WARNING

The court hearing this matter directs that the following notice should be attached to the file:

This is a case under Part III of the *Child and Family Services Act* and is subject to subsections 48(7), 45(8) and 45(9) of the Act. These subsections and subsection 85(3) of the *Child and Family Services Act*, which deals with the consequences of failure to comply, read as follows:

> **45.**—(7) *Order excluding media representatives or prohibiting publication.*— The court may make an order,
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> . . .
>
> (*c*) prohibiting the publication of a report of the hearing or a specified part of the hearing,
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> where the court is of the opinion that . . . the publication of the report, . . ., would cause emotional harm to a child who is a witness at or a participant in the hearing or is the subject of the proceeding.
>
> (8) *Prohibition: identifying child.*— No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding, or the child's parent or foster parent or a member of the child's family.
>
> (9) *Idem: order re adult.*— The court may make an order prohibiting the publication of information that has the effect of identifying a person charged with an offence under this Part.
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> . . .
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> **85.**—(3) *Idem.*— A person who contravenes subsection 45(8) (publication of identifying information) or an order prohibiting publication made under clause 45(7)(*c*) or subsection 45(9), and a director, officer or employee of a corporation who authorizes, permits or concurs in such a contravention by the corporation, is guilty of an offence and on conviction is liable to a fine of not more than $10,000 or to imprisonment for a term of not more than three years, or to both.

Toronto (Scarborough) Registry No. C30127/02
DATE: 2003·I·20
CITATION: *Children's Aid Society of Toronto v. O.N.*

ONTARIO COURT OF JUSTICE

B E T W E E N :

CHILDREN'S AID SOCIETY OF TORONTO,
Applicant,

— AND —

O.N. and S.A.H. (*also known as* S.A.A.),
Respondents.

Before Justice Robert J. Spence
Heard on 17 January 2003
Reasons for Judgment released on 20 January 2003

CHILD PROTECTION — Interim access — Evidence — Onus on children's aid society — Balancing of risks — Where child protection trial was possibly 2 years off because of intervening criminal prosecution for sexual child abuse, mere possibility of harm through father's access if he were guilty was not enough to meet society's burden of proof on balance of probabilities, where alternative was absolutely no contact between father and daughter for perhaps 2 years that would be certain to cause harm if father were innocent.

CHILD PROTECTION — Interim access — Grounds — Terms and conditions that court considers "appropriate" — At this interim stage, court should not be attempting to decide whether alleged events leading to intervention by children's aid society had in fact occurred — Sole issue is whether interim access would be "appropriate".

CHILD PROTECTION — Interim access — Grounds — Terms and conditions that court considers "appropriate" — Measure of what is "appropriate" is paramount purpose of promoting "best interests, protection and well being of children" in subsection 1(1) and "other purposes" in subsection 1(2).

A girl (now 13½ years old) was in the interim care of the local children's aid society after she disclosed that her father had sexually and physically abused her. He was facing a criminal trial, at the earliest, 5 months hence. The protection hearing was awaiting the outcome of that trial and could be as much as 1½ to 2 years away.

The father made a motion for interim access to his daughter. The girl also wanted to

see her father, albeit on certain conditions. The society secured a psychologist to prepare an assessment on the matter. He concluded that access should be allowed only in "the context of a therapeutic program", which would require the father's admission of abuse — something incompatible with his protests of innocence. The society supported the assessor's position. The assessors also testified at the motion, saying that, even though the girl actively sought access and seemed to have no fear of her father, it was "possible" that she could be psychologically damaged if she had access to her father, if the abuse had in fact occurred.

Held:— The court allowed the father's request. He was to have 2-hour visits twice a week supervised by the society at the society's offices on strict terms and conditions.

At a motion for interim care and custody, the onus lay with the society to establish the order that it wanted pending trial. Subsection 51(5) of the *Child and Family Services Act* allowed the court to affix an interim access order "on such terms and conditions as the court considers appropriate". The measure of what was "appropriate" was the paramount purpose of promoting "the best interests, protection and well being of children" in subsection 1(1) of the Act and "other purposes" in subsection 1(2).

At this early point in the case, the court should not be attempting to decide whether the alleged abuse had in fact occurred. The sole issue was whether interim access would be appropriate. Unfortunately, whether the abuse did occur was an important part of the court's consideration whether access would be appropriate, but the answer to the question over abuse could be as much as 2 years off.

If it should turn out that the father were blameless, a regime of no access for as much as 2 years (as the society wanted) would almost certainly damage the girl's "well being". If, however, the father were guilty of abuse, the society's best evidence was that, even under a regime of society-supervised access, it was "possible" that his daughter could be harmed. In matters of interim care and custody, the mere possibility of harm was not enough to meet the society's burden of proof on a balance of probabilities, where the alternative was absolutely no contact between father and daughter for perhaps 2 years.

STATUTES AND REGULATIONS CITED

Child and Family Services Act, R.S.O. 1990, c. C-11 [as amended], subsection 1(1), subsection 1(2), subsection 37(3), subsection 51(2) and subsection 51(5).

Mira Pilch ..... counsel for the applicant society

Shawna Fattal ..... counsel for the respondent father, O.N.

No appearance by or on behalf of respondent mother S.A.H., even though served with notice

Katherine Kavassalis ..... counsel for the Office of the Children's Lawyer, legal representative for the child

JUSTICE R.J. SPENCE:—

1: NATURE OF THIS PROCEEDING

[1] This is a motion for interim access to the child, who is currently in the temporary

care and custody of the Children's Aid Society of Toronto ("the society").

2: BACKGROUND AND CONTEXT

[2] The child T.N. (born on [...] 1989) is 13 years old. Prior to the commencement of the outstanding protection application, T.N. had been living with her father. Father and mother were, and remain, separated from one another. The society became involved with the family following T.N.'s disclosure that she had been sexually and physically abused by her father. As a result of this disclosure, the father was charged criminally. He denies the allegations. His criminal charges have yet to be dealt with. On 12 February 2002, the court made an order placing T.N. in the temporary care and custody of the society, with access in the discretion of the society.

[3] Initially, the father's bail conditions prohibited him from having any access to T.N. However, his bail was varied in late summer or early autumn of 2002 such that his access to T.N. was no longer prohibited by the criminal court. Pursuant to an order of this court, the father then had one access visit to T.N. on 24 October 2002. That visit was for two hours, supervised at the society's office. There is no evidence before the court as to the success, or otherwise, of that access visit.

[4] The issue before the court on this motion is whether father should have any further access to T.N. and, if so, what the nature of that access should be.

3: THE EVIDENCE

[5] On 14 November 2002, the society referred T.N. for an assessment to a psychologist, Dr. Daniel Fitzgerald. The purpose of that assessment was two-fold — first, to determine T.N.'s treatment needs and, second, to make a recommendation on the advisability of T.N.'s having access to her father. Dr. Fitzgerald prepared a report and also gave evidence on this motion. He was cross-examined by counsel for each of the father and the child.

[6] According to Dr. Fitzgerald, T.N. is "experiencing a considerable amount of psychological distress". Dr. Fitzgerald noted the fact that T.N. herself had made "a very clear disclosure of sexual abuse by her father." As to the issue of access, Dr. Fitzgerald noted in his report: "this is a particularly complex and difficult matter. [T.N.] herself says she would like to have contact with her father while having her mother present." In his report, Dr. Fitzgerald concluded his discussion of this issue by stating: "It would seem very appropriate then that any access between [T.N.] and her father occur within the context of a therapeutic program whose primary emphasis is to mitigate the impact of the abuse on [T.N.]."

4: THE POSITION OF THE PARTIES

[7] Armed with this evidence, the society's position is that there should be no access outside of "the context of a therapeutic program". Counsel for each of T.N. and her father argue that this kind of access cannot occur as it would require, by definition, the father's acknowledgment that he had committed the alleged abuse. And, of course, the father cannot

make such an acknowledgment in the face of his denial that the abuse occurred. The father would be content with some form of access that would include a supervision component but, in any event, he opposes the no-contact position taken by the society. T.N. is adamant that she be permitted access to her father.

5: ANALYSIS

[8] The legislative starting point is section 51 of the *Child and Family Services Act*, R.S.O. 1990, c. C-11, as amended, the relevant portions of which state (my emphasis):

> (2) *Custody during adjournment.*— Where a hearing is adjourned, the court shall make a temporary order for care and custody providing that the child,
>
> . . .
>
> (*d*) remain or be placed in the care and custody of the society, . . .
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> . . .
>
> (5) *Access.*— An order made under clause (2)(*c*) or (*d*) may contain provisions regarding any person's right of access to the child ***on such terms and conditions as the court considers appropriate***.

[9] Counsel for both the father and the society then direct me to consider the provisions of section 1 of the Act in order to ascertain the legislative underpinnings for what the court ought to consider "appropriate". The relevant portions of section 1 state:

> **1. Paramount purpose.—**(1) The paramount purpose of this Act is to promote the best interests, protection and well being of children.
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> (2) *Other purposes.*— The additional purposes of this Act, so long as they are consistent with the best interests, protection and well being of children, are:
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> 1. To recognize that, while parents may need help in caring for their children, that help should give support to the autonomy and integrity of the family unit and, wherever possible, be provided on the basis of mutual consent.
> 2. To recognize that the least disruptive course of action that is available and is appropriate in a particular case to help a child should be considered.
> 3. To recognize that children's services should be provided in a manner that,
>
> i. respects a child's need for continuity of care and for stable relationships . . .
>
> . . .

[10] The father's counsel submits that the emphasis in this case ought to be on the three numbered paragraphs of subsection 1(2), all of which would mitigate toward some form of access between T.N. and her father. The society's counsel, however, correctly points out that these three subparagraphs are "other purposes" of the Act and are applicable only to the extent they are "consistent with the best interests, protection and well being" of T.N.

[11] I leave aside, for the moment, the issues of "protection" and "well being", and look only at "best interests". Subsection 37(3) of the Act contains a number of factors that a court must consider in determining what is in the best interests of a child. It is clear from an exam-

ination of those factors that ongoing contact between a child and a parent is deemed to be of considerable importance. That section also lists a number of factors that go directly to the issue of "protection" and "well being". Therefore, I must determine whether there are protection or "well being" concerns that override the importance of maintaining or re-establishing the parent-and-child contact.

[12] The society has the evidentiary burden of establishing on a balance of probabilities that the protection or "well being" concerns for T.N. ought to prevent any kind of access from taking place, other than access in a therapeutic setting.

[13] Dr. Fitzgerald stated that the fact T.N. wants access does not mean, from a psychological perspective, that access should occur. He states that, even if T.N. does not fear her father, this does not mean that her father did not abuse her. In fact, according to Dr. Fitzgerald, it is not uncommon for children who have been abused to want to re-establish contact with the abusive parent. He also testified it is "***possible***" that T.N. could be psychologically damaged if she were to have access to her father, if the abuse in fact occurred, even though T.N. herself may be expressing no fear of her father and actively seeking that access.

[14] The society acknowledged that it is not for this court, at this point in the proceedings, to make a decision whether the alleged abuse has in fact occurred. The society argues — and I agree — that the sole issue is whether access would be appropriate. Unfortunately, the determination of the very question — did the abuse occur? — is an important component of the consideration that I must undertake in deciding this motion. When will that question be answered? The criminal trial will not take place until June 2003 — assuming that it proceeds as scheduled. Even if the father were to be acquitted at that trial, it would not be determinative of the protection issue. All an acquittal would mean is that the Crown had failed to prove its case beyond a reasonable doubt — a standard of proof that is different than the standard that this court must use, namely, proof on a balance of probabilities. An acquittal would require the parties to set a trial date in this court to determine that issue. In turn, that trial might not occur until some time in 2004.

[15] In the event of an acquittal at trial, the society would logically argue — consistent with the society's submissions on this motion — that no access ought to occur until the outcome of the protection application. That would result in there being no contact between father and T.N. for a period of approximately 1½ to 2 years, possibly longer (apart from the two-hour visit in October, 2002). This clearly poses a problem, particularly if the ultimate conclusion is that father is found not to have committed the alleged abuse. The "well being" of a child who has been living with a parent prior to society intervention and apprehension requires that the child have as much contact with her parent as possible — assuming there is no basis for the apprehension. Therefore, by acceding to the society's position, I run the risk of making an order that is inconsistent with T.N.'s well being, if it subsequently transpires that the father did not commit the alleged abuse.

[16] The second, and equally vexing, problem raised by this case is how the court ought to assess the degree of possible risk or harm to T.N. if access were to take place, even assuming that the abuse did occur. The best evidence I have on that issue is Dr. Fitzgerald's re-

sponse that it is "possible" that T.N. could be harmed even if access were to occur under society supervision. In my opinion, that response, namely, the mere possibility of harm is not sufficient to discharge the society's burden of proof discussed above. Furthermore, when I consider this issue in conjunction with the possible scenario that father and T.N. might have no contact with one another for, perhaps, two years, it becomes exceedingly difficult for me to conclude that a no-access provision is appropriate.

6: CONCLUSION

[17] In my opinion, for the reasons discussed, the society has not met the onus of proof, on a balance of probabilities. It follows, therefore, that I consider it appropriate in the circumstances of this case for access to be reinstated between father and T.N. Accordingly, father shall have supervised access to T.N., two times each week, each visit to be of two hours' duration, supervised by the society, at the society's offices, on the following terms and conditions:

1. Should T.N. express the wish to have her mother present during any access visit, the visit shall not occur unless her mother is present.
2. If, prior to the scheduled access, T.N. expresses the wish not to visit with her father, the visit will be cancelled.
3. If, during the course of any access, T.N. expresses the wish not to continue with the access, that visit will be immediately terminated.
4. The father shall be at liberty to bring with him to each visit not more than one member of his family with whom T.N. has previously formed an attachment, provided T.N. consents beforehand to the presence of that person.
5. The father, and any person accompanying the father, shall refrain absolutely from discussing the incidents of alleged abuse with T.N.
6. The father shall arrive at each visit promptly at the scheduled time. During the course of each visit, he shall refrain from acting in a discourteous or otherwise inappropriate manner towards society employees.
7. The society employee supervising the visit shall keep a diary of any significant events, including any breaches of these terms and conditions that occur during the access visits.

[18] Should counsel wish to address the court regarding these terms and conditions, they may contact the scheduling clerk and arrange a mutually convenient time to appear before me.