

Allegations of Sexual Abuse and Risk of Harm: When is supervised access justified?

By Ken Nathens¹

Few family law issues pose the degree of emotional and legal difficulty as when one parent alleges that a young child has been sexually abused while in the care of the other parent. The Court faced with this allegation must perform a delicate balancing act between protecting the child, weighing the nature of the evidence regarding the claim of sexual abuse, and ensuring that the child has meaningful and safe contact with both parents.

A recent case decided by Justice Jarvis of the Ontario Superior Court in Newmarket illustrates a thoughtful and disciplined approach to dealing with this issue. In the case of *D. v. D.*² the 3.5 year old child in question allegedly made claims to her therapist, her mother, and to her mother's side of the family that she was being sexually abused while on access visits with her father.

The parties had been separated for a number of years, and the father exercised frequent, unsupervised access to the child pursuant to an informal agreement reached by the parties. Fearing for the safety of the child, the mother took the position that the father's access must be supervised. As a result, the father brought an emergency motion to the Court to re-establish his unsupervised visits.

This case was considered by Justice Jarvis to be high conflict. A number of professionals had already been involved with the parties and the child before the matter was before Justice Jarvis. The Office of the Children's Lawyer had written a report that made no mention of any concern about the child's safety when with the father. According to the OCL investigator who witnessed the child and father interact, the child had a good relationship with the father and recommended that the child continue with frequent unsupervised access visits. The Peel Region Children's Aid Society had knowledge of the allegations made by the child of sexual abuse but could not verify that any sexual abuse had taken place. Metro Toronto Police had interviewed the child on two occasions and it too was not able to verify that any abuse had taken place. Medical testing of the child was inconclusive as to whether or not sexual abuse had occurred.

Justice Jarvis thus had the difficult task of balancing the evidence that consisted of the statements allegedly made by the child to her mother, her therapist, and to mother's witnesses with the evidence of the professionals involved with the parties and the child.

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² *D. v. D.* 2015 ONSC 6240

Justice Jarvis determined that there was a low “risk of harm” to the child in permitting unsupervised visits to continue. His Honour was of the view that there was significant benefit to the child in having a meaningful relationship with the father. Although the mother did not accept the conclusions of the professionals involved that the allegations are unfounded or incapable of verification, there was no credible evidence that the child had been sexually abused. Therefore, Justice Jarvis denied the mother’s claim for supervised visits. Justice Jarvis also denied the mother’s claim for temporary custody of the child, perhaps over concern that the mother may be attempting to undermine the child’s relationship with the father.

This case is an excellent example of the importance of having objective, professional evidence presented to the Court in deciding custody and access claims. Rather than having to rely only on the competing affidavits of the parents Justice Jarvis was able to rely on the report of the Office of the Children’s Lawyer, the evidence of the Children’s Aid Society and the Police in making his decision. This case also illustrates the importance of the Court in making reasoned decisions in custody and access matters of utmost importance to a child’s physical and emotional well being.