2006 CarswellAlta 1228, 2006 ABCA 268, [2006] A.W.L.D. 2955, [2006] W.D.F.L. 3552, 384 W.A.C. 385, 397 A.R. 385, 36 R.F.L. (6th) 259, [2007] A.W.L.D. 2119, [2007] W.D.F.L. 2372

P. (V.M.) v. P. (D.B.)

V.M.P. (Appellant / Plaintiff) and D.B.P. (Respondent / Defendant)

Alberta Court of Appeal

C. Fraser C.J.A., C. Hunt, C. O'Brien JJ.A.

Heard: September 11, 2006
Judgment: September 11, 2006
Written reasons: September 22, 2006
Docket: Calgary Appeal 0601-0188-AC

Counsel: D.P. **Castle** for Appellant

M.J. Shaften for Respondent

Subject: Family

Family law --- Custody and access — Appeals — Powers and duties of court

Ordering of new trial — Mother agreed to consent order which gave father unsupervised access to parties' twin daughters — Shortly after visit to father, one child disclosed sexual abuse by father — Videotaped disclosures by child, and interview conducted by RCMP with child were both admitted into evidence at trial — Father denied assaulting child — At trial, medical evidence established that child had very likely been sexually assaulted in recent past — Trial judge could not conclude on balance of probabilities that father had touched child as alleged, and refused to alter access arrangements — Mother appealed — Appeal allowed; new trial ordered — Once trial judge accepted that child had been sexually assaulted, material change in circumstances arose which required fresh inquiry into best interests of children regarding access — Trial judge was required to assess risk of future harm to children — Trial judge made no findings of credibility concerning father's denial of abuse, which should have led to assessment of future risk.

Family law --- Custody and access — Access — Variation of order — General principles

Allegation of abuse — Mother agreed to consent order which gave father unsupervised access to parties' twin daughters — Shortly after visit to father, one child disclosed sexual abuse by father — Videotaped disclosures by child, and interview conducted by RCMP with child were both admitted into evidence at trial — Father denied assaulting child — At trial, medical evidence established that child had very likely been sexually assaul-

ted in recent past — Trial judge could not conclude on balance of probabilities that father had touched child as alleged, and refused to alter access arrangements — Mother appealed — Appeal allowed; new trial ordered — Once trial judge accepted that child had been sexually assaulted, material change in circumstances arose which required fresh inquiry into best interests of children regarding access — Trial judge was required to assess risk of future harm to children — Trial judge made no findings of credibility concerning father's denial of abuse, which should have led to assessment of future risk.

Cases considered by *C. Fraser C.J.A.*:

> *S. (B.) v. T. (R.)* (2002), 212 Nfld. & P.E.I.R. 167, 637 A.P.R. 167, 2002 CarswellNfld 100 (Nfld. U.F.C.) — considered
>
> *Young v. Young* (1993), [1993] 8 W.W.R. 513, 108 D.L.R. (4th) 193, 18 C.R.R. (2d) 41, [1993] 4 S.C.R. 3, 84 B.C.L.R. (2d) 1, 160 N.R. 1, 49 R.F.L. (3d) 117, 34 B.C.A.C. 161, 56 W.A.C. 161, [1993] R.D.F. 703, 1993 CarswellBC 264, 1993 CarswellBC 1269 (S.C.C.) — considered

APPEAL by mother from trial judge's refusal to vary consent access order.

***C. Fraser C.J.A.* (orally):**

1 The appellant mother applied to vary a consent order that gave the respondent father unsupervised access to their very young twin daughters. She sought to deny his access because shortly after a visit to the father in another province, one of the children disclosed sexual abuse by the father. The mother videotaped disclosures by the child, and an interview that the RCMP conducted with the child was also videotaped and introduced into evidence.

2 In the face of contradictory affidavit evidence, the trial judge ordered a *viva voce* hearing. Medical testimony established that the child had very likely been sexually assaulted in the recent past but could not specify the exact date. The father denied having sexually assaulted his daughter. The trial judge concluded at A.B. F13:

> Having considered all of the evidence presented to me, including the evidence of both [the mother and the father], I cannot conclude upon a balance of probabilities that [the father] touched [the child] as has been alleged. [Brackets added]

As a result, he refused to alter the access arrangements. The mother appealed alleging various errors.

3 We are all of the view that a new trial must be ordered. Once the trial judge accepted, as he did, that the child had been sexually assaulted, a material change in circumstances had been established. This then required a fresh inquiry into the best interests of the children as regards access. The trial judge's finding that it had not been proven on a balance of probabilities that the father had committed the assault did not determine whether, in these circumstances, it was in the best interests of the children to maintain unrestricted access. In answering that question, the trial judge was required to go on and assess the risk of future harm to the children, *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.); *S. (B.) v. T. (R.)* (2002), 212 Nfld. & P.E.I.R. 167 (Nfld. U.F.C.).

4 The trial judge made no credibility findings concerning the father's denial of abuse. Had he found positively that the father did not abuse the child, that would have ended the inquiry. But where, as here, he focussed only on whether the mother had established on a balance of probabilities that the father was the abuser, his negative

answer to that question should have taken him to the next step in the inquiry. It was then incumbent on the trial judge to conduct the necessary risk assessment. That did not occur. While he was not asked to make one, that does not relieve the trial judge from ensuring that the assessment is carried out to determine, in light of the changed circumstances, what is in the best interests of the children.

5 The appeal therefore is allowed, and a new trial is ordered.

(Discussion as to Costs)

6 We are all agreed that costs should be in the cause to be dealt with by the new trial judge hearing this matter.

(Discussion as to Existing Stay Application)

7 There is a need for immediate case management of this file. Counsel are directed to apply within the next week to Associate Chief Justice Neil Wittmann to have a case management judge assigned to this case. Counsel are also directed to seek an expedited trial date.

8 We have also concluded that there should be an opportunity for supervised access pending the trial of this matter. Thus, we direct that supervised access be granted for a period of two weeks. In the event that the parties are unable to agree on when and how that supervised access should occur, including whom the supervisor or supervising agency should be, then either party is free to apply to the Court of Queen's Bench for directions. In the event that the trial is not concluded before the end of this calendar year, it will also be open to the father to apply for further periods of supervised access.

Appeal allowed; new trial ordered.

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