C.A. No. 116147

NOVA SCOTIA COURT OF APPEAL

Chipman, Freeman and Pugsley, JJ.A.

Cite as: E.H. v. T.G., 1995 NSCA 207

BETWEEN:

E.H. Appellant	Katherine Anderson for the Appellant
- and -	
T.G. Respondent	Andrew Pavey for the Respondent
	Appeal Heard: September 25, 1995
	Judgment Delivered: November 27, 1995

Editorial Notice

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

THE COURT: Appeal allowed with costs, in the aggregate amount of $1,200 plus disbursements to be paid to E.H., and eliminating all access by the respondent to the two children of the marriage, per reasons for judgment of Pugsley, J.A., Chipman and Freeman, JJ.A. concurring.

PUGSLEY, J.A.:

E.H. appeals from an order of a judge of the Supreme Court, dismissing her application of August, 1994, to terminate all access by her former husband, T.G., to B. and T., the two children born during the marriage.

The parties were divorced in October, 1993, and the Agreement and Minutes of Settlement incorporated in the Corollary Relief Judgment provided for E.H. to have custody of the children, with certain specified, unsupervised access granted to T.G.

E.H.'s grounds of appeal can be summarized as follows:

1. The trial judge erred in concluding that it would be in the children's best interests to continue access visits with their father; and
2. The trial judge erred when he disregarded material evidence, particularly the evidence of Dr. John Anderson.

Factual Background

E.H., 37 years of age at the time of trial, graduated from Mount Saint Vincent University with a Bachelor of Education Degree and a TC5 license in teaching. She worked initially as a substitute teacher and in 1990 obtained employment as a counsellor at a Youth Centre in Nova Scotia, a position she held up to the commencement of trial, in March, 1995.

T.G., 34, was employed as a military policeman with the Canadian Forces, in Calgary. He met E.H. on a visit to Halifax, in December, 1984.

The parties were married in March, 1985. E.H. had, at the time, the care of her daughter, J., then three years of age, born of a previous relationship. The family set up housekeeping in Calgary.

The marriage was marked by serious difficulties from the beginning, primarily concerning the parties' different views respecting parenting. E.H. described her approach

as much more relaxed than T.G.'s, who was, she testified, "emotionally rough" and "very rigid" in the matter of discipline.

In January, 1986, J. was taken into temporary protective care by the Calgary Children's Aid Society after an investigation resulting from a hospital examination for a urinary infection. The Society was concerned that J. may have been sexually abused, sought a court order "to monitor family dynamics and ensure J.'s safety and security is being provided." T.G. denied that he sexually abused J. and he was supported, in that denial, by E.H. No charges were laid against T.G. The parties successfully arranged for J. to return to their care in December, 1986.

B. (a female child) was born in April, 1986, while J. was in care. Shortly after the birth of T., (a male child) in February, 1988, the family returned to Nova Scotia. T.G. was discharged from the Canadian Forces in 1988, apparently due to stress, but was reinstated in April, 1989, partly due to the efforts of E.H.

In 1990, the parties separated for approximately three weeks. E.H. testified that, during the separation, B. disclosed to her that her father had sexually abused her and, in response to a question from her mother [i.e., show me], B. lay on top of a pillow and "moved herself up and down". T.G. denied the allegation. E.H. did not report the complaint to the authorities as she was concerned B. would be removed from the home. E.H. testified that, during the separation, the children touched each other in a sexual manner and engaged in excessive masturbation.

Although the parties reconciled three weeks later, they separated in January, 1991 for the final time. E.H. acknowledged that she had become "quite depressed" and had relied excessively on alcohol for several years.

In late January, 1991, B. made a further complaint to her mother that her father had abused her sexually during access visits and that he had, according to the report of her mother, "put a knife in her bum".

E.H. complained to Family and Children's Services and B. was interviewed by staff as well as by the RCMP. The RCMP file apparently was misplaced for a period in excess of a year.

An interim consent order, obtained in April, 1991, granted sole custody of the children of the marriage to E.H., with T.G. entitled to supervised access which was gradually extended to unsupervised access.

E.H. testified that after B. returned from an access visit, around Christmas, 1991, she said her father threatened her "to stop telling the truth about the knife in the bum and touching her and from that time forward, she referred to it as her nightmare... If she did [i.e., stop...] her father and I would get back together and if not he would get into a lot of trouble and he would be hurt".

E.H. commenced a relationship in February, 1991, with one G.H. In January, 1993, E.H. gave birth to a fourth child, S.H. E.H. and G.H. separated on two or three occasions before final separation, in March, 1994.

From 1991 onwards, a number of contested applications were made by the parties to the Family Court respecting access by T.G. to the three older children. At the request of the Family Court, Colleen Sheppard, M.S.W., prepared a comprehensive access assessment report, in June, 1992. She was asked to advise whether T.G. should continue to have unsupervised access to the three older children. After a review of reports from Alberta Social Services, and Alberta Children's Hospital, as well as conducting extensive interviews in Nova Scotia, Ms. Sheppard concluded that it was "virtually impossible to determine with any certainty whether either B. or J. were sexually abused" by T.G. She concluded that T.G. should have unsupervised access on a gradual basis but expressed "considerable concern about [T.G.'s] judgment and ability to control his temper" and wrote of his "rather harsh and authoritarian style of parenting".

Shortly after the report was tabled and made available to the parties, a consent order was taken out in Family Court providing for unsupervised access of the children by T.G.

The parties were divorced in October, 1993. The corollary relief order, in granting sole care and custody of the children to E.H., provided that T.G. should have unsupervised access with both children one weekend per month in addition to extended access at Christmas, Easter, March Break, and summer vacation.

The relations between the parties, after the divorce, deteriorated even further.

In March, 1994, E.H. brought the children to see their family practitioner, Dr. Jean Muggah. Dr. Muggah testified that, during the course of an examination, B. advised that while on an access visit with her father, two weeks previous, when he "was picking her up to hug her somehow his hand ended up between her legs". B. also related an earlier incident of inappropriate sexual contact by her father during an access visit. E.H. gave Dr. Muggah a picture with printed comment, which B. had drawn at school, at the request of her teacher. B. referred to the drawing as her "nightmare". According to Dr. Muggah, the picture showed "her father was chasing her and going to stab her in the privates with a knife, but she fell and lost her memory".

After making corrections for spelling errors and a few grammatical changes, Dr. Muggah interpreted B.'s words as follows:

> "I am scared that my Dad was chasing me with a knife, and I bumped my head and I lost my memory. And there were nine bunk beds and he was going to stab me in the privates with the knife but he didn't do it."

Sylvia Skerry, a social worker, interviewed B. and T. the following day. B. reaffirmed the two occasions in which her father made inappropriate sexual contact with her. B. further stated that she didn't care whether she visited her father because she said her "dad spanks her real hard".

Ms. Skerry's affidavit, sworn March 3, 1995, was filed in support of E.H.'s

application.

Ms. Skerry deposed, in part:

> "Family and Children's Services of Kings County has been involved intermittently with E.H. and her children since November, 1990...
>
> The Agency has declined to proceed under the Children and Family Services Act as E.H. has taken the steps necessary to protect her children;"

G.H. testified that B. told him that she did not like to visit her father, that she was scared of him, that he hollered at her and punished her. He further stated that B. told him "she had pictures of things in her head that had been done to her and she wanted to get them out of her head... that her father had taken a knife and inserted it into her anus, the handle of the knife".

B. gave her evidence in the trial judge's chambers, in the presence of counsel but in the absence of the parties.

B. testified that on the last visit with her father (i.e., July 3, 1994) when she was having supper with her father and his friend, R.:

> "I had a little salad dressing on my face... so she [R.] said 'put her in her room after she washes her face' so I locked myself in. I went in my closet after I locked the door and I hid there and when dad took the doorknob off and I said 'ouch' because the radiator is right in my closet. And he came in and he threw the boxes on my bed and then he slapped me, spanked me... hard 3 [i.e., times]... he puts his finger in my crack in my butt."

B. testified this incident made her feel "ill". When she returned home, her mother saw the bruised areas and took her to the hospital where an examining physician noted:

> "There were two bruised areas that particularly concerned me, with regards to possible physical or sexual abuse. The first area of concern was her left buttock. B. had a 10 cm diameter warm, swollen, blue bruise here. She told me and the assisting nurse that this bruise was from her father spanking her. The second area of concern was her anus. There was a ring of reddened skin around the anal opening surrounding an inner ring of bruised blue-purple skin that was 0.5 cm wide..."

T.G. testified as well about the incident and stated, in part, they

> "were setting down to eat dinner, at which B. starts using her hands to eat

> her salad... Anyways I said, B. we have guests, you know, use your fork, and she continued with her hands. I asked her about another three times. She refused to do so. It was almost, you know, she was defying. At that point I said, you know, enough is enough, you don't, if you can't eat properly go to your room. With that she left the table in a huff, flew into her room, slammed the door shut and started screaming... I asked her four or five times... open up the door. She said no... at which point I said if you didn't open the door that I would, you know, get the door open and you will would get a spank, now open up the door. She said, no; so I proceeded to take a screwdriver and take apart the doorknob".

After finding B. hiding in a closet behind boxes, T.G. continued:

> "I told you that if... I had to take the door off to come in that you are getting a spank. I took her by, used my left hand, I took her by her left wrist, took her to her bed, put her over my knee — ...she was screaming, flailing around, daddy, don't spank me, daddy don't spank me — at that point I had told her what was happening. As she was flailing with her legs, I put her legs between my legs in a scissor, and I spanked her three times on the bottom."

He denied any inappropriate contact between his hand and her anus.

He acknowledged that spanking was not what he preferred "...but it is a way that seems to work... that ah, since January '94... it was almost every, on the access visits there was a spanking done;"

E.H. testified after visits with their father, both B. and T. suffered from nightmares and were sexually and physically aggressive with each other.

E.H. further testified that T. complained that he would stick his fingers in his ears to block out B.'s yelling when she was being spanked by her father.

T. did not give evidence at trial.

B. was seen on July 26, 1994 by Dr. John Anderson, Director of the Child Protection Team at the Children's Hospital in Halifax. His report of July 27, 1994 reads in part:

> "It is our strong view... that B. should not be subjected to any more either supervised or unsupervised access with her father, because she has made it clear that she dislikes him and that she is frightened of him. In view of the above past history of physical, sexual, and emotional abuse of B. by her father, we would recommend that your Agency strongly consider using legal means to prevent any kind of access either unsupervised or supervised by T.G. to his daughter, B.."

Dr. Anderson testified at the trial, in February, 1995, that he continued to hold the same opinion.

E.H. applied to a justice of the Supreme Court in August, 1994 to vary the corollary relief judgment of October, 1993 so as to terminate access. She alleged that T.G. had sexually abused B. and also had subjected both B. and T. to physical and emotional abuse "of such a serious nature that it would not be in the best interests of the children to permit continued access by the father...".

The parties agreed that access would be suspended pending the completion of the hearing.

No charges of sexual misconduct were ever laid against T.G. although he was charged with assault respecting the July 3rd incident. The assault charge had not come to trial as of March, 1995.

The hearing was completed after four days of evidence in February and March, 1995.

Decision of the trial judge

After summation by counsel, the trial judge rendered an oral decision.

The trial judge referred to s. 17(5) of the **Divorce Act** R.S.C. 1985 (2nd Supp.), C-3 which provides:

> "Before the Court makes a variation order in respect of a custody order, the Court shall satisfy itself that there has been a change in the conditions, means, needs, or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order as the case may be and in making the variation order the Court shall take into consideration only the best interests of the child as determined by reference to that change."

The trial judge continued:

> "There is no doubt in my mind that if the allegations, made against [T.G.] by [E.H.] as to abuse of the children are substantiated that they would constitute a change of circumstances within the meaning of s. 17. Of course, the

> burden is on the applicant to show that there has been a change of circumstances and also that the change of circumstances is such as to require that in the best interests of the child or children there be a variation of the order... The child, who testified under oath after she was examined by myself as to her competency to be sworn, said that she had not been sexually abused in any way by her father and that what she had said earlier was not true and that indeed all of the suggestions of inappropriate sexual behaviour on his part toward her was nothing more than a dream or nightmare.
>
> I must say that when the child testified I felt that she was at ease; that she was well aware of what she was saying and the significance of it and that she well understood the importance of telling the truth... I am not satisfied that the allegations of sexual misconduct or abuse of the children or child, B., by [her father] have been made out."

The trial judge then addressed the issue of physical abuse and concluded that with respect to the incident of July 3rd:

> "I am not satisfied that there was any deliberate intention to strike the anus of the child nor that there was any sexual overtones attached to it. I am satisfied, however, that there was excessive force used by [T.G.] on the occasion of the spanking of the child and it seems to me that it is a very reasonable inference to draw that the significant bruise described by the doctors was caused by [T.G.] in the course of administering the spanking. It does seem to me, from the evidence, that [T.G.] placed too much reliance on the use of physical force and physical punishment in disciplining the children... I am satisfied that his use of physical disciplinary measures is inappropriate..."

The trial judge determined there should be conditions attached to T.G.'s access to the children, including "that there be no physical element in any disciplinary measures that T.G. might apply when the children are with him".

The trial judge thus found a change in the "condition, means, needs, or other circumstances" of the children within the purview of s. 17(5) of the **Divorce Act** (*supra*).

The "change" on which the trial judge focused was the incident of July 3, 1994.

Scope of Review

Chief Justice Clarke commented, 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 has not acted upon wrong principles and that there is evidence at trial to support the conclusions that he has reached."

It is clear, therefore, that this Court should not interfere with the decision of the trial judge unless we are satisfied that he clearly acted on some wrong principle or disregarded material evidence (**Lancaster v. Lancaster** (1992), 109 N.S.R. (2d) 88 at 89).

Analysis

The test to be applied is that of the best interests of the child. (See s. 16(8) and s. 17(5) of the **Divorce Act** (*supra*).

While E.H. was obliged to satisfy the trial judge that there was a change "in the condition, means, needs or other circumstances", of B. and T., since October, 1993, it is appropriate, indeed necessary, to consider the previous marital history of the parties, and their respective relationships with the children, to adequately consider the "needs" of the children after the corollary relief judgment was issued.

It is of particular relevance, when reviewing T.G.'s post-1993 treatment of B., to recall his comments directed to Colleen Sheppard, in June 1992.

> "T.H. describes his youngest daughter as being a fragile and emotional child who cries easily and especially if he corrects her in any way. While T.H. offers that some of this behaviour may be manipulative, and B. does seek his attention when he sees her, he adds that his daughter seems to be unhappy. 'She seems like a very hurt little girl'. He adds that the marital separation seems to have been particularly difficult for B. to cope with." [emphasis added]

B. told Ms. Sheppard:

> "I'm usually a sad girl 'cause my friends don't like me. I don't have no friends to play with."

These comments were reproduced in Ms. Sheppard's report.

In support of his submissions for continued access, T.G. relied on

Ms. Sheppard's report.

B.'s fragile psyche is illustrated in the evidence of L.A. who commenced a relationship with T.G. in May, 1994. They looked after the children from Friday, May 20th to Sunday, May 22nd. At trial, Ms. A. adopted the contents of an affidavit to which she deposed in August, 1994. It said, in part:

> "THAT during supper, B. spilled some bacon bits. [T.G.]'s reaction was to yell at her, resulting in the child becoming upset and starting to cry."

Ms. A. agreed, at trial, that T.G. spoke "quite harshly" to B., that she did not feel this was an appropriate reaction, and "I told him so".

After referring to a relatively minor incident causing B. to lock her bedroom door, the affidavit continues:

> "THAT [T.G.] became upset and demanded B. to open the door. She refused. He told her that if she did not open the door, she would get a spanking. She then opened the bedroom door, but was very upset, distraught, verging on hysterical and pleading not to be spanked... That generally during the visit I observed both children appearing to be very needy emotionally, very clingy and needing lots of attention and reassurance." [emphasis added]

T.G., she testified, returned "screaming and yelling" after the bedroom episode and was "very forceful". She suggested to him that he "find another way of disciplining", rather than spanking, in view of B.'s reaction to the threat of being spanked.

This incident preceded the access visit of July 3, 1994. Ms. A.'s caution to T.G. was obviously ignored.

It is very disturbing that a father would administer the abusive discipline described on July 3rd, in such a frightening context, particularly in light of his understanding of the child's emotional vulnerability. One can only conclude that he did not seem to appreciate the impact of his actions on the children, or alternatively, did not care.

The trial judge obviously was impressed with what he considered to be B.'s denial of all sexual abuse. He commented:

> "...she said the events described never occurred and that her father had

never touched her in an inappropriate manner from a sexual point of view."

This conclusion was presumably prompted, at least in part, by the child's responses to highly suggestive questions addressed in cross-examination:

"Q. Your father has never chased you with a knife, has he?

A. No.

Q. Your father has never stabbed you in the privates has he?

A. No.

Q. Your father has never put a knife in your butt or in your privates?

A. No.

...

Q. And your dad has never touched you in the vagina has he?

A. No." [Emphasis added]

All of these questions relate to overt acts of sexual abuse.

It is, however, relevant to consider B.'s answer to the next question:

"Q. And he has never put anything in your bum, your bum hole, has he?

A. Only his finger when he puts it in the crack."

The trial judge, after reviewing the evidence relating to July 3rd, commented:

> "This to me would indicate that there was not an attempt to insert anything into the anus, but that there was a blow, of some description to the exterior area which, indeed, may well have happened as the child described it, that the [father's] hand, finger, thumb or part of his hand, accidently, or in the course of the blows being struck, slipped into the crevice between her buttocks, causing the bruising in the anal area.

I am of the opinion the trial judge erred when he concluded such an interference did not constitute a violation of the child's sexual integrity.

The absence of intention on the part of T.G. was not conclusive of, nor indeed relevant to, the issue before the trial judge. The issue was not the guilt or innocence of T.G. respecting a charge of sexual assault. The issue was the determination of the best interests of the children.

It is pertinent that B. testified that her father spanked her on every visit (i.e., the visits between October, 1993 and July, 1994) at a time when she was only wearing her underpants, that he "puts his finger in my crack in my butt... all the visits when he spanks me", that it hurt her and made her "feel sick".

The trial judge made no reference to this evidence which, if believed, is strongly suggestive of sexual abuse.

While one might conclude that interference with the child's anus was accidental on one occasion, a continual interference, if it occurred, could not be considered unintentional.

The trial judge was satisfied that T.G.'s "disciplinary measures" were "inappropriate". The two bruised areas noted in the hospital report of July 3, 1994 constitute more than ample support for this finding.

B. testified she was spanked on every visit and this evidence was essentially confirmed by T.G. His comment, at trial, is revealing:

> "...I didn't feel so good about spanking her because all of a sudden I realized that, you know, this little girl is under a lot of pressure."

While this acknowledgement resulted from the abuse administered on July 3rd, the evidence is clear, certainly as far back as June, 1992, that T.G. was fully aware that B. was "under a lot of pressure".

Ms. Sheppard wrote:

> "All three children's excessive need for attention, the girls' poor social relationships and lack of confidence and low self esteem are indicative of some emotional distress... It is the evaluator's impression that these children are very needy, are not doing particularly well and <u>are at serious risk emotionally</u>." [emphasis added]

The trial judge directed his focus essentially to two areas — sexual abuse and physical abuse.

There is, in my respectful opinion, a further area that was overlooked, that is the emotional or psychological effect on B. of her father's actions.

Although the trial judge was not satisfied that sexual abuse of B. had been established, he appears to have accepted the evidence of E.H. that B. complained to her that her father touched her in her private areas. There is no finding that E.H.'s evidence is not credible.

B. identified two pictures drawn by her, one at school, at the request of her teacher, to illustrate the nightmares of which she complained, and the other, apparently at home, as constituting "her nightmare".

In the first, B. is lying on the floor by her bed and her father is standing adjacent to the bed with a knife in his hand.

In the second, her father is standing near her with a knife in his hand. B. is pictured on the floor "when he stabbed me and I fell down".

In response to a question (requesting her to explain the picture) — "where did he stab you?", she replied "In the privates".

She further identified a picture on which she had written "I wish that Dad was dead" and explained that her father was mean, that he beat her and T., and that "she did not wish to see him".

These very disturbing images and comments convinced Ms. Skerry that B. should be seen by Dr. Anderson who expressed, after interviewing B., the "strong view... that B. should not be subjected to any more either supervised or unsupervised access with her father, because she has made it clear that she dislikes him and that she is frightened of him".

Dr. Anderson's opinion was based on the history of "physical, sexual, and emotional abuse" suffered by the child.

The trial judge did not refer to Dr. Anderson's opinion yet he described him as an "acknowledged expert in the field of child abuse".

The trial judge, in my respectful opinion, disregarded material evidence when he failed to consider Dr. Anderson's "strong view".

The trial judge determined that the denial of access to their father might be harmful to the children and "indeed it would be beneficial to them to have access visits with their father". No reasons were given for this conclusion.

While he did not make specific reference to the **Divorce Act** (*supra*) in this context, the trial judge presumably had in mind the provisions of s. 16(10) requiring the Court to give effect to "the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child".

Justice McLachlin comments on this provision in **Young v. Young** (1993), 4 S.C.R. 3 at 117:

> "This is significant. It stands as the only specific factor which Parliament has seen fit to single out as being something which the judge must consider. By mentioning this factor, Parliament has expressed its opinion that contact with each parent is valuable, and that the judge should ensure that this contact is maximized. The modifying phrase 'as is consistent with the best interests of the child' means that the goal of maximum contact of each parent with the child is not absolute. To the extent that contact conflicts with the best interests of the child, it may be restricted." [emphasis added]

I am strongly of the view that any contact with T.G. conflicts with the best interests of these children and that all access to both B. and T. should be terminated.

While the abuse was primarily centred on B., it is evident that T. was present on all visits, and was aware of the treatment visited upon his sister.

I do not consider supervised access to be a suitable compromise.

T.G. testified:

> "She (my mother) said, well, don't spank them or whatever. They are going to go home and tell their mother and going to cause you a lot of problems. And I go to her, they are my children and ah, I will discipline them the way I will discipline them, whether it be sending to their room, in a corner or spanking and as a father that is my parental right...
>
> If I want to spank them in front of my mother or send them to their room or put them in the corner, I don't care if it is my mother there or anyone else." [emphasis added]

Parental preferences and so-called parental rights should not influence our consideration of the best interests of the children.

There is one further matter that is of some relevance.

It was obvious to T.G., as is evidenced by his complaints to Ms. Sheppard, and others, that E.H.'s emotional stability was fragile, and particularly threatened, when she was placed under stress. She testified that the children's behaviour would deteriorate after each visit with their father, and that it took a number of days for them to settle down, during which time they were aggressive, both physically and sexually, with each other and with others. E.H. has the responsibility of looking after the children on a daily basis. If the continuing relationship between the children and their father causes additional upset to E.H., this will have a harmful effect on the children themselves. It is critical that E.H. be able to provide a stable environment for the raising of these children. (See **Abdo v. Abdo** (1993), 126 N.S.R. (2d) 1 at 15 (N.S.C.A.).

Conclusion

In my respectful opinion, the trial judge erred when

(1) he concluded the "spanking" of July 3, 1994 did not constitute a violation of B.'s sexual integrity;

(2) he disregarded, without reasons, Dr. Anderson's opinion that B. should not be subjected to any more, either supervised or unsupervised, access with her father, evidence which I consider to be material;

(3) he failed to take into account the effect T.G.'s actions had on B., limiting his focus to issues of physical and sexual abuse; and

(4) he failed to take into account T.G.'s knowledge of B.'s fragile psyche. T.G.'s reliance on physical discipline, as his "parental right" on all access visits, caused profound upset to both B. and T. and was harmful to them. It is reasonable to infer that T.G. should

have known his actions were not in the best interests of the children.

I would allow the appeal, eliminate all access by T.G. to the two children, and award costs of the appeal to E.H., as well as the motions in Chambers to which our attention was directed by counsel, in the aggregate amount of $1,200 plus disbursements.

J.A.

Concurred in:

Chipman, J.A.

Freeman, J.A.

C.A. No. 116147

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

E.H.

Appellant

- and -

T.G.

Respondent

REASONS FOR JUDGMENT BY: PUGSLEY, J.A.