2001 CarswellAlta 379, 2001 ABPC 55, 287 A.R. 1

S. (B.A.) v. Z. (C.L.)

B.A.S. (Applicant / Respondent) and C.L.Z. (Respondent / Applicant)

Alberta Provincial Court

Flatters Prov. J.

Heard: December 20, 2000
Judgment: March 16, 2001
Docket: Calgary CFC122979

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Counsel: *James F. Robertson*, for Applicant

Diann P. ***Castle***, for Respondent

Subject: Family

Family law --- Custody and access — Access — Factors to be considered — General principles.

Cases considered by *Flatters Prov. J.*:

M. (B.P.) v. M. (B.L.D.E.) (1992), 42 R.F.L. (3d) 349, 59 O.A.C. 19, 97 D.L.R. (4th) 437 (Ont. C.A.) — considered

MacGyver v. Richards (1995), 11 R.F.L. (4th) 432, 22 O.R. (3d) 481, 123 D.L.R. (4th) 562, 84 O.A.C. 349 (Ont. C.A.) — considered

Tucker v. Tucker (1998), 165 D.L.R. (4th) 103, 219 A.R. 383, 179 W.A.C. 383, 41 R.F.L. (4th) 404, 65 Alta. L.R. (3d) 213, [1999] 4 W.W.R. 461 (Alta. C.A.) — considered

Young v. Young, [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 (S.C.C.) — applied

Statutes considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

Generally — considered

s. 16 — referred to

Provincial Court Act, R.S.A. 1980, c. P-20

Generally — considered

s. 32(1) — considered

s. 32(2) — considered

s. 32(3) — considered

s. 32(4) — considered

s. 32(5) — considered

s. 32(6) — considered

s. 32(7) — considered

APPLICATION by mother for variation of interim access order so as to require professional supervision of father's access.

***Flatters Prov. J.*:**

INTRODUCTION

1 The principal issue raised on this Interim Application is whether the Interim Access Order setting the terms of access between the child C.B.S. (the child) and the child's father, the Applicant, B.A.S., should be varied to provide for professional access supervision rather than supervision by the parents of B.A.S. The application is made by the child's mother, C.L.Z., and is opposed by B.A.S. who seeks unsupervised access. Concurrently, C.L.Z. brings an originating application for sole custody of the child.

THE FACTS

2 The parties met in September 1987, and lived in a common-law relationship for eleven years. The child was born January 2, 1997. C.L.Z. was responsible for child care. Parenting by B.A.S. was minimal.

3 The relationship between the parties was punctuated by episodes of domestic violence. B.A.S. had angry outbursts, fuelled by his abuse of drugs and alcohol, during which he assaulted C.L.Z. some two to four times a week. The assault which eventually resulted in separation occurred when the child was six-weeks old. On that occasion C.L.Z. was pushed down beside the child and assaulted. While the child was not physically harmed, C.L.Z. feared for his safety. Eight to nine months later in the Fall of 1997, C.L.Z. had sufficient funds to leave the relationship. Despite the separation, the violence continued and in January 1999 C.L.Z. obtained a Restraining Order for a six-month period. B.A.S. has taken anger management. He has not been charged for his assaults of C.L.Z.

4 More recently B.A.S. has been living with his parents and continues to live with them while on Judicial Interim Release for alleged property offences (which C.L.Z. had understood from B.A.S. was an assault charge re-

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lated to a girlfriend, breaches of parole and new but unspecified charges). The contact between C.L.Z. and his parents arises in that they supervise the weekly, three-hour access between B.A.S. and the child, as provided in the Interim Access Order granted July 27, 2000. B.A.S.'s mother has told C.L.Z. that since he has been living with them his behaviour has been "appropriate." Nevertheless, the current charges were laid while B.A.S. was living with his parents.

5 C.L.Z. is concerned that B.A.S.'s parents are not supervising the access sufficiently. The child has told her that he is often left alone with B.A.S. His behaviour is also changing in that he is becoming aggressive both in actions and language. When playing with his toys he uses naming terms such as "stupid little whore" and has called C.L.Z. "a bitch." His behaviour at daycare is also troublesome. On occasion when he balks at complying with daycare routine, he has stated that he has a gun like his daddy, he will get it, and then come back to the daycare and shoot "them": the daycare staff. This suggests to C.L.Z. that the child, whom she describes as "absorbent," is learning these behaviours from B.A.S.

6 C.L.Z. is also concerned B.A.S.'s parents cannot control B.A.S. which affects their ability to supervise the access effectively. Hence, her application for professionally supervised access while B.A.S. seeks no supervision. Latterly, C.L.Z. has joined this with an originating application for sole custody.

THE LAW

7 The application is brought pursuant to Section 32 of the *Provincial Court Act*, R.S.A. 1980, c. P-20, as am (*PCA*). The relevant sections follow:

> 32**(1)** If
>
> > (a) the parents of a child are in fact living apart from one another, and
> >
> > (b) the terms respecting custody of or access to the child are agreed to by the parties or there is a dispute respecting custody of or access to the child,
>
> the Court may, on an application, make an order as it sees fit regarding
>
> > (c) the custody of the child, and
> >
> > (d) the right of access to the child,
>
> by either parent or any other person, having regard to the best interests of the child.
>
> **(2)** The application for an order under this section may be made
>
> > (a) by either parent of the child, or
> >
> > (b) by the child, who may apply with or without any person interested on his behalf.
>
> **...**
>
> **(3)** An applicant for an order under this section must
>
> > (a) file an affidavit with the clerk that sets out the material facts, and

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(b) give written notice to all interested parties to the application to appear before the Court at the hearing of the application.

(4) If a parent or other interested party

(a) has been served with a copy of the written notice, and

(b) fails to attend as required by the written notice,

an order may be made in the absence of that person.

(5) Pending the hearing of an application under this section, the Court may make an interim order regarding the custody of and right of access to the child.

(6) The applicant and all persons that the Court thinks proper may be examined on oath touching the matters in issue.

(7) The Court,

(a) on application for review, and

(b) on reasonable notice to the interested parties,

may review an order made under this section and may confirm, vary or discharge the order.

...

8 The purpose of access is to constructively preserve a child's positive familial relationships (see *Young v. Young* (1993), 49 R.F.L. (3d) 117 (S.C.C.) (*Young*)). *Young* is instructive regarding factors to be taken into account when making access decisions under s.16 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) (*Divorce Act*). "Best interests" is the ultimate test for decision making (*Young* , at 150*)* as it is under the *PCA*. As a positive test it encompasses a wide variety of factors. After examining those in detail, McLachlin J. (as she then was) concluded (at 151):

> ... that the ultimate criterion for determining limits on access to a child is the best interests of the child. The custodial parent has no "right" to limit access. The judge must consider all factors relevant to determining what is in the child's best interests; ... The risk of harm to the child, while not the ultimate legal test, may also be a factor to be considered. This is particularly so where the issue is the quality of access - what the access parent may say or do with the child. In such cases, it will generally be relevant to consider whether the conduct in question poses a risk of harm to the child which outweighs the benefits of a free and open relationship, which permits the child to know the access parent as he or she is. It goes without saying that, as for any other legal test, the judge, in determining what is in the best interests of the child, must act not on his or her personal views, but on the evidence.

Harm was defined by Sopinka, J. in *Young* as (at 167):

> ... a term which, in this context, connotes an adverse effect on the child's upbringing that is more than transitory. The impugned exercise by the access parent must be shown to create a substantial risk that the child's physical, psychological, or moral well-being will be adversely affected.

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9 While I am not bound by the *Divorce Act*, in my opinion the same considerations and factors enunciated in *Young* should apply to access decisions made under the *PCA*. As noted, "best interests" is also the ultimate test under the *PCA,* applying to both originating and variation applications. Using the same criteria will ensure continuity and harmonization in decision making between federal and provincial legislation regardless of the forum or legislation chosen for determination.

[1]

10 In applying "best interests" under the *PCA*, I start from the premise that these are child-centered proceedings and therefore "... decisions relating to children are always governed by the best interests of the children." (per Conrad, J.A., *Tucker v. Tucker* (1998), 41 R.F.L. (4th) 404 (Alta. C.A.) at para. 36). It follows that access is for the benefit of the child and assessed from the child's perspective. Although a mobility case, in *MacGyver v. Richards* (1995), 11 R.F.L. (4th) 432 (Ont. C.A.), Abella J.A. discussed the difficulty for a trial judge in the application of "best interests." At 446, she described "best interests" as "... the *child's* right to see a parent with whom she does not live, rather than the parent's right to insist on access to that child. That access, its duration, and quality, are regulated according to what is best for the child, rather than what is best for the parent seeking access." It is clear then that the parental biological relationship must not be allowed to override "best interests" (see *M. (B.P.) v. M. (B.L.D.E.)* (1992), 42 R.F.L. (3d) 349 (Ont. C.A.). It similarly follows that absent a germane reason, a child should have unregulated access to a parent. If regulation is required, then this must be assessed on those factors based on the child's best interest, one of which is harm (see *Young* at 151: per McLachlin, J. (now C.J.C.): "Risk of harm to the child is not a condition precedent for limitations on access." ... "On the other hand, in some cases the risk of harm may be a factor to be considered in determining what is in the child's best interests." (paras. 21 and 22 respectively)). Ordinarily this will entail a step analysis in considering unregulated access, regulated access (the more or less intrusive nature of which will depend on the circumstances), and ultimately termination of access if access regulation is not in the child's best interests. This may be due to the nature of the terms for access and/or the time period required for access regulation. It is axiomatic that each case will be determined on its facts and the starting point for any analysis is the child's "best interests".

11 Applying a step analysis to this case, and the child's best interests as the governing and ultimate determinant, I am not satisfied, on balance, that B.A.S.'s access should be unregulated but rather further regulated by the provision of formally supervised access by a professional supervisor rather than the current informal supervision provided by B.A.S.'s parents. This increased level of supervision will give an opportunity for an impartial view as to the quality of the interaction between B.A.S. and the child in determining whether there is a risk of harm to the child occasioned by the access.

12 In moving to more intrusive supervision, I appreciate B.A.S.'s parents wish to assist him in fostering a relationship with the child. That is clear from their willingness to supervise. However, given the child's behaviours in relation to his age and stage of development, it is questionable whether supervision by family members untrained in supervision can provide the necessary level of supervision required in the circumstances of this case. It also puts them in a position of conflict where they are expected to protect the best interests of the child when it appears they cannot exercise control over B.A.S.

13 Supervision by an Agency or individual trained, skilled and experienced in supervising a court-ordered visitation will ensure supervisors who understand their role and responsibility to the child, the parties, and the Court, and are capable of objective observation and effective intervention in maintaining the level of supervision required here. As each visit will be followed by a Supervision Report, there will be some objective criteria

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against which the Court may measure the quality of the access between B.A.S. and the child.

14 Counsel have raised the hope that if the Supervision Reports are positive then the grandparents may again supervise. However, that is a decision for the Court as the Court is charged with the responsibility for decision making in the child's best interests. Positive Supervision Reports are not the only criteria. B.A.S.'s ability to parent, his intervening relationships, which may have been violent, and his ability to control his anger, despite anger management, are also relevant in determining whether he is an appropriate role model for the child. Further objective criteria in the form of a Parenting and Psychological Assessment of B.A.S. may be required as well as an Assessment of the child, all of which will assist the Court in ultimately determining B.A.S.'s access.

15 As to C.L.Z.'s application for sole custody, she has been the primary care parent during the relationship and the sole custodial parent since separation. In my opinion the preservation of stability, security and continuity for the child is an important factor to consider in determining the question of custody in the child's best interests. In this respect and in the circumstances of this case, I am satisfied that C.L.Z. must have sole custody.

RULING

16 The specific terms of the Interim Custody and Supervised Access Order shall be as follows:

1. Any and all previous Order shall be replaced by this Order;

2. C.L.Z. shall have sole custody of the child;

1. B.A.S. shall have supervised access to the child commencing Saturday, December 23 from 1 - 4 p.m., then on Sunday, December 30 at the same time, and thereafter access shall continue on this alternating basis;

2. At all times the access shall be supervised either by an Agency or individual experienced and skilled in Court-ordered supervised access;

3. Following each and every supervised visit, the supervisor shall provide a Report to each counsel and this Court;

4. B.A.S. shall be responsible for any and all costs related to the supervised access;

1.

5. In the event B.A.S. misses any supervised access visit, then the visit shall not be rescheduled;

6. B.A.S. shall not consume alcohol, non-prescription restricted drugs or prescription drugs, other than those prescribed by a licenced medical doctor and taken in accordance with the prescription, provided that if B.A.S. is or appears to be impaired at the beginning of or during an access visit, then the visit will be cancelled forthwith and not rescheduled;

7. Either party may apply to vary either on two day's notice or ex parte in special circumstances.

Oral Reasons delivered at the Courthouse in Calgary, Alberta on December 20, 2000.

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Application granted.

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