2001 **F. Y. 96-0106**

IN THE FAMILY COURT OF NOVA SCOTIA
[Cite as: S.B. v L.A., 2001 NSFC 4]

BETWEEN:

S. B.
-APPLICANT

AND

L. A.
-RESPONDENT

AND

E. A. & M. A.
-THIRD PARTY APPLICANTS

Editorial Notice

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

DECISION

BEFORE THE HONOURABLE JUDGE BOB LEVY

COUNSEL:

MURRAY JUDGE FOR THE APPLICANT

ROSALIND MICHIE FOR THE RESPONDENT and THIRD PARTIES

HEARING DATE:

February 12, 2001

DECISION DATE:

March 9, 2001

ISSUE:

Access, custodial parent opposed to access, security to ensure compliance, Family Maintenance Act

Levy, J.F.C.

This application presents the difficult conundrum of whether it is better to order continuing access to a child in the face of the determined opposition of the custodial parent, understanding what this might mean by way of ongoing conflict in the life of the child, or to accede to the position of the custodial parent, buying peace for the child at the cost of losing a parent.

I acknowledge that this trial proceeded with Mr. Murray Judge, counsel for the mother, having had little time to prepare. He is to be commended for the exemplary job he did. I had refused a last minute request by the mother for an adjournment as she had only recently had a parting of the ways with her previous counsel. Given the enormous length of time this matter had been before the court, and the history as evidenced by the content of the file, I declined to grant that adjournment unless in the meantime she complied with the existing order of Chief Judge Comeau permitting supervised access by the grandparents. She declined and the hearing went ahead.

M. A. was born March *, 1995. Her mother is the applicant S. B.. Her biological father is not known to the court or to the respondent L. A.. M. was born after the applicant and respondent had gotten back together for a time after a period of separation. The child has Mr. A.'s last name. There is some dispute as to when Ms. B. told Mr. A. that he wasn't or may not be the father. In that, as on any occasion that their testimony may differ, I prefer the evidence of Mr. A.. Thus, I find that he wasn't told until well after they separated. Until that time he had no reason to think of the child as other than his biological child and he and his family treated the child as such. When he finally found out by means of a D.N.A. test in 1998 that he was not M.'s father, it didn't make any difference as far as he and his family was concerned.

In 1998 the mother made application to the court to terminate Mr. A.'s access. Days before the scheduled hearing the mother reported that the child had disclosed that she had been sexually abused by L. A.. This allegation immediately came under investigation by the R. C. M. P. and the local Family and Children's Services. An interim order was made in May of 1998 that L. A. not be permitted any access pending further order of the court. His parents however, E. A. and M. A., applied for access to M. and were granted supervised access every Sunday afternoon. That order has not been honoured by Ms. B. except for once or twice initially. No charges have ever been laid against L. A. as a result of the sexual abuse allegation.

By Order dated the 1st of October, 1999, His Honour Chief Judge Comeau made provision that, "... a psychological review of the child ... be performed by a paediatric specialist or a psychiatrist/psychologist familiar with survivors of childhood sexual abuse or those who have potentially been abused. Furthermore, this assessment shall be conducted with an emphasis on the Respondent's access to the child." The lengthy report, prepared by Sharon Cruikshank, a psychologist, was received early this past fall, and after several adjournments the matter proceeded before me on February 12, 2001.

Ms. Cruikshank concludes, among other things, that the reported sexual abuse allegation is "false", or, "at the very least" is a "gross misunderstanding" based on her "animosity" towards Mr. A.. She diagnosed Ms. B. as having a "histrionic personality disorder with narcissistic tendencies". She concluded that it would be in the best interests of the child if the access with Mr. A. and his family to resume, without supervision, whether he be the natural father or not. She stated that even if there is some conflict, that the access can still be good for the child but that the access will need

"creative management".

In addition to Ms. Cruikshank the court heard from six witnesses. For the mother the court heard from herself, her 17 year old son, and her fiancé, A. K.. The son and fiancé were both quiet spoken and gave a good impression of themselves on the witness stand. They spoke of the tension this whole court proceeding had caused around the house and of the opposition of Ms. B. to there being any access. Mr. K. spoke of the plan for he and Ms. B. to be married this coming July and of his plans to adopt the child. Not surprisingly Mr. K. did not agree with Ms. Cruikshank's conclusions about Ms. B.

The son expressed his genuine love for his mother and allowed that she is, "...the best mother in the world...". He testified that things weren't great around the house when Mr. A. and Ms. B. were together such that for a time he went to live with his father. He said that on one occasion Mr. A. had gotten very upset with him when he had stepped on some siding being put on the house. He said that Mr. A. pulled him by the hair and carried him to his room. It was the son who first noticed M. putting a plastic toy in her vagina and went to alert his mother, which led to the alleged disclosure, the involvement of the authorities, and the interruption of access. He had no further evidence to offer as to the alleged disclosure beyond that.

I was very impressed by both of the paternal grandparents. They were quiet-spoken, gentle, respectful, and anxious not to be in a confrontation or to say or do anything that would make matters worse. It is obvious that family means a great deal in their lives and that they have a lot of love to share. I did not get the impression at all that these were merely *personas* being adopted for the court proceeding. They seemed genuinely to be attached to M., committed to the child's best interests and anxious for her to be re-acquainted with their family and a part of it once again. It was made clear that should their son be granted access to M. that they would drop their separate application and be content to see the child through their son's access.

It was evident from his line of questioning that Ms. B. had instructed her counsel that the grandparents, being *, were profoundly out of step with mainstream values, and that their beliefs and lifestyle would be awkward for and upsetting to the child. Notwithstanding a reasonably thorough canvassing of the issue I can't see that the grandparents' religion is at all relevant to the matter before the court. Her counsel, in his closing submission felt constrained to express his discomfort with the tone of his questions, indicating that he had been given to anticipate an entirely different mind set in the grandparents.

I accept the evidence of the grandfather that Ms. B. had once gone so far as to allege that he too might have sexually abused the child, saying to him in a telephone conversation that the child returns from his house with " a red crotch", and saying in that or another conversation, "If you ever thought that M. would be a part of your lives you're mistaken." The mother denied saying anything of the kind. I find that she did and, needless to say, that such an allegation, utterly without foundation, is appalling, and the threats, terrible.

I was similarly impressed by Mrs. A. senior. Like her husband she struck me as being a kind and gentle soul motivated only by a genuine love of the child and an honest and heartfelt wish to be a small part of the child's life. She had done a lot of babysitting for the child when she was younger and had formed a strong and close bond with a the child, a bond which was entirely mutual. I have no doubt whatsoever that both she and her husband would be a valuable and caring addition to the child's life, sensitive to her needs and respectful of the primacy of the mother's role as parent.

I was also favourably impressed by the father. I'm sure that when he and Ms. B. cohabited that there was tension as her son testified; it would be surprising if that was not so. It is possible that there may have been the one incident as the son testified when Mr. A. was a little rougher than he should have been. Then again, it may also be that the son's recollection of Mr. A. has been coloured by the mother's animosity and that the negatives have become magnified with the passage of time.

There was nothing in the demeanour or evidence of the father that gave rise to any concern. Like his parents he appeared to be gentle and unassuming, and motivated exclusively by the child's best interests. I am satisfied that he is very much committed to this application and to being a part of M.'s life and that he is not, as has been implied, simply going along with an application that is being driven by the grandparents rather than himself. Similarly I accept his evidence, (as with the grandparents as well), that he is in this for the long haul, and that he will not easily or soon give up on her. He did not go out of his way to speak harshly of the mother even though, surely, she has given him more than enough cause. I have no hesitation in concluding that the father would be a decided positive in the child's life.

As a part of the assessment process there was an access visit that occurred between M. and her father and his family. I accept the evidence of Ms. Cruikshank that the mother did all she could to prevent or delay this visit from occurring. When it did happen, after there being no contact at all for a very long time, I accept that M. was 'strange' at first, (Ms. Cruikshank speculated that she had been "programmed"), but that after forty-five minutes or so M. warmed up to everyone and thereafter that she and everyone had a wonderful time to the immense delight of the child. On the basis of the reports of this visit it is utterly beyond question that the child sees Mr. A. as her father and his family as part of her family as well and that she was thrilled to be back with them again. The visit proved the fact that Mr. A., although not the child's biological father, is in every way that counts, her "father".

I'm sure Ms. A. is not without her strengths as a person and as a mother. Her son, as I said, gave a good impression of himself, and, from what is before the court, it seems like M. as well is a sound, indeed delightful little girl. This doesn't just happen; the mother has to be given credit where it is due. Indeed, neither the father or his parents said otherwise.

I am persuaded however that she is being not only irrational, or "histrionic", but callously vindictive towards the father and his family and utterly insensitive to her daughter in this respect. Her campaign to deprive her daughter of her father and his family, and her methods, are at the very least cruel to them, and what is more, amount to outright abuse of M..

I make the following findings of fact:

- I find that Ms. B. did her level best to delay and defeat a proper assessment being carried out.

- I find that there was no sexual abuse of M. by the father.

Almost all of the information about the alleged sexual abuse by the father that is before the court is documented in the report of Ms. Cruikshank. There was relatively little *viva voce* evidence about it in court. It was denied outright by the father, and credibly so. Beyond that there is the limited evidence of Ms. B.'s son which, by itself, tells us next to nothing, and the equally limited testimony of Ms. B. which amounted, essentially, to her saying that her daughter told her of her father's actions and that she believes her daughter.

First, the mother told Mr. A. that he was not the child's father and started shutting off access, just around the time, we are told, that Mr. A. had a new girlfriend in his life. Secondly, she made application to terminate the father's access, and when he wouldn't back off, a mere six days before the scheduled trial she came forward with this report of alleged sexual abuse. Thirdly, although I well recognize that this is not determinative, there have never been any charges laid against the father notwithstanding a full investigation. Fourthly, there is the matter of the comparable allegations or threats of allegations made against the grandfather of the same type of thing. This shows a disposition to "play the sexual abuse card" to get her way.

I want to make it clear that I have not abdicated to Ms. Cruikshank the role of making findings of fact on this or any other issue. Rather, her report and it's conclusions were before the court as was her verbal evidence and it was obvious that witnesses were aware of and responding to it. There was no objection to the report or it's contents being before the court and little response from Ms. B. or her witnesses to the extensive information in Ms. Cruikshank's report when the situation clearly called for that.

-I further find that Ms. B. did make a not-so-subtle allegation of sexual abuse against the grandfather along with the threat that he should not take his involvement with the child for granted. I find that there is no basis whatsoever to this allegation.

-I further find that there is absolutely no basis whatsoever to any concern founded on the matter of the grandparents' religious beliefs or practices. Firstly, I accept unreservedly that the grandparents are conscious of the mother's concerns and would not seek to do anything to thwart her wishes in this respect. Secondly, I find that it is the son, not the grandparents who would in fact be the prime contact and that the son is not at this point an adherent of, nor does he practice, his parents' faith. Thirdly, even if M. was exposed to the community of faith of the grandparents, the consequences would not be anywhere near as dramatic or awkward for M. as the mother was obviously trying to have the court believe.

- The mother was inviting the court to find that the father is a violent person. It is noted that she had him charged with an assault against her, a charge, she testified, on which he "got off" because "he lied". Again I say that I can well imagine that the two of them did not get along, and I have made note of the evidence of her son, but I decline to find that the father is violent by nature. I don't want to treat this as anything other than a serious matter if true, but I have to say that her willingness to engage in malevolent accusations as to sexual abuse is coming back to haunt her on this. I have little faith, and little basis for faith, in her word.

The mother urged through her counsel, in essence, that she will make the exercise of access so difficult, and perhaps exact such a toll from the child, that the father and his family will sooner or later simply give up and go away, and that since this is likely, access ought not to be ordered in the first place. She deserves credit for novelty and for some rather formidable gall, if nothing else, for this argument. That is quite another thing of course from saying that it deserves to succeed.

There really is no question that access would be in the child's best interests. I find that it would be, or at least would be unless the mother is totally committed to using her daughter's well-being as cannon fodder in her one-sided war against Mr. A.. The question is: how much damage will the mother be willing and able to inflict on the child in the process of attempting to thwart or undermine that access and that relationship? Ms. Cruikshank testified that she believed that the child

was programmed to be uncomfortable during the access that occurred under the auspices of the assessment. Will the attempts at programming will stop there? Ms. Cruikshank and Mr. A. were rather of the view, or allowed themselves to hope, that the mother will "come around". I'm not so sure. Neither am I sure how many wounds the child will have before that happens, if and when it happens.

The further question is: what can be done to prevent or minimize problems or to provide redress when they arise? I am worried about setting up a situation that will get and remain out of hand. I wonder if all concerned are prepared for repeated police involvement to effect access. I wonder whether anyone is ready for the potential or probable consideration of changing custody or putting the mother in jail. I wonder, if it is clear that the child is suffering from the stress and turmoil, who will be the first to back off. I believe that anything other than a quick, firm and consistent response will do no one any good, least of all, the child. Similarly, too quick or too harsh a response and the result, for the child, may be no better.

It surely will be immensely difficult for the child if there is to be police intervention every time, or almost every time, it is the father's turn for access. Neither the father or his parents expressed any enthusiasm for the idea of the mother having to be placed in jail, nor is it a prospect that courts would relish. The father said that he would be prepared to take custody of the child should the court so order. But is he? The court did not hear from his common law spouse who has apparently been laid up in bed since last fall with severe back problems. Can they handle custody? Does his common law partner really want custody? Would that be the best thing for the child? I think a court would want more information before going that far. We are dealing after all with a child not a chattel, a child who is attached to her mother.

I want to caution the mother that I am merely indicating that enforcement steps may have to be harsh and that courts are reluctant to be too heavy handed...not for the offending parent's sake, but for the child's. It would be a mistake for her to confuse regret at having to use these steps with a refusal to use them. If the situation requires it, the mother should consider herself on notice that they could and would be used.

Not taking these drastic steps may simply allow the mother to rob this child of her father and to set herself above the law. It would allow her to use her young daughter, in effect, as a "human shield", counting on others to back down for fear of traumatizing the child. If Ms. B. can flaunt the law then any parent can, and then any hope for children to have access to parents is left entirely up to the good graces or even the whim of one parent.

What would make the most sense here, is to make an order very specific as to times and places **and** to require the mother to provide a series of escalating promissory notes which become sequentially payable in the event of a willful breach of the terms of the order. The penalty for non-compliance then becomes monetary as opposed to criminal and custodial, and stops short of an order of forfeiture of the child as if she were a chattel.

Of course I recognize that there is no provision in the **Family Maintenance Act** expressly enabling this court to order a parent to post security to ensure compliance with an access order. There is a provision, section 36, enabling a court to so order in the case of having made a maintenance order. (Even that has been impugned in the Supreme Court... see **Hicks v. Bird** (1995), 139 N.S.R. (2d) 159 (C. A.), which overruled the Supreme Court on a procedural aspect, keeping it's thoughts on the substantive matter to itself.)

I was thinking however of another case, that of **Blois v. Blois** (1988), 83 N.S.R. (2d) 328

(N.S.S.C., App. Div.). The Appeal Division upheld a decision of the Family Court to attach (mobility) conditions to a custody order. The **Act** nowhere gives the Family Court the express authority to do that. In so holding, Justice Jones wrote at page 330-1:

> "Dealing with the first question I am satisfied that s. 18(2) of the **Family Maintenance Act** empowers the Family Court to impose conditions in custody orders including residency requirements. I see no need to give that provision a narrow interpretation. Section 18(5) provides that in any custody proceeding the court must apply the principle that the welfare of the child is the paramount consideration. Accordingly if it is necessary to impose conditions on custody orders for the welfare of the child that is the test."

Sections 18 (2) and 18 (5) of the **Act** read then as they do now:

> "18(2) The court may, on the application of a parent or guardian or other person with leave of the court, make an order
> (a) that a child shall be in or under the care and custody of the parent or guardian or authorized person; or
> (b) respecting access and visiting privileges of a parent or guardian or authorized person.
> (5) In 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."

If there was "no need" in **Blois** to give a narrow interpretation to the provisions of section 18, there would be none here. I am, after all, trying to allow this girl to have contact with her father, and to keep her mother out of jail, and to keep from having the child undergo a potentially traumatic change of custody. I am aware that some view the posting of security perhaps as some kind of provision that can only be effected by a section 96 court as it affects 'property', or involves some inherent, perhaps *parens patriae,* jurisdiction. For my part, for what it's worth, any 'property' aspect to this is ancillary to the primary objective of serving this child's needs. Additionally, and by way of an aside only, I am not aware of any reason to conclude that children in Yarmouth or Shelburne Counties are entitled to a lesser legal protection than their peers in the Halifax Regional Municipality or in Cape Breton with their Family Division (section 96) Courts, or to lesser protection because their parents aren't married.

DECISION

The existing custody provision or provisions will be modified to provide that the residence of the child shall not be removed from either Yarmouth or Shelburne Counties, Nova Scotia, without the written consent of the respondent L. A. or order of a court of competent jurisdiction. As a further condition of custody the applicant mother shall, within 14 days, execute and deliver to counsel for the respondent "In Trust", an escalating series of promissory notes in the respective amounts of $500.00, $1,000.00 and $1,500.00 to become in turn due and payable forthwith upon Ms. B. willfully breaching any provision of the order emerging from this proceeding.

The respondent shall have the right to unsupervised access to the child as follows:

-On Sundays, March 18 and 25 and April 1 and 8, 2001, from 1:00 p.m. until 6:30 p.m.

-Commencing Saturday, April 21, 2001, and every second weekend thereafter, (being May 5, May 19, and June 2, 2001), from Saturday at 12 noon until the next day, Sunday at 6:30 p.m.

-Thereafter, until further order of the court, every second weekend, commencing Friday June 15, from Friday at 6:00 p.m. until the immediately following Sunday at 6:30 p.m.. Regardless of any other access that may take place as is hereby ordered, the respondent's access weekend shall be as calculated from the 15th of June 2001.

-For the summer of the year 2001 the respondent shall also be entitled to have access to the child and to have the child in his care for the week following his weekend access. Thus, the father shall have the child in his care from 6:00 p.m. Friday, July 27 until Friday, August 3 at 6:30 p.m..

-Starting with the summer of 2002, the respondent shall be entitled to have the child in his care for a two week period commencing at 6:00 p.m. on the first scheduled access Friday in August through to the Sunday evening at 6:30 p.m. two weeks and two days hence.

-The respondent shall be entitled to have the child in his care every Christmas from 2:00 p.m. until 6:30 p.m. December 29th.

-The child shall be allowed to telephone home as she may wish during access visits, with the cost of the call being borne by the respondent.

-The child shall be allowed to call the respondent from her mother's at least twice weekly as she may wish, with any charges being borne by the father.

-The respondent shall be allowed to call and to speak privately to the child at least once weekly, and, in the absence of agreement to the contrary, the call shall occur between the times of 6:30 and 7:00 p.m. every Wednesday.

The following stipulations also apply:

-The applicant and the respondent may change the terms of this access order from time to time as circumstances may dictate. However, all such changes must be in writing and signed by both parties.

-In the event that the child is ill and cannot make an access visit the respondent shall be notified promptly **and** the mother shall, by no later than Wednesday of the following week, deliver to the respondent a written letter from the child's doctor confirming that the child was unable, by reason of illness, to go on the access visit.

-All transportation of the child to and from access visits shall be the responsibility of the respondent. Pickup and drop off shall be at the residence of the mother unless the mother, at least 24 hours in advance of the scheduled access, delivers to the respondent a written notice that the location shall be at another place, which alternate place shall be a public place and be clearly specified.

-Time shall be of the essence of the access provisions. Each party shall put forward his or her best efforts to ensure that times are strictly adhered to. It shall be deemed to be a breach of the order herein if the mother shall be more than fifteen minutes late on any one occasion in having the child ready for the respondent's access or, if the mother is otherwise habitually late in having the child ready to go at the appointed time and spot.

I am aware that the mother stopped accepting the maintenance payments from the respondent even though he continued for a time to forward them to her. This matter is not before the court at this time. I will however **suggest** to the respondent that he resume the maintenance payments through the Maintenance Enforcement Program. In the event that the mother continues to decline

them I **suggest** that he put them aside in an investment vehicle for the child's post-secondary education. The maintenance order is quite dated now, maybe the quantum should be looked at again by a court.

I would respectfully ask counsel for Mr. A. to prepare the order.

Bob Levy, J.F.C.