

Case Name:  
**K.J.B. v. S.M.**

**Between**  
**K.J.B., applicant, and**  
**S.M., respondent**

[2006] O.J. No. 1090

2006 ONCJ 87

146 A.C.W.S. (3d) 499

Milton Registry No. 423/05

Ontario Court of Justice

**T. Wolder J.**

Heard: February 9, 2006.

Judgment: March 1, 2006.

(17 paras.)

*Family law -- Custody and access -- Access -- Denial or interference with -- Considerations -- Best interest of child -- Parental alienation -- Motion by estranged father for temporary access allowed -- Gradual reintegration of access to children was in their best interests -- Award structured to minimize mother's ability to interfere with father's access.*

*Family law -- Maintenance and support -- Spousal support -- Interim support -- Needs and means test -- Cross-motion by mother for interim spousal support allowed -- Mother's ability to work was matter to be determined at trial -- Present need entitled mother to temporary support.*

*Motion by the father for temporary specified access to his children and ancillary relief -- Cross-motion by the mother for temporary spousal support -- Parties separated after nine years of marriage with two children, ages two and four -- Mother frustrated father's past access by imposition of unrealistic conditions -- Mother was highly educated but did not work and placed children in private pre-school full-time -- Father submitted that mother suffered from mental instability that caused her to act contrary to children's best interests --*

*Mother complained of domestic assault and alleged that the father was intoxicated in presence of children -- Children's Aid Society found no evidence to support allegations -- Assault matter was presently before criminal court -- Parties agreed that access should resume, but disagreed on terms -- HELD: Motion and cross-motion allowed -- There was no evidence of misconduct by the father sufficient to warrant interference with the children's right to a consistent and meaningful relationship with him -- It was in best interests of children to remedy separation from father -- Rate of reintegration should be gradual, but not bar the children's right to enjoy a reasonable amount of time with their father -- Access arrangement structured to prevent ongoing interference by mother -- Mother possessed academic tools for gainful employment, but either chose not to work, or was unable to do so due to mental illness -- Issue could not be determined until trial, but mother's present needs entitled her to temporary spousal support at guideline amount.*

**Statutes, Regulations and Rules Cited:**

Child Support Guidelines, O. Reg. 391/97,

**Court Summary:**

*Access to child -- Form of order -- Graduated access -- Adaptability of young child -- In past, mother had frustrated father's access by imposing unrealistic conditions to which father refused to submit, resulting in father's not having seen children for past 9 months -- Now both parents agreed that children should be allowed to enjoy meaningful relationship with father, but mother wanted gradual reintroduction -- Court concluded that, generally at ages of 2 and 4 years, children were extremely resilient and, although access reintegration should be graduated, rate of re-integration should be rapid and child-focussed and not become tool to deny children their right of reasonable access to their father much longer -- Nevertheless, direct contact between parties needed to be minimized to curb mother's ability to interfere with father's access in future.*

*Access to child -- Grounds -- Conduct of parent -- Alleged spousal assault -- In context of domestic dispute where mother had repeatedly frustrated father's access to children, fact of father's alleged assault on mother that was still pending before criminal court should not constitute basis for denying father normal access relationship with his children -- At this interim stage, court was not satisfied that it had any evidence of father's misconduct that justified interference with his children's right to have consistent and meaningful relationship with their father.*

*Support orders -- Interim support -- Grounds -- Doubt about entitlement -- Mother had 4 university degrees and both of her children (2 and 4 years of age) attended Montessori school on full-time basis, 5 days per week, but she did not work -- Instead, she mainly stayed at home watching television and regularly went out to exercise at fitness clubs -- It would be premature, on basis of conflicting evidence, for motions judge to determine with any degree of certainty why she was not working -- Question of her mental stability should be reserved for trial judge -- Until then, mother should be given benefit of doubt -- At this interim stage, reality was that mother had present need, had no income and was entitled to*

*some temporary spousal support -- Court ordered father pay mother monthly interim spousal support of \$1,500 for 12 months or until trial, whichever event came first -- This would allow mother enough time to become gainfully employed or to persuade court that she was unemployable for reasons beyond her control (such as mental health) -- Short-term nature of interim order would also discourage mother from delaying case.*

**Statutes cited:**

Child Support Guidelines, O. Reg. 391/97 [as amended].

**Counsel:**

Brendan R. Neil for the applicant mother

Steven D. Benmor for the respondent father

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**1 T. WOLDER J.:**-- In his motion of 30 January 2006, the respondent father seeks an order for temporary specified access to his two children, M.G.M. (DOB) and M.R.M. (DOB), together with other relief. The applicant mother has filed a cross-motion seeking temporary spousal support, temporary child support and special expenses.

**2** The parties have now agreed that a temporary order should issue for the primary residence of the two children to be with the applicant mother. They have also agreed that a temporary order should issue for the relief sought in paragraphs 3, 4, 5, and 6 of the respondent father's motion. The parties have also agreed that the respondent will pay \$1,544 per month for temporary child support for the two children as requested in paragraph 3 of the applicant mother's cross-motion. The only issues remaining are that of the father's claim for temporary access and the mother's cross-claim for temporary spousal support. The mother has agreed temporarily to withdraw her request for temporary special expenses.

**1: BACKGROUND**

**3** The parties were married on 27 December 1996 and separated nine years later on 25 February 2005. This was the first marriage for the applicant mother and the second marriage for the respondent. Two children were born from this relationship, namely, M.G.M. on (DOB), now 4 years of age, and M.R.M. on (DOB), now 2 years of age.

**4** Although both parties now agree that both children should be allowed to enjoy a meaningful relationship with their father, the mother has frustrated such access in the past and has imposed unrealistic conditions, resulting in the father's not having seen his children since June 2005. Even an arrangement for Christmas 2005 access fell through when the mother decided to impose unilateral conditions upon the father that the father could not accept.

**5** The applicant mother is well educated. She has four university degrees. Yet she does not work. Both children attend MTS school full-time, notwithstanding their young ages. The applicant mother generally stays at home watching television and going out to fitness clubs to exercise.

**6** The father claims that the mother suffers from a mental illness or mental instability that has caused her in the past to act aberrantly and contrary to the best interests of the children. By way of example, the father claims that the mother changed the children's schooling arrangement unilaterally without consulting with the father, causing great disruption to the children's educational plans and great financial cost to the family.

**7** The mother complained that the father assaulted her early in 2005. This complaint caused the father to be charged criminally for assault. That matter is presently before the criminal court.

**8** The mother has made complaints about the father to the Children's Aid Society, including allegations that the respondent is intoxicated in the presence of the children and consumes alcohol to excess. These were investigated by the children's aid society, which found no evidence to support the allegations.

**9** Although the mother now agrees that access to the father should be reinstated, she argues that such reinstatement should be very gradual since the children have not seen their father since last June.

## **2: ANALYSIS**

**10** Since both parties now agree that access by the father to the children should resume, I will not dwell on the reasons why the father's access stopped last June.

**11** After considering all the evidence filed and submissions heard, I find that, since the birth of the children until June 2005, the respondent father has been engaged with the children and that his ability to continue a meaningful relationship with the children since June 2005 has been frustrated by the mother. The fact that the assault proceeding continues before the criminal court should not constitute a basis for denying the father a normal access relationship with his children. Although the criminal proceeding will be determined on the basis of the evidence placed before the criminal court, I am not satisfied that there is any evidence before this court of misconduct on the part of the father sufficient to warrant an interference with his children's right to have a consistent and meaningful relationship with their father.

**12** The children are two and four years of age. I find that, generally, children of that age are extremely resilient. They have been denied their right to have a relationship with their father since last June. This situation needs to be remedied very quickly in the best interests of the children. Although I agree that the reintegration of access should be gradual, I am not persuaded that the need to restore the access on a graduated basis should bar the children's right to enjoy a reasonable amount of time with their father very quickly. In other words, the rate of re-integration of the children with their father should be child-focussed

and should not act as a tool to deny the children their right of reasonable access to their father much longer. I am of the view that any access arrangement should be structured in such a way as to prevent the ability of the mother from interfering with the father's access in the future. Therefore, until the Office of the Children's Lawyer is able to report to this court, I am of the view that it would be in the best interests of the children that the contact between the parties for the purpose of access be kept at a minimum.

**13** With respect to the issue of spousal support, there is no doubt that, if the mother's mental health is sound, with four university degrees she should have no difficulty in securing lucrative employment and thereby being able to support herself. The present reality is that the mother does not work. Although both children attend school full-time, five days per week, the mother mainly stays at home and mainly watches television and regularly goes out to exercise when the children are not at home.

**14** The issue of the state of the mother's mental health cannot be determined at this stage. If she is mentally ill, as the father alleged, then this may very well explain some of her strange past behaviour and her present inability to seek and to find gainful employment, notwithstanding her numerous university degrees. A finding to this effect will have a bearing both upon the issue of the mother's need of spousal support and the issue of custody and access. If it should be found that the mother is not mentally ill but merely chooses not to work, notwithstanding that she possesses the academic tools for gainful employment, then such would be a basis for the father's successfully being able to argue that the mother is not in need of and that, therefore, he should not have to pay spousal support for the mother. The fact that the mother either chooses not to work, although she is able to work, or cannot work on account of a mental illness, will also have some impact on the custody and access issue.

**15** It is my view that this court must decide the issue of temporary child support based upon the present realities, which are that the mother is not working and has no income. It is premature, on the basis of the conflicting evidence before me, to determine with any degree of certainty why the mother is not working. However, until that issue can be determined at trial, I find that the mother should be given the benefit of the doubt. Therefore, she has a present need and is entitled to some temporary spousal support. Since the father is already paying and has agreed to continue to pay the sum of \$1,544 per month for support of the two children to the mother, based on his income of \$129,000 per year, and since the quantum of spousal support must be considered after the amount of child support has been determined, I find it appropriate that the father pay to the mother for temporary spousal support, the sum of \$1,500 per month for a period of 12 months or until the trial of this case, whichever shall be the earlier event. This amount is determined without a DivorceMate spousal support calculation being provided but reflects an income split of less than 50% in favour of the mother. This will then give the mother sufficient time to become gainfully employed or to prove to this court that she is not capable of being employed on account of her mental health or for other reasons beyond her control. The short duration of this temporary order will also act as an incentive for the mother not to delay this litigation.

### **3: CONCLUSION**

**16** This court orders that:

1. The children, M.G.M. (DOM) and M.R.M. (DOM), shall have their primary residence with the applicant.
2. The respondent's access to his two children shall be reinstated immediately as follows:
  - (a) Commencing 3 March 2006 until 17 March 2006, the respondent shall pick up the children from school on Fridays between 4:00 p.m. and 6:00 p.m. (subject to the requirements of the children's school) and deliver them to any neighbour or friend whom the applicant designates, on the following day, (Saturday) at 8:00 p.m., who shall return them to the applicant; and the respondent shall pick up the children from school on Mondays and Wednesdays between 4:00 p.m. and 6:00 p.m. (subject to the requirements of the children's school) and deliver them to any neighbour or friend in Oakville whom the applicant designates, at 8:00 p.m. who shall return them to the applicant; and,
  - (b) Commencing on 24 March 2006 and on alternating weekends thereafter, the respondent shall pick up the children from school on Fridays between 4:00 p.m. and 6:00 p.m. (subject to the requirements of the children's school) and deliver them to school on Mondays between 7:00 a.m. and 9:00 a.m. (subject to the requirements of the children's school) (such day to be extended in case of a Statutory holiday) and the respondent shall pick up the children from school on Wednesdays between 4:00 p.m. and 6:00 p.m. (subject to the requirements of the children's school) and shall deliver them to school on Thursday morning between 7:00 a.m. and 9:00 a.m. (subject to the requirements of the children's school), to continue until further order of this court or until the criminal proceeding has been completed, when this access arrangement may be further reviewed.
3. Each party shall be entitled to information regarding matters relating to the well-being of the children, including health, education, religion and extra-curricular activities and both parties shall have the same right to obtain all educational, medical, and religious records of the children, as well as the right to discuss the welfare of the children with the children's doctor, teacher, counsellor, therapist or spiritual advisor or others who are involved with the children, subject to the children's right to have their communication with doctors, therapists and spiritual advisors kept confidential from their parents.

4. Neither party shall change the children's residence or school without the consent of the other.
5. Neither party shall discuss with, or near the children, any matter related to the criminal or family court proceedings or any subject related to the conflict between the parties that resulted in their separation; indeed on the contrary, each party shall recognize that the children need to love and respect both parents and that the welfare of the children is best served by their mutual co-operation as partners in parenting, and by each of them providing a home to the children in which they are loved and to which they belong; each party must acknowledge that the other party is a devoted and loving parent and he or she further acknowledges that it is essential to the welfare of the children that they each have close communication and contact with the children as is reasonably possible, commensurate with the best interest of the children.
6. The respondent shall continue to pay to the applicant child support for the children of the marriage -- M.G.M. (DOB) and M.R.M. (DOB) -- in the sum of \$1,544 per month based on the table amount under the *Child Support Guidelines*, O. Reg. 391/97, as amended, for two children based on an income of \$129,200 per year commencing on 1 March 2006.
7. The respondent shall pay to the applicant for the temporary support of the applicant, the sum of \$1,500 on the first day of March 2006 and continuing on the first day of each month thereafter to and including the first day of February 2007.
8. All payments shall be made to the Director of the Family Responsibility Office.
9. A support deduction order shall issue.

**17** If either party seeks costs, counsel shall serve and file a written submission on the issue of costs within 30 days and I will then decide the issue of costs based on the material filed unless either party or counsel should seek leave to present oral submissions on the issue of costs.