will continue to be, the prime care giver. It is essential that she is able to maintain a stable environment in which the children are raised.

The extent of her fear of her husband is illustrated by her discussion with Ms. MacIntyre wherein Mrs. A. stated that she would not bring an application for maintenance because she could not stand to be in the same room with her husband.

There is no suggestion, in the trial judgment, that Mrs. A.'s fears were hysterical in origin and without foundation. Nor is there any hint that those fears could be eliminated by the exercise of self-control or any reasonable measure.

Cowan, C.J. recognized the validity of this issue in **Lavery v. Lavery** (1977), 22 N.S.R. (2d) 432 at 441:

> "I also find some basis for making the kind of order I do in the evidence of the petitioner, as to the effect on her of the access given to the respondent. This is important only insofar as it relates to the welfare of the child. As is usual in these cases, the mother ends up with the responsibility of looking after the child on a daily basis, and if, as I find, the continuing relationship between the child and the respondent causes emotional upset on the part of the mother of the child, this, undoubtedly, has an effect on the child itself, and is a factor which I keep in mind, not as I have said, because the welfare of the mother itself is of primary concern, but because anything which disturbs the emotional balance of the mother is bound to have an effect on the child."

I conclude that it was quite appropriate for the trial judge to consider the possible adverse effect upon Mrs. A., if Mr. A. was granted even limited access.

(4) The trial judge erred in concluding the wife was a credible witness, because the evidence leads to the belief that the wife is prone to exaggeration, if not worse, in her complaints of physical abuse by the husband.

The instance cited by the appeal judge relates to the evidence of Dr. Darcy, the wife's physician. The judge on appeal writes:

> " The direct evidence from Dr. Darcy, the wife's doctor, was that the wife had suffered a damaged rib at the hands of her husband. However, it was determined upon cross-examination that the injury could not have been caused by the husband. Judge Sparks in commenting adversely on the wife's credibility said in relation to that evidence at p. 18 of her decision:
>
> > 'Cross-examination of this witness gives good reason to question the foundation upon which Dr. Darcy bases her medical opinion.'"

.

Dr. Darcy saw Mrs. A. on August 24, 1990 at which time she complained of a cough. The patient returned on September 6 complaining of ongoing chest pains. Dr. Darcy conducted an examination, concluded that it might be pneumonia and ordered x-rays. The x-ray technician commented that there were some irregularity in the sixth rib on the right side which was suggestive of a fracture. As of this visit, ie. September 19, Mrs. A. denied any history of injury.

Dr. Darcy then ordered a bone scan and the radiologist's report stated that:

> "This abnormal uptake on the right side rib is consistent with a rib fracture. Is there any history of trauma?"

Dr. Darcy concluded that the most common cause of a rib fracture in a young healthy woman would be a traumatic injury. She asked Mrs. A. to come back to the office to review the results. When confronted with the radiographic evidence, Mrs. A. replied that there had been an injury that had not been disclosed previously, that she had been in an abusive relationship with her husband, but at the time of the interview, she was pain-free which indicated that the fracture had healed. Mrs. A. confirmed that she and the children were no longer at risk of abuse and, accordingly, the

doctor enquired no further.

The report prepared by Dr. Darcy read in part:

> "When confronted with the radiographic evidence, Mrs. A. admitted a physical trauma inflicted by her husband approximately two weeks prior to her initial consultation in my office. She appeared reluctant to discuss further details in front of her children, but I recall confirming that she and her children were no longer at risk of abuse."

The foregoing does not lead to the inescapable conclusion that Mrs. A. was prone to exaggeration or "worse". Mrs. A. did not involve her husband in the incident until after the fourth visit to Dr. Darcy's office and upon specific enquiry by Dr. Darcy. Mrs. A., according to her evidence, was subject to a substantial amount of physical abuse at the hand of her husband. She may well have concluded that the injury was caused by her husband, although mistaken about the time when it occurred.

Mrs. A. was on the witness stand for a day and a half, and was subject to a rigorous cross-examination. Notwithstanding the "Darcy evidence", the trial judge made no finding that reflects adversely on the evidence of Mrs. A.. Rather, it is apparent, from a reading of the decision, that the trial judge was very favourably impressed with Ms. A..

(5) The trial judge erred in relying on the recommendation of the guardian ad litem to terminate access, since there were no valid reasons advanced by the guardian ad litem for the recommendation.

The trial judge accepted the **guardian ad litem's** assessment "insofar as it reports on M. A. and the children", but concluded that the **guardian ad litem's** report was "seriously skewed without balanced interviews" and that the final recommendation of "no access, including supervised access, seems to fall short".

Her reasons for that conclusion were as follows:

> (1) The guardian failed to give sufficient weight to the benefits of unsupervised access.
>
> (2) The guardian failed to sufficiently explore blood ties.
>
> (3) The guardian did not sufficiently allow for the animosity to deescalate between the parties.

The trial judge did not permit the recommendation of the **guardian ad litem** to foreclose an examination and independent analysis of all the evidence. This review convinced the trial judge that supervised access was not in the best interests of the children.

The trial judge commented on the similarities in the evidence before her and the evidence adduced in **Saffarnia v. Moore** (1989), 94 N.S.R. (2d) 301 where Butler, J.F.C. said at p. 306:

> "What would the children be getting from access that they are not getting now? They are happy and healthy with a great deal of extended family input. It seems to me that this is a situation where the father failed to bond with the children at a critical time in their lives. It is now inopportune to introduce him into their lives with the many risks which could flow therefrom."

CONCLUSIONS

Decisions on access "must reflect what is in the best interests of the child" (**Young v. Young*, supra,*** para. 19). While the decision to terminate access by a parent is one, at which a court should be extremely slow to arrive (**M. v. M.** (1973), 2 All E.R. 81 at 85 and 88 (Davies, Family Law In Canada, (1984), p. 542), the evidence, in this case, dictates that result.

It is borne out by the trial judge's conclusion that Mr. A. was a domineering, selfish, argumentative, and at times, cruel spouse and father, who was both unpredictable and uncontrollable, and that his life style was at odds with

his parental responsibilities.

I am not persuaded the trial judge acted on wrong principles or failed to consider all the evidence before her (**Routledge v. Routledge, supra**).

I would allow the appeal without costs, set aside the decision of the judge on appeal, and restore the decision of the trial judge.

J.A.

Concurred in:

Jones, J.A.

Freeman, J.A.