1991 CarswellOnt 1379
Ontario Court of Justice (Provincial Division)

Kutz v. Kutz

1991 CarswellOnt 1379, [1991] W.D.F.L. 1070, [1991] O.J. No. 1381, 28 A.C.W.S. (3d) 573

In The Matter of: The Children's Law Reform Act, R.S.O. 1980

Lori Theresa Kutz, Applicant and Michael John Kutz, Respondent

Pickett Prov. J.

Judgment: July 10, 1991

Counsel: *Mark A.B. Frederick, Esq.*, Counsel for the Applicant.
Jack E. Pantalone, Esq., Counsel for the Respondent.
Ms. Judith Millard, Counsel for the Official Guardian.

Subject: Family

Headnote

Children — Custody and access — Factors governing award of access — Conduct of parents — Sexual assault.

When the parties separated in 1989, the mother received custody of their daughter, M., now 2 1/2. Generous access was awarded to the father, who had received counselling for his inappropriate roughness with M. soon after she was born. In February 1990, after an access visit at the father's parents home. M. complained that her bottom was sore and that a "little snake went up there," "at Daddy's house." The mother immediately took the child to hospital. The doctor found some redness, but no bruising, edema or bleeding. A pediatric social worker, a nurse practitioner, and a psychiatrist who also examined the child believed she had been sexually abused and that access should be terminated. After an initial suspension of access, supervised access was introduced. Supervisors reported that M. was very happy to see her father and that the father behaved access visit in August, the mother noticed unusual redness about M.'s vagina. "Cross-examined" by the mother and the mother's boyfriend, M. said her father had put one finger and then another up her bum. Examination in hospital revealed no sign of sexual abuse. A sexual behaviours clinic assessed the father and found him highly unlikely to have sexually abused his daughter. The mother sought to suspend access or have access be supervised. *Held*, access to continue on conditions. M.'s statements in February were very vague, and there was no physical evidence of abuse. As for the August incident, the evidence showed that the father could not possibly have abused M. at that time. It was apparent that the medical professionals were predisposed to confirm the mother's suspicions. Their zeal in that regard made them accept, without any perceivable caution, the mother's and her family's version of events. They grossly over-interpreted and put the most sinister possible explanations on innocent behaviours. Their attitude and approach was anything but fair and open-minded, and was decidedly unprofessional. While it was impossible to exclude the possibility, the mother did not prove sexual abuse or exposure to inappropriate activity of a sexual nature. It was in M.'s best interests that access be restored. Nevertheless, although the mother's testimony was not credible, it was clear that she remained convinced that the father had abused M. Therefore, solely to mollify her, special access conditions as to communication were put in place for one year.

***Pickett Prov. J.*:**

1 This is an application by the mother and custodial parent for an order suspending the access of the father to the child Melissa Mary Kutz born August 23, 1987, or in the alternative an order that the access be supervised. At the hearing, the

order sought by the applicant would have limited the respondent to supervised daytime access.

2 The parties married on June 19, 1987 and separated on April 29, 1989. They settled their marital affairs by a separation agreement dated December 28, 1989, which provided amongst other things:

> The wife shall have the sole custody, care and control of the child subject to the husband's right of generous and liberal access upon reasonable notice which shall include as a minimum overnight each Friday and Monday evenings from approximately 5:00 p.m. to 9:00 p.m. and at such other times as the parties may agree upon...
>
> The husband shall have access as above stipulated and at such other times as are mutually agreed upon; and to be allowed overnight visitation and longer periods during holidays as are agreed upon and as the child desires.
>
> The husband shall exercise his right to access outside the child's home and shall make all the necessary transportation arrangements to collect the child and return her to her home.
>
> Whenever the husband intends to exercise his rights of access, he shall give notice of his intention to the wife as soon as possible...
>
> The husband and the wife agree and undertake that in all matters relating to the maintenance, education and general well being of the child, the child's interest shall at all times be paramount, and the husband and the wife agree and undertake that in all matters they shall place their own separate convenience and interest second to the convenience and interests of the child.
>
> The husband and the wife acknowledge that their separation could do emotional harm to the child. They undertake with one another that they shall, at all times, do everything necessary to ensure that the life of the child is disrupted as little as possible. The husband and the wife shall conscientiously respect the rights of one another regarding the child. The husband and the wife shall continue to instill in the child respect for both the parents and neither the husband nor the wife shall by any act, omission or innuendo, in any way tend or attempt to alienate the child from either parent. The child shall be taught to continue to love and respect the parents.
>
> The husband and the wife agree that there shall be full disclosure between them on all matters touching the welfare of the child and they agree that they shall confer as often as necessary to consider any problem or difficulty, or matter requiring consideration, touching the welfare of the child. [underlining added; inappropriate plurals removed]

3 I set out the conditions which the agreement attached to custody and access in detail for ultimately it was my view that if these conditions had been adhered to, a very sorry result may have been avoided. It is also my view that the solution lies in further strengthening and specifying these conditions.

4 Over the four days of trial, I heard a great deal of evidence to which I shall not be referring in these reasons. I wish to assure the parties that this testimony has not been ignored but rather it is my view that it was either in the end not particularly relevant to the issue before me, was manifestly unreliable or its repetition here would serve no useful purpose.

5 The marriage of the parties was precipitated by the pregnancy of the applicant. Although at trial the applicant emphasized the respondent's acknowledged lack of patience and inappropriate roughness with the newborn infant as the cause of their separation, it was evident that they were for each other poor choices as partners, immature and unprepared for a parenting role and their marriage [illegible text] never had much hope of succeeding.

6 Notwithstanding this the parties established almost immediately following separation a very sensible access regime which had the respondent picking the child up from the babysitter every day (except Wednesday which was the applicant's day off) around 4 p.m. when he finished work, taking the child to the applicant's apartment and staying there in the apartment until the applicant arrived home either after 6 p.m. or 9 p.m. On Fridays the respondent would have the child at his residence from after work until after 5 p.m. on Saturday when the applicant finished work for the week. Unfortunately the respondent failed to respect the applicant's privacy while in her apartment, so the arrangement was modified. Beginning in September, 1989 he had to take the child from the babysitter to his residence (which from the time of separation and up to the time of hearing was at the home of his parents) to be picked from there by the applicant on her way home after work. Commencing in mid-January, 1990, the respondent took the child to a gymnastics program for toddlers during the time the child was with him on Saturdays.

7 This access arrangement continued after the execution of the separation agreement even though the agreement did not specify such access - although it was clearly within the scope of the access envisioned by the agreement. It was the evidence

of the applicant that she permitted such liberal access because the respondent had sought professional counselling for his inappropriate roughness towards the child and because the child enjoyed the visits. In addition the applicant's mother was encouraging access and further there was a benefit to the applicant in having the respondent care for the child during the time that she worked.

The Incidences

(1) February 15, 1990

8 On this date, which was a Thursday, the respondent had in the normal course picked the child up from the babysitter and taken her to his parents' home. The child was subsequently taken by the applicant to her home some time after 6 p.m. Approximately one hour after dinner according to the evidence of both the applicant and Daniel Stoness, her boyfriend at the time, Melissa while on the floor removed her pants and panties, began to handle her genital area and said that her bum was sore. When the applicant asked her either what was wrong or why her bum was sore, Melissa responded that a little snake went up her bum. The applicant then asked the child, "Where?" The child's reply was either, "At Daddy's" or "At Daddy's house". Without contacting the respondent or anyone for that matter, the applicant immediately took the child to the emergency department of the Kingston General Hospital.

9 The emergency department record which is imprinted with the time 8:45 p.m. reads in part as follows:

> Triage Mother states patient with sore vaginal area for two days. Mother states area slightly red. Patient does not complain on urination. Mother states she seems well...
>
> Patient with pain in vagina area. Told her mom "little snake went up there". "little snake" belonged to daddy. Parents separated for 1 year - father physically "rough" with child previously. Father has had access to child this week for few hours.
>
> Mother concerned. Child verbalized story to me.
>
> Perineum - slight amount redness around introitus. No bruising. No edema. No bleeding... [underlining added]

10 This document also records that the child's current medication consisted of the antibiotic Amoxil for an ear infection. The discharge diagnosis is the notation "? Child abuse". The applicant was referred to the Children's Outpatient Clinic for evaluation by the child abuse team. Also added were the words: Father not to see.

11 This emergency department record which is the initial documentation of what will become a considerable body of documentation contains some significant errors or discrepancies:

> (1) The applicant reported that the child's vagina area had been sore for two days. This is totally inconsistent with her evidence given at trial and in affidavit.
>
> (2) The applicant is said to have reported that the child said the little snake belonged to her Daddy. It is clear the child never said this. This change in the wording of the apparent disclosure significantly and unjustifiably focused suspicion on the respondent. The actual words used by the child were far more ambiguous especially in view of the fact that the respondent lived with his parents in their home including from time to time one other brother, a place which would be clearly identified in the child's mind as the home of her grandparents. The child apparently had something to say to the doctor in emergency, however, nothing was detailed in the record and this person did not testify.
>
> (3) This record indicates that the child was currently taking an antibiotic for an ear infection; this was denied by the applicant at trial although clearly she must have been the source of the information. In fact the child was on antibiotic as she commonly was for a chronic problem extending back to December, 1987, just a few months after her birth. It is inconceivable that the applicant could have forgotten it.

12 What is one to make of these errors or discrepancies? The impact of (2) is obvious but the possible motive behind (1) and (3) is more subtle. If the child's complaints extended back two days then the connection to time with the respondent is

somewhat compromised by the fact the child was not with the respondent on Wednesday. The denial at trial that the child was on antibiotics has a clear connection with the suggestion of the child's paternal grandmother that the redness was a yeast infection brought on by the child's long standing use of antibiotics.

13 As a result of the referral from the emergency department Melissa was seen by Dr. Dale Pietak on February 16. In her report dated February 22, 1990 she concludes:

> I did not interrogate Melissa as she had had a long morning and had already told the story to the Emergency Officer. During the physical examination apart from some redness in the introitus and around the hymenal opening, no major abnormality was seen. The hymen was intact, the hymenal opening was a normal size and there was no evidence of bruising, tearing or bleeding. Examination of the anus was also within normal limits.
>
> This is a very precocious two and a half year old and I think her revelations should be taken seriously. Unfortunately my physical findings can neither support nor refute the possibility of sexual abuse. My only observation was from her behaviour and the minimal findings that if the abuse did occur it was of a recent and short term basis and has not led to any behaviourial disorder or chronic changes in this little girl. I certainly feel strongly that the father should not have unsupervised access to this little girl until this allegation can be investigated.

14 One wonders if the Doctor's feelings would have been as strong if she had not adopted the erroneous version of the child's alleged disclosure set out in the emergency department records. In her entire letter of February 22, 1990 Dr. Pietak makes no mention of the child's extensive use of antibiotics, however, in her affidavit of April 4, 1990, repeated by her in testimony at trial, the applicant reports Dr. Pietak's views being that the redness was not a rash from penicillin and was "definitely unnatural". I seriously doubt that the doctor had any idea how extensive the child's use of antibiotics had been - when one considers that the applicant at trial denied that the child was even taking them at the time. As for being "definitely unnatural", there is nothing in the doctor's letter which comes even close to such a conclusion. In fact taken in its entirety and excluding information some of it erroneous received from others Dr. Pietak's examination added nothing but unwarranted professional support to what at this point was an almost baseless suspicion.

15 I note that the doctor did not observe any behaviourial disorder or chronic changes in Melissa. Apparently this was about to change; in the end I concluded that these changes were not caused by what had happened to this child but by what was about to happen.

16 In her testimony the applicant related a conversation between herself and Melissa which she alleges occurred on the evening of February 15, 1990 after she had put the child in her crib. The applicant claims she was summoned by the child who staring at the ceiling said sadly, "Mommy, I didn't want Daddy to put that snake up my bum". Now everyone would agree that this is a very unequivocal, damning piece of evidence. Everyone would also agree that it was very surprising that the applicant never shared this disclosure with Dr. Pietak a few hours later - it certainly would have made the doctor's job a lot easier. In fact despite extensive intervening professional involvement of an investigative nature this alleged statement by the child did not appear on the record until it surfaced in an affidavit of the applicant sworn on April 4, 1990, an affidavit clearly crafted to answer specific defences and explanations raised at that time by or on behalf of the respondent.

17 According to the applicant in the morning of Wednesday, February 14, 1990, Melissa spontaneously asked her what the hole in her bum was for. As a result of this question the child ended up speaking to the applicant's mother on the telephone to get the answer. At different times the Court was given the following explanations for this telephone call:

> (1) The child's own interest was so strong that the child called the grandmother.
>
> (2) This was a special event that the applicant wanted to share with the grandmother.
>
> (3) The applicant thought the question was "weird".
>
> (4) The applicant did not know why she called her mother.
>
> (5) According to the grandmother, the applicant had called her because the applicant lacked the skills to handle the child's question. The grandmother was "falling apart laughing" but also was "peeved" that the applicant was not able to answer the child's question herself.

18 One again wonders why the applicant had such a difficult time in her testimony dealing with a very straight forward event. Any parent would recognize this situation and certainly would not consider it "weird". I have concluded that the applicant was struggling to give it far more significance than even she could comfortably attribute to it. It is important to remember that in contrast to the confusion evident in the applicant's mind over the reason for the telephone call, she was unequivocal in stating that she did not suspect that the child had been sexually abused.

19 Now would be a very good time to address the issue of the applicant's credibility. In addition to the above matters, I was extremely concerned with the applicant's general presentation as a witness. Her responses to questions, even those put by her own counsel, were very tortured and slow in coming. Although a Court appreciates a witness who considers a question before responding, her delay was excessive and she appeared to be struggling to overly craft her answers to fit a very strongly preconceived scenario of her own creation. She had a basket of mannerism not associated with a truthful witness.

20 As a result of her extremely poor performance and almost total lack of credibility and recognizing the critical importance of her testimony, I addressed counsel in chambers on the issue of non suit. It was evident to me that professional opinions based on information provided by the applicant would have little probative value. Past experience indicated to me that the evidentiary integrity of the child's disclosures would likely be rapidly and adversely affected by adult influences both in the family setting and in the investigative or medical setting. It was the position of counsel for the applicant that his client was suffering from understandable nervousness and lack of sleep - since these are conditions under which most parties testify I did not find the explanation comforting. Counsel for the respondent was anxious to have the hearing proceed as he was satisfied that in the end he could convince the Court that the accusations against his client were manifestly unfounded and thereby clear his client's name.

21 Most of the usual motives or explanations for the applicant's lack of forthrightness are not obviously present:

> (1) There was no outstanding access dispute and the applicant's custody of the child was not being threatened.
>
> (2) It was highly unlikely that the applicant was maneuvering the respondent out of the child's life to accommodate her then current boyfriend, Daniel Stoness, whom the child had apparently taken to referring to as "Daddy".
>
> (3) The evidence did not indicate that there was any recent precipitating event, any act or omission of the respondent which may have changed the applicant's attitude towards his access to the child.

22 While it is possible that one of these more usual motives or explanations was active in this case, I would not be comfortable in taking this view of the applicant. I am satisfied in the end that the applicant became convinced and in fact remains convinced that there was some improper sexual contact between the respondent and his daughter.

23 In *Scott v. Scott*, S.C.O., January 29, 1990, an unreported judgment of FitzGerald L.J.S.C. (as he then was) in the District of Algoma, the mother of a young female child became obsessed in the belief that the child was being sexually abused during access to the father either by the father or his teenaged son. Everything from diaper changes to bedtime kisses were suspect. The child was taken for frequent medical examinations, at one point before and after every visit with the father. The mother told doctors that when the child was returned from access she was withdrawn, feared people, even small children and would develop diarrhea and have nightmares. At this stage the mother was observing every word and gesture of the child, not yet two years of age, for signs that might be interpreted as evidence of sexual abuse. The mother reported many conversations between herself and the child which were extremely suggestive of such abuse. The mother complained that the child's anus was bruised and that the vagina was opening more than it should and there was bruising there. Medical examination found no abnormalities, an intact hymen and no abnormal coloration around the anus. Not once in her entire testimony was there any indication that the mother had even considered the devastating effect her allegations were having on her husband, nor was there the slightest indication of remorse or contrition should the evidence be to the contrary. Indeed, she maintained her concerns to the very end of the trial that she would prefer the father to have supervised access only. Anatomical dolls were used in the assessment of the child. The results were discounted by the Court because of the leading nature of the interview.

24 The result in this sad case was that custody was changed from mother to father.

25 I do not believe that the problem here is as serious as in the *Scott* case; however, I do believe that the applicant's reliability as a witness is subject to similar concerns; I believe that the applicant is doing what she thinks is necessary to sustain her version of what happened and to protect her child. It is also clear that the maternal grandmother's reliability as a

witness is similarly suspect and I do not intend to deal in detail with her evidentiary contributions.

26 I am aware that it is the suggestion of the respondent counsel that the applicant's actions in part at least are due to her relatively recent experiences as a victim of two sexual assaults. I am also aware that the assessor from the Family Court Clinic concluded that the applicant was credible. Issues of credibility are matters, of course, for the Court and the Court alone to decide, and in this situation, as is most often the case, the Court was in a far better position to make such assessments.

27 I do not wish to leave this area without noting the strange difference in the response of the applicant to the incidences on February 14 and February 15. Objectively there is not much to distinguish them. The child's cryptic comment on the 15th in the acknowledged absence of any earlier suspicion of sexual abuse is potentially as innocent as her questions on the 14th, yet the reactions could hardly have been different. Considering the nature of the relationship which clearly exists between the applicant and her mother, I was never able to come to an understanding of why the applicant did not seek the counsel of her mother before taking the actions she did. One also wonders what happen to the agreement between the parties "that there shall be full disclosure between them on all matters touching the welfare of the child and *that they shall confer as often as necessary to consider any problem or difficulty, or matter requiring consideration, touching the welfare of the children*".

28 The respondent had had the child with him in the normal course of access from Friday evening, February 9, to Saturday afternoon of the 10th. And again from when he picked the child up after work until the applicant in turn picked the child up from him when she finished work on Monday, the 12th, Tuesday, the 13th and Thursday, the 15th. The Court heard testimony concerning these periods of time from the respondent, his mother and his brother, David, with special emphasis- on Saturday - when the child was taken to gymnastics - and on Thursday, the most suspect periods. Although it is impossible to find with absolute certainty that some inappropriate act did not occur during these periods, it is certainly possible to conclude that the normal routine of access was followed, that the respondent had a minimum of time alone with the child, that the child made no complaint or disclosure to others during these times and that everything appeared to be normal, and I do so find.

29 Following the examination by Dr. Dale Pietak, the child was referred for "interview" by the team of Deborah Docherty, a paediatric social worker and Sharon Duce, a nurse practitioner making extensive use of anatomically correct dolls, on February 23 and 27, 1990. There also was a referral to Dr. Margaret Joynt, a psychiatrist, for therapy sessions, commencing on April 4, 1990 and continuing for approximately the next year. For the purpose of this judgment it is sufficient at this time to note that these persons supported the applicant's suspicions by actually expanding the allegations of inappropriate sexual conduct by the child's father. Reports generated by their involvement were used in support of motions to this Court with the result that the respondent's access which had been occurring on five days in each week was at first totally suspended (until May 15, 1990 - a three month period) and then re-instated on a supervised basis which supervision continues until the present time - first only under the auspices of the Court's mediation service and another agency and later (after June 6, 1990) the second visit per week was supervised by the paternal grandmother.

(2) August 26, 1990

30 This was a Sunday following a Saturday on which the respondent had had access to the child for approximately three and one half hours at his parents' home; by court order this access was to be supervised by the respondent's mother. In early Sunday afternoon when the child was apparently getting ready for swimming, the applicant noticed unusual redness in the child's vaginal area. After disbelieving and cross-examining the child with the assistance of boyfriend who was present and whom the applicant was prepared to involve in this matter without any reluctance, including allowing the boyfriend to pinch the child's bum, she succeeded in getting the child to say that *the respondent had put one finger and then another up her bum*. She then proceeded to the hospital where the child was examined by Dr. Brian A. Wherrett at the request of the applicant to determine if there had been sexual abuse. In his report, after noting that the child told him that, "*Daddy put his finger on my bum*", the doctor states:

> On examination there was not obvious redness or irritation in the vulvar/perineal or anal area. The anus appeared normal. There is a small vaginal opening. I was unable to detect bruising, abrasions or other abnormalities in the perineal area. The remainder of the examination was entirely normal.
>
> The physical examination did not specifically indicate evidence of significant perineal contact apart from the child's comment.

31 Dr. Wherrett is the head of Paediatrics at Queen's University and at both of the hospitals in Kingston.

32 Once again the Court received the evidence of the respondent, his mother and his brother, which established that the

respondent and his family were being extremely vigilant on the supervision issue and were taking extraordinary measures to be in a position to respond to further allegations from the applicant. It is also clear that the applicant was unaware of these measures as she had been unaware of David Kutz presence in the respondent's parents' home on February 10th. These measures precluded any improper contact between the child and her father.

33 What is one to make of this event initiated by the applicant's mistaken belief that there was unusual redness in the child's vaginal area, when there was not, and yet the child arrives at the hospital telling a strange doctor without prompting that her father had touched her bum. I believe that we now have a clear measure of the strength of both the applicant's belief that sexual abuse was occurring and her influence over this child.

34 At trial upon learning that it was virtually impossible for anything improper to have happened on August 25th, she offered no apology but rather clung to her position by stating that she now believed that what the child had said related to the disclosure of February, 1990! Amongst other things what she has failed to consider or perhaps had forgotten was that there was no abnormal redness in the child's vagina area or anything else abnormal for that matter. All that happened that day was a product of her behaviour and influence with the child.

The Medical Interventions

(1) Melissa's "Interviews" with the Anatomical Dolls

35 These took place on February 23 and 27, 1990. The child was accompanied by her maternal grandparents - on both occasions, the applicant felt she had to give priority to her employment. These interviews were conducted by a team consisting of Deborah Docherty, a Paediatric Social Worker and Sharon Duce, a Nurse Practitioner. It was their opinion that the child had been sexually abused and their recommendation was that all access by the respondent be terminated.

36 Whatever usefulness and validity their procedures and techniques may have in a medical setting, they have no place in this legal proceeding. The protocol employed was totally devoid of the minimal safeguards required by the most basic level of natural justice. In fact, it would be my conclusion that there was no intention or attempt to incorporate such safeguards into the protocol. They would perhaps be viewed by the practitioners of this procedure as inappropriate or unnecessary. I was, at the time and remain, distressed that drastic conclusions and recommendations such as those that were made flowed from such a flawed process. In the result the respondent and his family along with Melissa were victims of very shoddy justice.

37 In *Children's Aid Society of Belleville, County of Hastings, and Trenton v. C.H.*, Ont. Prov. Ct. (Fam. Div.), Belleville, August 10, 1984, Kirkland, Prov. J., a social worker did an investigation which included interviewing with the aid of anatomically correct dolls a child who was the alleged victim of sexual abuse. The worker concluded that abuse had occurred but the worker did not interview the alleged perpetrator. An independent police investigation had resulted (as in this case) in no charges being laid. His Honour commented:

> I confess, however, that it offends my sense of justice that an accuser does not confront the alleged violator with the allegation. In making her validation (that sexual abuse had occurred), J.M. never afforded Dan (the alleged perpetrator) an opportunity to reply to the attack against him...
>
> I would have felt much more comfortable with the evidence of abuse had J.M. at least heard Dan's response before drawing the unequivocal conclusion that the abuse occurred. The lifetime stigma attached to such a finding demands certainty beyond question. The danger in validating such an allegation on the words of a four year old child, even in the context of all the sociological protective devices, is perilous.

38 Dunn, Prov. J. in *Family and Children's Services for Guelph and Wellington County v. B. (J.)*, Ont. Prov. Ct. (Fam. Div.), Guelph, January 23, 1989, a case in which anatomically correct dolls were employed in interviews of children suspected to have been sexually abused cautions:

> Sexual fondling of infants is just as real and as serious a part of child sexual abuse as intercourse or digital vaginal insertion. The unique problem this type of abuse poses for the investigator is to obtain sufficient proof that it occurred. By its nature it can be difficult to establish because no physical marks are left on the victim. Yet for the perpetrator who feels falsely accused and for a court to make its findings, there must be clear evidence. A court is not free to assume that "if there is smoke, there must be fire." A [children's aid] society should recognize that in cases of sexual abuse by fondling, there is no substitute for a thorough and fair minded investigation and constant re-assessment of its position, as

information becomes available to it.

39 Generally, cases in which the results of interviewing children with anatomically correct dolls have been accepted by courts have been those cases:

> (a) where there is an abundance of other evidence of abuse, or
>
> (b) where the interaction of the children with the dolls has been so extremely and unequivocally indicative of abuse
>
> > (i) that the chance of overly subjective, biased, over or mistaken interpretation (in the present case one could frankly add bizarre interpretation),
> >
> > (ii) questionable responses due to leading or suggestive technique, and
> >
> > (iii) misconducted interviews or misinterpretation due to erroneous, incomplete or unchallenged background information
>
> are negligible.

40 For examples of such cases see: *Children's Aid Society of Hamilton-Wentworth v. C. (D.)*, Ont. U.F.C., Hamilton, Beckett, U.F.C.J., March 30, 1987; *R.C. Children's Aid Society for the County of Essex v. G. (L.)*, Ont. Prov. Ct. (Fam. Div.), Windsor, Abbey, Prov. J. (as he then was), November 17, 1986; *Children's Aid Society of Stormont, Dundas and Glengarry v. W. (W.)*, Ont. Prov. Ct. (Fam. Div), Cornwall, Lalande, Prov. J., Div.), October 8, 1987.

(2) Melissa's Sessions with Dr. Margaret Joynt

41 Initially these sessions were little more than an extension of the "interviews" with Docherty and Duce with Dr. Joynt replacing Docherty. Eventually Duce dropped out and the doctor carried on in what I assume was a therapeutic mode. It is extremely unfortunate from an evidentiary point of view that the doctor's involvement was not independent. To a large extent the doctor's lot was to inherit all the erroneous, incomplete and suspect background material of the earlier intervenors. In addition it is clear that she adopts all the earlier conclusions uncritically for she never disagrees or even questions one of them. In fact in most cases she advances their themes e.g. the exposure to masturbation. Although in correspondence with the applicant's counsel, she recognizes the bias issue, nothing effective is done to address it. I cannot escape the conclusion once again that it is seen as a non-issue in the eyes of these assessors and this is truly tragic.

42 In the end I would conclude that whatever medical validity the involvement of this doctor - whose work with families and children in the Kingston area this Court greatly respects - may have, her reports have little or no evidentiary value on the issue before me i.e. was Melissa abused sexually by her father. Once the doctor purports to identify the respondent as the abuser all of the criticisms which were levelled at the intervention of Docherty and Duce are equally applicable to the intervention of Dr. Joynt.

43 Before leaving this area I wish to note my wonderment at the apparent insensitivity or dismissive attitude demonstrated by the above assessors towards two issues:

> (1) The profound effect of the earlier medical examinations and their own intervention on the child's behaviour generally and in particular, at subsequent interviews or sessions. This effect was obvious and the absence of evidence that the assessors considered it significant and made allowance for it was truly frustrating.
>
> As an example, consider this passage from Dr. Joynt's report of May 2, 1991:
>
> > On 23 May 1990, Melissa came into the clinic for her usual session. She was playing in the doll's house as was her wont, however, she used more people than usual. She put several of the doll families plus a male pig,

> a baby pig and a male rabbit standing up in an upstairs bedroom. She started to sing a song and move her hips in a sexual way. The song she sang was 'I'm going with my daddy, I'm going with my daddy" [I do not know whether the doctor was aware that the child's access to her father had just resumed. If she did know it would have been very helpful if she had explained why this was not the straight forward explanation for the child's song and apparent happy mood]. She then announced that they all had to talk about their sore bums and she pointed to 'this one, and this one, and this one have sore bums, and that one and that one don't' as she pointed to the two males in the dolls house room. I wondered aloud how they got sore bums and whether someone had touched them, Melissa nodded her head in great affirmative that this was so. As she finished this particular piece of play and moved on to another area, she grabbed her crotch and made it even clearer that the previous jumping and hip swinging had been somewhat stimulating for her in a sexual way.
>
> My interpretation of the previous piece of play was that it was definitely indicating sexual knowledge on Melissa's part that would be age inappropriate and was likely to have derived from sexual contact, probably with her father. The disclosure was extremely spontaneous...

I find this conclusion to be utterly astounding! If the "previous piece of play" does in fact indicate that the child has age inappropriate sexual knowledge it was without question derived not from contact with her father but clearly from her contact with Duce, Docherty and Dr. Joynt herself and this is so obvious as to be beyond any doubt whatsoever. And further no fair-minded person could describe what happened as "extremely spontaneous".

As a further example of how the "interviewing" or assessment process was affecting this child and re-surfacing to be misunderstood or misinterpreted, consider this. The child's maternal grandmother reports the following exchange between Melissa and herself, as I understood her evidence around July 1, 1990:

> Melissa says, "I'm not going to let Daddy take my baby to his scary house. But I know my Nanny lives there too.
>
> The grandmother asks, "Why is it scary?"
>
> Melissa replies, "Because he gives it suckers and makes it sick. He has balls there and I don't like it it's scary. I don't love my Daddy anymore."
>
> The grandmother notes that the child repeats everything over and over again.

I cannot but suspect that what re-surfaced here was the effect on Melissa of her exposure to the procedure doll "Ashley" on February 23, 1990 - complete with sucker, sickness, (squeeze) balls and scary.

(2) The impact on this child of its sudden and total separation from the paternal side of the family. It is inconceivable that this child would not suffer from the unexplained and unaddressed loss of contact to these loving persons whom, prior to February, 1990, she was seeing on five days out of seven. This did not in the assessors' eyes even merit mentioning - although for some peculiar reason, parental separation which by this time would relatively speaking be a minor matter was mentioned albeit only once.

44 It is apparent that those involved in the medical intervention were clearly predisposed to confirm the suspicions that Melissa had been sexually abused by her father. Their zealousness in this regard made them accept without any perceivable caution the applicant's and her family's version of events; they felt there was no need and had no interest in learning a single piece of information directly from the respondent or his family before they were prepared to label him as a person who sexually abused his own child. It is also my view that they were grossly over-interpreting innocent behaviours and putting the most sinister possible explanations on them. I found their attitude and approach to be anything but fair and open-minded and decidedly unprofessional. I believe they have become dangerously over-impressed with their interviewing technique and perhaps their own skills in employing it.

The Child Melissa

45 Melissa was two and a half years of age at the time of the alleged disclosure in February, 1990. According to her mother the child attained most developmental milestones in advance of the average with exceptionally advanced verbal skills. Dr. Dale Pietak describes her as "a very precocious bright two and a half year old". Docherty and Duce record that:

> Melissa presented as a child with above average receptive and expressive language skills, remembering that she is 2 yrs, 6 mos at the time of this interview. Her comprehension of language and concepts also struck us as being quite sophisticated for her age.

46 Dr. Margaret Joynt describes Melissa as “bright and verbal”.

47 It is clear from the above observations that Melissa was possessed of the skills necessary to elaborate of her remarks on February 15, 1990.

48 According to her mother and maternal grandmother Melissa’s behaviour before February 15, 1990 was uncommonly good and immediately afterward became remarkably poor. I cannot accept such evidence without reservation not only because of bias but also because I believe they were over enthusiastic in noting every behaviourial lapse and attributing it to what they fervently believed had happened. Also their evidence was directly contradicted by Daniel Stoness, the applicant’s boyfriend at the time. According to Stoness he did not notice any change in the child who was still a “happy little girl” and who talked about her Daddy and how she missed him. It is important to recall that the child had a close enough relationship with Stoness to call him Daddy and to speak about “Dammy” when she was with others, including, much to his dismay, the respondent.

49 Nevertheless, I am convinced that this child weathered some very rough times following February 15, 1990 and a great deal of this was due to family, legal and professional reaction to what was a cryptic and never satisfactorily explained remark on the child’s part and what could have been a very innocent remark. Some behaviourial deterioration undoubtably occurred.

50 I do not accept that the applicant and her family successfully shielded the child from their own anger and distress. I believe there is compelling evidence in the interview with Docherty and Duce on February 23, 1990, that Melissa was exposed to her mother’s tearful recounting of the “sore bum” and “snake” story to the applicant’s parents probably upon leaving the hospital emergency department later in the evening of February 15. The interviewers note:

> When asked if Melissa could help us with understanding sore bums and snakes, Melissa responded “no”. Melissa referred to the little girl and her mummy being at her nanny’s and poppa’s and crying.

51 If they were so careless from the outset why should this Court believe that they became more careful as time went by. Experience tells us that quite the opposite would likely be true and with the passage of time it is more likely that they became even less diligent. There is also evidence that the applicant, at least, was prepared to pressure and cross-examine the child in a quest for confirmation of her suspicions. There is a clear example of this on August 26, 1990 (during this incident she was even prepared to have a boyfriend become involved, including allowing this person to touch the child’s bum). I have no difficulty in concluding that it is unlikely that this was the only occasion on which the applicant “grilled” this child.

52 Thankfully, it was the evidence of everyone, family members and professionals alike, that by the time of the hearing, Melissa was once again free of negative behaviours and enjoying her childhood.

The Respondent

53 In the report of the Family Court Clinic the respondent is described as:

> ...a cooperative 25 year old man who expressed frustration and sadness with regard to the allegations made against him and the resultant effect on his time with Melissa. He denies any inappropriate activity with Melissa and believes that the allegations stem from Lori’s hate of him and her desire to ruin his life. He does believe that something did happen with Melissa but attributes responsibility to Lori’s boyfriend, whom he believes Melissa was encouraged to call Daddy.
>
> Michael presents as a somewhat passive and insecure individual. His lack of success in his chosen employment and in personal relationships have led to the development of low self-esteem and a sense of powerlessness in certain areas of his life. This seemed apparent when discussing his family relationships, school performance, and work history. Michael seemed unaware at times of the responsibility he holds for his actions and tended to project blame onto others. When confronted, he acknowledged his contributions to certain events or relationships, yet one is left with a sense that he holds to a belief that people deliberately seek to cause him difficulty... Michael saw Dr. Neil Conacher post-separation

and has seen him on a few occasions since that time. Dr. Conacher's impression was of an immature young man who was maturing quickly through the adversity presented by marital separation. He describes Michael as a straightforward and honest individual whose shyness and early feelings of inadequacy were exacerbated by Lori's role as breadwinner in the family. In treatment, he was encouraged to be more assertive with Lori, and it was this, Dr. Conacher believes, which lead to some relationship difficulties.

54 Based on my observations of the respondent while testifying, I find myself quite comfortable with the above description of him. In addition, unlike the disastrous performance of the applicant on the stand, the respondent impressed me as a person who was attempting to be as honest and forthcoming as one could expect in the circumstances.

55 The respondent attended for assessment at the Sexual Behaviours Clinic of the University of Ottawa School of Medicine. The conclusions and recommendations of that clinic were the following:

> There is no indication at this time that Mr. Kutz is suffering from major mental illness. The diagnosis of adjustment disorder with anxious mood and other interpersonal problems are consistent with a reaction to the stress he is undergoing as a result of the pending court appearance and the consequences of the result of the allegations made against him. At this time the disharmonious relationship he is experiencing with his wife and the problems of shared parenting support the diagnosis of interpersonal problems at this time. According to his history, there is greater than a two year period of depressed mood, together with low self-esteem, poor concentration and difficulty making decisions and overeating leading to obesity corroborating a diagnosis of dysthymic disorder which may be secondary to his marital and paternal difficulties.
>
> There is no indication from the assessment done that Mr. Kutz has any pedophilic arousal or incestuous interest. Most of his physiological responses were less than 10% of full erection and this may be partially explained by his current level of anxiety and preoccupation with the events surrounding his pending court appearance. In addition there were no cognitive distortions with regards to patterns typically seen in men who molest children. Our findings are in fact consistent with Mr. Kutz's contention that he has not had any pedophilic/incestuous interests. Though it may be impossible to absolutely rule out the possibility of Mr. Kutz having sexually assaulted his daughter, there is no objective evidence to suggest that such an allegation is highly likely for him. [underlining added]
>
> Based on our findings and after discussion with Mr. Kutz, it is our opinion that he does not have a profile that is consistent with one of the paraphilic disorders and no treatment is indicated at this time in the Sexual Behaviours Clinic...

56 According to representatives of the agencies which supervised the respondent's access to Melissa, commencing on May 15, 1990, such access was faithfully exercised and that the father and child enjoy a positive relationship and that the respondent is "appropriate and child-focused in his activities with her". In her testimony, Thea Young made it clear that the child was very glad to see her Dad. She noted no negative reactions and could recall no comments or conversations between the child and the respondent of concern or significance. It was also the evidence of the respondent and his family that the supervised access at the family home have gone equally well.

Conclusions

57 Without qualification or reservation, it is the finding of this Court that it was not proved that the respondent sexually abused his daughter or exposed her to inappropriate activity of a sexual nature.

58 Unfortunately, it is impossible to exclude the possibility of abuse. It is virtually never possible to do so. It is a tragic aspect of such situations that allegations which can be so easily and sometimes irresponsibly made are left hanging over innocent persons. One hopes that the intervention of professionals can be of significant assistance in confirming or refuting the allegations. To a large extent, this was sadly not so here. A troubling lack of fairness and professional caution rendered a great deal of the medical intervention part of the problem not part of the solution.

59 Despite having to be very hard on the applicant in this judgment, on balance, it is my finding that she honestly believed and, in fact, still fervently believes that the respondent abused their child. It would be speculation only to comment on why she was predisposed to believe the respondent capable of this. His past roughness with the child although contemptible is a very poor basis for such a belief. I recognize that from the outset to the end the medical intervention - apart from physical findings of abuse which did not exist - confirmed her worst fears. I hope that the applicant now recognizes that the investigative quality and value as evidence of much of the intervention was extremely poor. In fairness the comment should

be added that some of the techniques employed are innovative and those persons working in these areas are truly pioneers, struggling to improve their protocol and achieve legitimacy for their work.

60 In addition, the applicant may have been overly impressed by each doctor in turn reporting the incidences to the Children's Aid Society. She was likely unaware that the doctors' statutory obligation to report such allegations does not give them much latitude to pick and choose which cases to report. They certainly are not free to report only those cases which they think are well founded.

61 I am of the view that it is in the best interests of Melissa that access to the respondent as agreed to by the parties in their separation agreement be restored. I am also of the view that the restoration of such access must recognize and respect the honestly held concerns of the applicant about the safety of her child while with the respondent - even if this Court does not share those concerns. I therefore believe that during the next year special conditions must be attached to both custody and access rights. In part these conditions will be a strengthening through specifying of the consultive obligations that the parties agreed to in the separation agreement set out earlier in this judgment. I caution the applicant against assuming that conditions imposed on the respondent's access by this Court in anyway indicate that the child needs to be protected from him. *These conditions exist solely to assist in giving the applicant some peace of mind which ultimately is to the benefit of all including the respondent, and most importantly, Melissa*.

The Order

62 As of August 1, 1991, the access provided for in the separation agreement, dated December 28, 1989, shall resume subject to the following conditions being applicable to both custody and access for a period of twelve months:

> (1) The applicant shall forthwith or as soon thereafter as is reasonably practical upon discerning or being made aware of any utterance, physical condition or behaviour on the part of the child which causes her to suspect or believe that the child has been subject to sexual abuse, interference or exploitation or exposed to inappropriate sexual material advise the respondent of the details.
>
> (2) Upon being so advised the respondent shall receive the information politely and uncritically and shall forthwith or as soon thereafter as is practical, provide the applicant with any information which he has or is available to him which may be relevant.
>
> (3) The applicant shall receive the information politely and uncritically and shall be free to request further relevant information from the respondent which shall be provided by him forthwith or as soon thereafter as is practical; the applicant is free to disclose any information so received to any persons or agencies which may become involved and shall not conceal such information from such persons or agencies.
>
> (4) If, in the opinion of the applicant, it is appropriate to involve other persons or agencies, she shall advise the respondent of her intention to do so; the respondent shall respect the applicant's decision in this regard without negative comment; the respondent shall however have the right to contact such other persons or agencies independently or to attend on such persons or agencies at the same time as the applicant or applicant and child whenever practical and the applicant shall cooperate with the respondent in this regard. The purpose of the respondent contacting independently or accompanying the applicant and child to such other persons or agencies is solely for the purpose of being kept informed and for providing information which may assist such other persons or agencies. These rules shall be applicable so far as they are appropriate throughout the involvement of such persons or agencies.
>
> (5) The applicant shall have the right:
>
> > (a) to be informed in advance of the respondent's plans for the child during any access period including where the access will be exercised, who besides the respondent and child will be present and what the sleeping arrangements will be for the child. The respondent shall offer this information to the applicant without her having to request it.
> >
> > (b) to contact the child by telephone during access periods as frequently as she wishes and to be provided with any telephone numbers necessary for her to do so; the respondent shall do all that is reasonably necessary to accommodate and facilitate these telephone calls; so far as the respondent or his family are concerned, these telephone conversations shall be respected as private between the applicant and the child.

(c) to discuss fully in a benign manner access periods with the child both during these telephone calls and afterward.

(6) The respondent shall under no circumstances sleep alone in the same room as the child and he shall avoid so far as is practical being alone with the child when she is any state of undress; this condition is not to be interpreted as requiring the respondent's access to be supervised.

(7) The parties instead of or in addition to direct contact or in place of personal attendances may from time to time or for a particular purpose designate another person or persons to act on their behalf; any such person or persons must be willing to abide by the directions and restrictions set out in this order.

(8) Either party may apply to this Court on 4 days notice to have access further specified.

63 All the above is so ordered, There shall be no order as to costs.