IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *D.M.M* v. *T.B.M.*, 2006 YKSC 9 Date: 20060202
Docket No.: S.C. No. 02-D3464
Registry: Whitehorse

Between:

D.M.M.

Petitioner

And

T.B.M

Respondent

Before: Mr. Justice L.F. Gower

Appearances:

D.M.M.	On her own behalf
Kathleen Kinchen	For the Respondent
Laura Cabott	Child Advocate

REASONS FOR JUDGMENT

INTRODUCTION

[1] The petitioner mother has applied for a variation of her existing interim access order to allow supervised access by her new spouse, T.M, with her eight-year old male child, R. She also asks that T.M. be granted unsupervised access with the child in public places, such as churches, soccer games and shops and at events where other people are present. T.M. has effectively been denied access to R. since this Court's order of November 14, 2003, because of his alleged violence towards the mother and abusive behaviour towards R.

[2] The respondent father opposes both applications. He argues that the mother previously applied for essentially the same interim relief in April 2005 and her application

was denied. The father says there has been no compelling change of circumstances since then to justify the variation and that there continues to be a risk to R. if T.M. is allowed access.

[3] The child advocate supports the mother's application for supervised access only, largely because the child himself has recently expressed a desire for such access and because any risk is manageable by supervision.

ISSUE

[4] The issue is whether the mother has presented sufficient evidence to show that the existing state of affairs, that is the *status quo*, is unsatisfactory and not in the best interests of the child.

POSITIONS OF THE PARTIES

The mother's position

[5] The mother was unrepresented on this application, but was assisted by T.M., who made submissions on her behalf as her agent. Therefore, my reference in these reasons to the submissions of the mother may, from time to time, include submissions actually made by T.M. on her behalf.

[6] T.M. was charged with a common assault upon the mother in June 2004. He pled guilty to that charge and received a sentence of 11 weeks of pre-trial custody, as time served, plus eight months probation. Assuming he was given the usual two-for-one credit for his pre-sentence custody, that is equivalent to a jail sentence of approximately five months.

[7] However, T.M. advised me in this hearing that he has retained counsel with a view to obtaining leave to appeal that conviction and having it overturned. In any event,

since that conviction was entered, both the mother and T.M. have gone to considerable lengths to try to persuade me that the assault did not occur and that the charge was without foundation. Pursuant to an order of this Court, the mother obtained transcripts of the principal Crown witness on the assault, one Corina Butterworth. T.M. claims not to have received the complete statement of Ms. Butterworth as part of the Crown's disclosure of particulars prior to his decision to plead guilty. The mother argues that a careful review of Ms. Butterwoth's transcribed statement to the police indicates that she really did not have a clear view of T.M. assaulting the mother and that her evidence should be discounted as worthless. T.M. explained that he only entered the guilty plea because of the advice of his lawyer at the time and that it was the quickest way for him to get out of jail (I note that T.M. was then represented by the most senior criminal defence lawyer in Whitehorse, who is a counsel of considerable experience and reputation).

[8] I understand all these submissions were part of the mother's attempt to persuade me that T.M. should no longer be considered a risk to either the mother or the child. However, I as pointed out to T.M. at the hearing, as matters presently stand, I am faced with the fact of his guilty plea and the subsequent conviction. He is no longer presumed innocent. The guilty plea can only be seen as an admission by T.M. that the essential elements of the offence were made out and that he committed an assault upon the mother in at least one of the ways in which an assault can be proven under the *Criminal Code of Canada*. Therefore, it is of no consequence to me what the reason for his guilty plea was or whether the Crown's evidence is now perceived to be weaker than perhaps T.M. originally thought.

[9] The mother also points to the report of Dr. Lee Titterington, dated August 15, 2005, in support of her argument that T.M. no longer poses a risk to the child. This is evidence that was provided since the mother's previous application to allow T.M. access to the child in April 2005. In his two-page report, Dr. Titterington says that T.M. has been his client since mid-April 2005 and that he has seen him several times, for a total of 14 hours. Dr. Titterington holds a Master's Degree in social work and a Doctoral Degree in adult education and is a registered social worker in British Columbia. He claims to have been a "psychotherapist" for 30 years, providing counselling in the areas of trauma, addictions, mental health and violence. He says he has provided risk assessments in several provincial jurisdictions and the Yukon Territory. He stated that T.M. and the mother are committed to each other and plan to be married in the near future. He has met on two occasions with the mother and the child, R., for 4 hours. He believes that R. "feels a significant bond" with T.M. He concludes that T.M.'s risk of violence towards the mother or the child is "very low to non-existent". He recommends that a plan be implemented as soon as possible to integrate the family (the mother was then expecting, and subsequently gave birth to a daughter M. on September 5, 2005). Dr. Titterington recommended a gradual increase in the amount of supervised access by T.M. to the child R., with eventual "full integration" of the family, providing all goes well. He also recommended unsupervised access by T.M. at public functions.

[10] In her affidavit #18, the mother deposed to an incident on October 30, 2005, when the child R. was kicking a kitchen chair aggressively and was visibly upset. When she asked him why he was kicking the chair, he stated to her that he was "trying to kick through the barriers to get to [T.M.]" and said he missed T.M.

[11] Attached to affidavit #18 were two exhibits. The first was from the mother's family physician, Dr. S. Buchanan, who stated in her one-and-a-half page letter that she has known the mother for two years and that she has had dealings with both the mother and T.M. Dr. Buchanan expressed her opinion that T.M. should be allowed full access to R.

[12] The second exhibit was a letter from social workers Trish Luet and Jane Bates, dated November 15, 2005. That letter confirmed that on September 7, 2005, the Family and Children's Services Branch of the Department of Health and Social Services ("FCS") had received information from the Whitehorse General Hospital's staff, who were concerned about the mother's high level of stress after the birth of her daughter M., her apparent lack of bonding with M. and T.M.'s "controlling, over-reactive, aggressive and critical behaviour" directed towards the mother and/or the hospital staff. The social workers confirmed that they spoke with the chartered psychologist who prepared the Custody and Access Report in this action, and the Update to that report, G.S. Powter, about these concerns on September 9, 2005. Apparently, Mr. Powter told the social workers that he did not feel the child M. was at risk of harm. The letter went on to state that the social workers met with the mother, T.M. and the child M. on September 13, 2005. It was apparent to the social workers that both the mother and T.M. were experiencing a lot of stress, but that despite the stress "it appeared that you were both able to meet [M.]'s need adequately". As a result, the social workers concluded that there were no child protection concerns regarding M. The mother stated in her affidavit that this letter is "clearly an endorsement from Family and Children's Services" of the parenting skills of both her and T.M. Further, the mother argues that if FCS has no child

protection concerns regarding her daughter M., then it can also be inferred that they should similarly have no concerns about the couple jointly caring for the child R.

[13] Finally, the mother places considerable reliance upon para. 7 of the Custody and Access Report Update, dated September 15, 2005, where Mr. Powter states that “for a variety of reasons, [T.M.] still figured prominently in the boy’s mind.” She says this should be taken as evidence that R. misses T.M. and would like to be reunited with him.

The father’s position

[14] The father argues that the mother has been down this road before with her unsuccessful application in April 2005. Apart from the letter of Dr. Titterington in August 2005, the father says that there is no new objective evidence to support a variation. Further, to the extent that there is any evidence at all, it is insufficiently compelling to constitute a reason for a change. The father says the only thing that has changed since last April has been the passage of time. The facts that T.M. was apparently making a serious commitment to his relationship with her and that the couple were expecting a child were known at the time of that application. The father relies on a number of passages from the Custody and Access Report Update which indicate that the child has *not* told Mr. Powter that he personally misses T.M., nor does the child appear to be particularly suffering from the absence of T.M. in his life. As for the suggestions by the mother to the contrary, Mr. Powter says that this is not borne out by the evidence. Further, while it would not be unusual for T.M. to figure prominently in the child’s mind, especially if he is still receiving presents from T.M. and hearing about T.M. from his mother, there is presently little benefit to any contact between the child and T.M., especially when balanced against the possible risks from such contact. And the father

says that the risk is not simply limited to one of physical violence by T.M. against R. or the mother, but also the risk of the child being exposed to T.M.'s anti-social personality and his noted tendencies towards aggression and explosive behaviour (which I will return to in more detail later). Finally, the father says that the credibility of the mother and T.M. on the issue of T.M.'s level of risk will be a central issue at trial and it is entirely possible that this Court could rule that there be no contact between T.M. and the child on an ongoing basis. Therefore, to allow even limited supervised access by T.M. to the child at this interim stage would be confusing and detrimental to R., if that situation is reversed at trial.

[15] In summary, the father says first that essentially nothing has changed since the mother's unsuccessful application in April 2005. Second, there is no evidence that the *status quo* is unsatisfactory in the context of R.'s best interests. Third, to the extent that R. may have expressed a desire to visit with T.M., that should not be determinative of my decision. Finally, I must continue to have full regard for the clear concerns expressed by Mr. Powter about T.M.'s level of risk.

The child advocate's position

[16] The child advocate supports the mother only with respect to her application for supervised access by T.M. to the child. She continues to oppose any unsupervised access by T.M. in public places. She argues that there are four principal considerations on this application. First, whether the *status quo* is satisfactory; second, whether the level of risk can be effectively managed; third, whether there exists a compelling change in circumstances; and fourth, whether such a change would be in R.'s best interests.

[17] As for the *status quo*, the child advocate states that the child has told her that he does want to have contact with T.M. She also points to the awkwardness of the current situation, as deposed to by the mother in her affidavit #18. Obviously, when the mother accesses R., T.M. cannot be present. That has resulted in the mother and T.M. purchasing two different residences. When the mother has access to R., she resides at one residence and T.M. resides at the other. There is a further complication with the infant daughter M. I understand the mother is still breastfeeding M. However, R. does not wish to share his time with his mother with M. and prefers to be with his mother alone. That means that T.M. must keep M. with him while the mother exercises access to R., and occasionally this requires feeding M. formula which causes her cramps and diarrhea.

[18] Interestingly, I understood the mother to suggest that when M. is with T.M., this interferes with T.M.'s ability to work as a management consultant, which he does out of one of their homes. However, in contrast, T.M. claims to be very happy to have the care of his daughter, even to the point of saying that he would have her full time if he could. In any event, the situation is causing significant anxiety and stress for the mother.

[19] The child advocate also argues that it is unnatural for R. not to be having contact with T.M., when T.M. is the natural father of R's new sister. She points to the fact that Mr. Powter noted that R. feels that he is somehow to blame for the fact that T.M. has no contact with him and that this is likely causing R. some stress.

[20] As for the level of risk, the child advocate concedes that it still appears to remain the same today as it was when the mother made her application in April 2005, and ultimately the issue must be decided at trial. However, the mother says that the level of

risk can be managed by supervision, which would virtually preclude the possibility of any physical harm by T.M. to either the mother or to R. As for the risk of the child's exposure to T.M.'s alleged personality disorder, the child advocate says that this too can be minimized by supervision, and if it becomes a problem, then Family and Children's Services could be contacted to investigate. Finally, the child advocate argues that T.M. has a great deal to lose if something untoward happens during his supervised access with R. Therefore, given what is at stake for T.M., he would likely be highly motivated to monitor and control his own behaviour.

[21] As for whether there has been a compelling change in circumstances, the child advocate argues that the trial which was expected to take place this past November, shortly after the Custody and Access Report Update, has been adjourned, albeit at the request of the mother. It is now scheduled to take place in September 2006, which is a significant period of time away. Further, T.M. continues to remain in the relationship with the mother and his involvement in the family unit appears more permanent, particularly since the birth of their daughter M. That is to be contrasted with the relative uncertainty about whether the mother would continue her relationship with T.M. earlier in these proceedings.

[22] As for whether such a change would be in the best interests of the child, the child advocate argues that, according to Mr. Powter, the child is well-adjusted to the *status quo* and that this is a good basis for considering a move to supervised access by T.M. The supervision will minimize the risk and after all, it is R. who has expressed a desire to see T.M. Finally, the child advocate presumes that this change would be a positive one for the mother and that "what is good for the mother is ultimately good for R. as well". In

that sense, the mother's anxiety and stress should be relieved to a certain extent and the status of their family unit would become more normalized.

ANALYSIS

[23] The law in this area is relatively clear. Interim proceedings are not geared for a final determination of the issues and the merits of the case are not to be thrashed out at this stage, particularly not on matters of substance: *Newson* v. *Newson*, [1998] B.C.J. No. 2906 (BCCA), at para. 11.

[24] In *Hama* v. *Werbes,* [1999] B.C.J. No. 596 (BCSC), Martinson J., at para. 12, noted the need for a "compelling change of circumstances" in order to justify a variation of an interim order.

[25] When one of the main issues in the case is expected to be based on an assessment of credibility, then the determination of that issue should generally await the trial, when a full assessment of the credibility of the parties and their witnesses can be made: *Kyung* v. *Bowman*, [1998] B.C.J. No. 21 (BCSC), at para. 13.

[26] Courts should be slow to interfere with any order on interim custody (and in this case I would add any order on interim access) and generally any substantial changes should only be made after trial: *Eaton* v. *Eaton*, [1987] B.C.J. No. 2217 (BCCA).

[27] Finally, parties seeking to alter a child's *status quo* must present evidence to show that the existing state of affairs is unsatisfactory and not in the best interests of the child before that state of affairs should be changed: *A.H.P*. v. *C.A.P*., 1999 BCCA 203, at para. 25. Further, it is important to recognize the stability of the child's life and not to quickly substitute an uncertain situation for a certain one. In general, when looking to the health and emotional well-being of a child, courts will almost always prefer those

circumstances which will create “the most stable, least disruptive environment for the child” (*A.H.P.*, at para. 23) and one which carries the least risk for the child (*Prost* v. *Prost,* [1990] B.C.J. No. 2487 (BCCA)).

[28] It must not be forgotten that the mother’s problems with T.M. began in late September 2003, when Family and Children’s Services became involved in an investigation of alleged abuse by T.M. against the child R. At one point FCS was intending to seek a six-month supervision order. Then, in late October 2003, the mother filed an application for an emergency intervention order under the *Family Violence Protection Act*, R.S.Y. 2003, c. 84, alleging violence in the form of assaults and sexual assaults by T.M. against her. The order was granted; however, in November 2003 the mother successfully applied to a deputy judge of this Court to have the order revoked. The FCS application for a supervision order was discontinued when the father obtained interim custody of R. in mid-November. Then, in mid-December 2003, the mother again complained of violence in a sexual context and harassment by T.M. against her and she obtained a second emergency intervention order. Once again, she applied to this Court to revoke that order, but was not entirely successful. About that time, T.M. left the Yukon to attend a Christian-based treatment program in Ontario. Upon his return, she reconciled with him.

[29] Further, T.M. has a criminal record of 26 convictions between 1992 – 2004. Those convictions include sexual assault (x2), assault causing bodily harm, common assault (x4), fraud (x6), attempted fraud (x2) and breach of probation (x9).

[30] It is largely for the foregoing reasons, as well as the assault conviction in 2004 and the interim opinions of Mr. Powter, that access by T.M. to R. has been denied to date.

[31] While there is some new evidence to support the mother's claim for supervised access by T.M., it is far short of compelling. The report of Dr. Titterrington is very brief, being limited to two pages. His qualifications include a Master's degree in social work and a Doctoral degree in adult education. While he refers to himself as a "psychotherapist" with 30 years of experience in the field, he is neither a psychologist nor a psychiatrist. Further, Mr. Powter reviewed Dr. Titterington's report and spoke with him about it. At para. 161 of the Custody and Access Report Update, Mr. Powter offers the following critique of Dr. Titterington's report:

> "Dr. Titterington appears to have considerable experience in family counselling, but he agreed that his work with [T.M.] – including his assessment of risk submitted to the court – was constructed from a humanistic vantage point. He stated that he had been focusing on the strengths in the couple rather than sceptically or scientifically assessing the conflicts and risks. He had not completed any measures of risk and had not checked the veracity of any of [T.M.]'s statements. He also stated that he had not directly pushed [D.M.M.] to establish her sense of safety in the home, and had not done any collateral checks on [R.]'s statements."

[32] The mother provided no response to this critique. Therefore, I have no reason not to accept at face value Mr. Powter's view of the strength of Dr. Titterington's work at this interim stage.

[33] In contrast, Mr. Powter's assessment of T.M. in the Custody and Access Report Update was relatively extensive and comprehensive. That assessment including Mr. Powter's review of a number of previous psychological assessments of T.M., including some provided by T.M. himself, at least one psychiatric assessment, a

previous judgment involving T.M. in Ontario in 1996, a transcript of the proceedings of T.M. in Yukon Territorial Court in relation to the assault on the mother, the emergency intervention order summaries of 2003, T.M.'s criminal record, a detailed written explanation from T.M., retractions of assault complaints against T.M. by two complainants, press clippings and media transcript of reports regarding T.M., a John Howard Society assessment regarding T.M. and collateral letters of support for T.M. In addition, Mr. Powter indicated that he spent 11 hours in direct contact with T.M., far exceeding the psychological practice standard of 4.7 hours of interview time per adult.

[34] Further, Mr. Powter administered 3 separate psychological tests upon T.M. He noted, at para. 119 of the Update, T.M.'s score pattern was consistent with individuals clinically judged to have a personality disorder with histrionic, narcissistic, antisocial and sadistic elements. Mr. Powter also noted that such individuals are described in the psychological literature as "generally hostile and pervasively combative, and they appear to be indifferent to or pleased by the destructive consequences of their contentious, abusive and brutal behaviour" (para. 124). Further, such persons are "not inclined to see psychotherapy as valuable unless it offers a tangible material benefit, such as a way out of a jam" (at para. 125). Mr. Powter concluded that T.M.'s overall diagnosis is that he has "an Antisocial Personality Disorder with anxious features" and he will likely have repeated trouble with rules, authority and conduct issues (at para. 127).

[35] He states that the child R. does not particularly suffer the absence of T.M. and that there would be little benefit to contact between the child and T.M. in comparison with the dangers of subjecting the child to the possible gravity of T.M.'s antisocial personality disorder (at paras. 180 to 182). Further, although both the mother and T.M.

now claim the alleged episodes of violence never happened, Mr. Powter concludes that it would seem “a dangerously unnecessary gamble to place a child in an environment where these *allegations* continue to occur. It is difficult to believe that *something* is not provoking the repeated allegations of violence” (para. 184, with his emphasis). Finally, Mr. Powter concludes that a decision to hazard contact between T.M. and the child R. “simply seems untenable” at the present time (para. 186). As I have noted, the Update was prepared on September 15, 2005 and is therefore still relatively timely.

[36] In general, while it is difficult if not impossible to assess the credibility of Messrs. Titterington and Powter at this interim stage, on the face of the evidence provided to me thus far, I prefer the more comprehensive and detailed opinion of Mr. Powter over that of Dr. Titterington with respect to T.M.’s perceived level of risk.

[37] As for the support of the mother’s family physician, I confess that I was somewhat surprised by Dr. Buchanan’s apparent readiness to side with the mother and T.M. in this custody dispute. She is obviously prepared to conclude that T.M. should be allowed full access to R., but provides no basis for that opinion. Although she refers to having had “dealings” with the mother and T.M., she does not say how much time she has spent with T.M. or whether she has even interviewed him in particular about the issues before this Court. Indeed, Dr. Buchanan even goes so far as to state that as a “medical professional …I do strongly believe that [R.] should be in [the mother]’s custody.” I do not know whether she intended to opine that R. should be in the mother’s custody to the exclusion of the father, but such a bold-faced conclusion largely without any stated factual foundation, seems quite alarming, especially when coming from a general practitioner, whom I assume has had only limited exposure to the disciplines of

psychology and psychiatry. Finally, Dr. Buchanan states “it is clear from [the mother] as well that her ex-husband as been abusive to her at one time and tied her up with an electrical cord. This is by [the mother’s] report.” Once again, I am disturbed that the doctor would be so ready to accept such an allegation as “clear”, and therefore implicitly as true, particularly when it was made in the midst of a drawn-out and acrimonious custody dispute. In short, for these reasons, I am unable to place any weight upon Dr. Buchanan’s report at this interim stage.

[38] As for the mother’s reliance upon the letter from Family and Children’s Services dated November 15, 2005, which I have quoted above, I do not accept this as “clearly an endorsement” from FCS of the parenting skills of the mother and T.M. Rather, the obvious purpose of the letter was to confirm that FCS had received information of complications with the mother and T.M. following the birth of their daughter M. Following some preliminary investigative steps, FCS concluded that there were no child protection concerns regarding M.

[39] Thus, I am not satisfied that the mother has presented sufficient evidence to make a compelling case that the *status quo* is unsatisfactory and not in the best interests of R. Nor is there any suggestion that R. is in some way at risk if the *status quo* continues until trial. On the contrary, Mr. Powter is of the view that “the boy is doing quite well and coping with the situation in the family homes” (at para. 152). Further, he stated at para. 166:

> “*[R.] is older and more aware of the situation*, but despite the difficulties this might entail, the child still seems to be handling this very difficult situation quite well. Both parents deserve credit for this and there is no immediate reason to assume he will have a harder time as the situation

> progresses, unless the parents start over-involving him in their battles." (his emphasis)

[40] While I appreciate that the current situation is no doubt extremely awkward and unnatural for the mother, R., M. and T.M., to respect the prohibition against contact between T.M. and R. while the mother exercises access, that inconvenience and awkwardness is not in itself sufficient reason to support a variation. It is not the best interests of the mother, T.M., or even M. which are at stake here. Rather, it is the best interests of R. which must be paramount.

[41] While Mr. Powter does state that it would be in R.'s best interests to have a normalized relationship with his new sister, he questions at the same time how that may be achieved without contacting T.M. (at para. 189). However, there is nothing in the current state of affairs with prevents R. from having as much contact as he wishes (within the scheduled times) with his mother and sister. The fact is that R. apparently prefers to spend time with his mother alone during access time. Given that R. is only eight years old, I expect that his views about his baby sister may change from time to time and that gradually he may come to appreciate spending more time with her, and doing so would not necessitate contact with T.M.

[42] I am also not content to rely upon the submission of the child advocate that if there are problems with R. being exposed adversely to T.M.'s alleged personality disorder, that the check and balance here would be the potential involvement of Family and Children's Services. Who is likely to contact FCS in the event of a perceived problem? Almost certainly not T.M. and not likely the mother, due to her apparent attachment to T.M. Eight-year old R., of course, is far too young to initiate such contact. That would leave the supervisors, who, depending on their relative expertise and

independence, may or may not perceive a problem and may or may not be willing to overlook any problem which is perceived, in an effort to give T.M., with whom I assume they would have an existing relationship of some kind, the benefit of the doubt.

[43] I have seized myself of this matter and I fully appreciate that the assessment of credibility of the parties and their respective witnesses must await a full testing of the evidence at trial. However, I am not oblivious to the fact that Mr. Powter felt it was important to note, at para. 102 of the Update, that T.M. was described by Killeen J., in an earlier judgment against him, *M. v. M*, 1996 CarswellOnt 1101, as a "master manipulator". At para. 103, Mr. Powter continued that several psychological assessments of T.M. have judged him to be "cunning", "manipulative", and "deceitful".

[44] In addition, Mr. Powter noted, at para. 145, that R. indicated that he knows "[T.M.] isn't mad" about the fact that he is separated from R. as R. "gets presents from [T.M.]" and "hears all about how much [T.M.] likes [him]" from the mother. I find this observation particularly troubling, given that I previously dealt with this issue in my reasons for judgment filed April 21, 2005: *D.M.M.* v. *T.B.M.*, 2005 YKSC 21. Because of the importance of the point, I will repeat what I said in that decision at paras. 30 and 31:

> "[30] Also, notwithstanding the no contact order, the respondent has made allegations in his affidavit #14, at paragraph 23, that the petitioner and T.M. continue to involve T.M. in the child's life. For example, the child has apparently indicated, on an unsolicited basis:
>
> a) T.M. and the petitioner jointly purchased chocolate advent calendars for the child before Christmas 2004;
> b) T.M. purchased soccer goalie gloves for the child;
> c) T.M. set out Easter eggs for an Easter egg hunt for the child in March 2005;
> d) T.M. and the petitioner jointly purchased a bicycle for the child to which T.M. attached training wheels.

> [31] The petitioner received the respondent's affidavit #14 late, and only had a brief opportunity to reply. She stated that her failure to respond to all the allegations in that affidavit does not signify her agreement with them. Nevertheless, she went through the affidavit and made specific responses to various paragraphs. She particularly noted paragraph 23, but took no issue with the allegations, other than to generally complain that they were not being made in a timely fashion. *If those allegations are true, they are very disturbing, as they indicate that T.M. is trying to ingratiate himself into the child's life, perhaps even trying to manipulate the child, in circumstances where he clearly should not be doing so*: First, the order of Veale J. of July 14, 2004 clearly said the petitioner shall not speak about T.M. with the child or in his presence. Second, while in Court on October 8, 2004, after I referred to the recommendation in the Custody and Access Report that the petitioner should refrain from pushing the importance of T.M. onto the child, I asked T.M. whether I needed to hear from him and he said:
>
> > "Only to assure you in your mind and heart that I won't leave gifts or pass gifts or any indirect, so I will be out of that equation. What they do is between mother and son. I won't encourage any, I will put it that way, Your Honour."
>
> Third, the gift giving, if proven, could constitute indirect contact under the peace bond."
>
> (emphasis added)

[45] Notwithstanding that the mother and T.M. were specifically warned by me against such future conduct, the evidence of Mr. Powter in the Update indicates that both the gift-giving by T.M. and the mother talking about T.M. with the child may be continuing. If true, such conduct is perilously close to contempt of court. Further, that type of conduct, if proven, no doubt contributes greatly to why Mr. Powter found that T.M. *figures prominently* in R.'s mind (at para. 7 of the Update), a fact which the mother relies upon heavily in support of her argument that R. misses T.M and would like to be reintegrated with him.

[46] Indeed, this alleged conduct of T.M. and the mother may also be causally connected to the fact that R. now tells the child advocate he wishes to have contact with T.M. If all that is true, and of course, that likely won't be known until trial, it paints an unsettling picture of the possibility that the child is continuing to be manipulated by T.M., the mother or both. Thus, the prospect of allowing T.M. supervised access gives me even more reason to fear that such manipulation could continue and possibly increase, with a view to having an impact on the outcome of the trial. In short, out of an abundance of caution on this point, I am not prepared to risk that possibility at this interim stage.

[47] Finally, when pressed on the point, the child advocate candidly conceded that had the child not indicated to her that he was interested in contact with T.M., she likely would not have supported the mother's application for supervised access by T.M. In other words, this fact seems to have been pivotal in prompting the child advocate to make the arguments she has in support of supervised access. However, I agree with the father's counsel that this decision should not to be based upon the wishes of an eight-year old child. I must look objectively to the evidence and the circumstances in order to assess what is most likely to be in R. best interests.

CONCLUSION

[48] I conclude the existing state of affairs provides the most stable and least disruptive environment for the child, and it is therefore in R.'s best interests that the *status quo* continue until the trial. Accordingly, I dismiss the mother's applications on T.M.'s behalf for supervised private access, and unsupervised public access, to the child R.

[49] Given that the trial has been adjourned to September 2006, I feel it would be helpful to have a further update to the Custody and Access Report prepared and I hereby make that recommendation pursuant to s. 43(2) of the *Children's Act*, R.S.Y. 2002, c. 31. However, assuming such an update is done, I do not wish to prejudice the mother's opportunity to make her case that contact by T.M. with R. is in R.'s best interests.

[50] I note that when Mr. Powter prepared his Update of September 15, 2005, he was unable to interview T.M. in the presence of R. or observe any contact between them. I understand that the possibility of such contact was discussed by Mr. Powter with the parties, but was rejected for two reasons: first, there was T.M.'s recognizance under s. 810 of the *Criminal Code* preventing contact; and second, the father was concerned that permitting such contact might be used against him as evidence that T.M. was not a genuine risk to R.

[51] As for T.M.'s recognizance, which prevents him from having direct or indirect contact with R., it is subject to any further order of this Court. Therefore, if I order that T.M. may have contact with R. for the limited purpose of preparing the second update, the recognizance will not be an impediment to such contact (incidentally, I wish to draw the parties' attention to the fact that this recognizance is due to expire on August 19, 2006, unless it is renewed before then). Further, since I am considering this order on my own motion, there should be no prejudice to the father's position at trial.

[52] Therefore, for the purposes of this second update, I order that the author retained for that purpose (whom I expect to be a chartered psychologist) may, in his or her discretion, decide whether it would be beneficial to allow contact between T.M. and R.

for the specific purpose of preparing the update. If so, then I expect it would be the author who would effectively act as a supervisor during any such periods of contact. Further, given that I do not expect this form of access would likely occur for a number of months, through discussions between the author and the parties, I expect that R. can be given sufficient advance notice to minimize any surprise or awkwardness.

[53] Given that the mother is currently unrepresented, I would ask the father's counsel to prepare an order to reflect the matters I have decided in these reasons. The mother's signature approving the terms of the order is dispensed with, however the draft order should be brought to me for approval before being filed.

[54] Costs were not spoken to at the hearing. If anyone wishes to address me on that issue, I will remain seized and a further hearing can be arranged through the trial co-ordinator.

GOWER J.