**34 Days, Two Experts and an Overnight: a Critique of *M v F,* 2013 ONSC 6089 and *M. v. F.*, 2015 ONCA 277**

Esther L. Lenkinski and Shawn Richard

## Introduction

In many ways this particular case is a demonstration of the failure of the judicial system to adequately address custody and access in high conflict cases. It is noteworthy that the parties' main issue was whether or not there should be overnight access to a five year old child when there was a history of unsupervised and uneventful access. The trial was 34 days long and there was a subsequent appeal.

An assessment report was ordered and the assessor in fact produced two reports which were dated just over a year apart with the last report being an update immediately prior to trial. The mother accepted the findings in the report but did not accept the conclusion and recommendations. She retained her own 'expert', Dr. Jaffe, an expert who had not met the parties but criticized the assessors report for being fundamentally flawed because of its methodology.

The parties communicated with each other extensively on email and text messaging in ways that were criticized by the trial judge as demonstrating a sustained and persistent desire on each side to undermine and damage the other's well-being and self-confidence. There were over 5000 emails and texts produced, and of those admitted into evidence at the trial, Justice Whitaker commented that the emails were inappropriate and emotionally damaging. He found that both parties had subjected the other to emails that were harassing and intimidating. He concluded that the parties were both responsible for emotional and psychological abuse and shared responsibility for same.

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The issue of credibility is crucial in this case as the trial judge preferred the evidence of the mother but did not find either party to be particularly credible. He found that both parties had misled the court in an effort to further their individual agendas.

This case is important in that it underlines a number of very important issues and conclusions regarding in family law.

1. The maximum contact principle – the court will ensure that a child is offered the maximum contact with both parents that is safe for the child and recommended as being in the child's best interests;

2. The court is not statutorily required to make a determination of custody. Since such language frequently denotes a winner and loser, in high conflict cases a multidisciplinary approach which does not use the word 'custody' may be preferred.

3. The report of an expert who has not met the parties and who on the basis of methodology critiques the report of another expert who has had extensive contact with the parties is of little value to the court. The criteria of 'helpfulness' previously considered is rejected as being too low a standard for the admission of such evidence and such reports should not be admitted into evidence. Critique evidence is rarely appropriate, has little probative value, unduly increases the expense of and lengthens a trial and raises the animosity between the parties.

4. Evidence of physical violence that is dated; evidence of a personality disorder that is problematic for parenting and evidence of heavy use of alcohol during a past period that did not impact on the child will not necessarily disentitle a parent from overnight access

particularly when there is a history of access to the child that has occurred without incident over a lengthy period of time.

5. A history of toxic electronic communication may not be sufficiently persuasive to deter a court from following an expert's recommendations even when it is clear that the parents are caught in a high-conflict dispute and there is irrefutable evidence that the conflict has had a negative impact on the child's well-being. Such evidence will not necessarily compel a court to exercise its discretion to make a custody award.
6. A trial judge is not found to be delegating his authority by accepting the recommendations of the assessor particularly when the expert report was detailed and comprehensive.
7. The argument that the trial judge's reasons were insufficient after a lengthy trial will likely be viewed as a surreptitious complaint that the judge's findings of fact were incorrect and may increase the likelihood that an appeal will be dismissed on that ground.
8. Parties may be required by a court to participate in a private dispute resolution mechanism to address the implementation and maintenance of the accepted parenting plan if there is evidence that the parties consented to same.
9. The parties spent over $2 million in the proceedings to address overnight access. While substantial costs awards may be made to address unreasonable behavior in custody and access disputes when the successful party to the dispute has behaved unreasonably the costs award may be reduced in the discretion of the trial judge.

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**FACTS**

M. v. F. was primarily about one issue: overnight access. It was as Justice Whitaker referred to as "the most significant and critical issue" and most of the 34-day trial was spent addressing this issue.

The parties, referred to as M and F to protect the child's interests, were the unmarried parents of a nearly 5-year-old son referred to as C. C was M's third child. She had two children, aged 8 and 11. C was also F's third child. His two other children were aged 13 and 18, and lived with him part of the time, including overnight visits.

Throughout their relationship which began in 2006 and ended in 2009, they lived together only for a few weeks in the spring of 2008. M and F were both successful, upper-class professionals. M earned $250,000 annually and owned an insurance brokerage; F was a lawyer making $750,000.

F had been diagnosed with a narcissistic personality disorder. A feature of the disorder is a significant lack of empathy for others, which Justice Whitaker noted as a known problem for parenting. At the time of trial, F was receiving counselling for his disorder. F acknowledged verbally abusing M.

Since C was born, F regularly had significant unsupervised access to C, but never overnight. This was the heart of the disagreement. The parties attempted to mediate their parenting

dispute with Dr. Irwin Butkowsky, a highly regarded and experienced child psychologist from October 2009 to February 2010. Following the unsuccessful mediation, the parties asked Dr. Butkowsky to perform a section 30 assessment. After the parties signed consents and waivers for him to perform the assessment despite his involvement in the mediation, Dr. Butkowsky completed his report on August 10, 2011, and an updated report in September 2012 on the eve of trial. M opposed overnights and F sought to have overnight access.

Dr. Butkowsky concluded it was in the best interests of C to start overnights and not surprisingly F agreed. Dr. Butkowsky noted C had changed from precocious and sociable to apprehensive, shy and somewhat fearful from the time of his first report to his second, which he completed just before trial. He believed the change was the result of continued exposure to instability, parental tension and conflict none of which were detailed in Justice Whitaker reasons. Dr. Butkowsky further believed C was in need of "increased opportunity to further develop his psychological/emotional attachment" to F. Overnight access was such an opportunity to develop C's attachment, and C would not be at risk during overnight access with F according to Dr. Butkowsky. Further, he recommended F participate in counselling to deal with alcohol dependence and abuse, and recommended further mediation.

M opposed overnight access between C and F. M believed that F's narcissistic personality disorder, anger and alcohol abuse only arose at night when F drank. Otherwise, M believed that F is a good, responsible parent. This admission may have been the actual turning point in the case.

M obtained a critique report from Dr. Peter G. Jaffe who did not see the child or the parties in preparation of his report and who disagreed with Dr. Butkowsky's recommendations on the basis of his methodology. Dr. Jaffe understood his role as raising concerns about Dr. Butkowsky's report for the court's consideration. On a principled basis, Dr. Jaffe did not support overnight access if there was domestic violence. He believed that Dr. Butkowsky's methodology was flawed because he failed to assign fault, failed to investigate or make positive findings of domestic violence, and failed to use the most appropriate tool as part of his assessment. The judgment does not disclose what this appropriate tool would be but it is a fair assumption that the tool is simply based on addressing the issues of domestic violence. Dr. Jaffe did not believe overnights should begin until F took responsibility for his domestic violence, expressed genuine remorse and completed treatment.

Senior counsel represented both parties. Much of the parties' evidence was discredited as was the evidence of their witnesses. From Justice Whitaker's reasons, it is unclear how many witnesses testified on the issues. What we do know is each side called several witnesses about the parties' violence and inappropriate behaviour, but Justice Whitaker found only one of them, Mr. Moncada, a workman who was at the home briefly and testified that he had seen F "throw" the child into a car, helpful on the central issue. Justice Whitaker's reasons are unclear on how the testimony offered by Mr. Moncada actually assisted him in drawing conclusions about the father's overnight access.

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## Justice Whitaker Awards F Overnight Access

After 34 days of trial over 9 months, Justice Whitaker ordered the start of overnight access. Justice Whitaker drafted short reasons given the length of the trial. The facts in support of his decision, stated and unstated, include:

- Dr. Butkowsky concluded starting overnights with F was in C's best interests and would be safe. Justice Whitaker's reasons were silent on whether or not Dr. Butkowsky had considered the allegations of domestic violence.

- From C's birth, F had enjoyed significant unsupervised access with C. Further, C would be asleep during most of the overnight access.

- M did not seek to limit or reduce F's access to C.

- Between January 1, 2009 and the close of trial, May 1, 2013, despite the palpable acrimony between the parties, M had never raised an issue about F's competence or abilities as a parent, in particular during his access with C.

- F had successfully parented three children without incident from birth to university "without any restrictions on his role or conduct" *His past behaviour revealed a positive pattern of safeguarding his other children during overnights on his own.*

- There was no evidence that F's narcissistic personality disorder negatively affected his parenting of C.

- From 3 years before the start of trial to the writing of Justice Whitaker's reasons, there were no allegations of domestic violence.

- Dr. Jaffe's opinion was based on limited information from M and her counsel, and he admitted that additional facts could change his opinion. He had no opportunity to meet with the parties or the child.

It is evident that Justice Whitaker's findings of fact were hamstrung by the lack of credibility of the parties: during the trial each party admitted to giving false evidence knowingly in the proceedings in an attempt to influence the court.

In addition to the findings of fact in support of his conclusion on the central issue, Justice Whitaker found that the parties had psychologically and emotionally abused each other, by harassing and intimidating each other, undermining and damaging each other's well-being and self-confidence and preying on each other's vulnerabilities and perceived short comings.

After hearing evidence from both sides about F's alleged alcohol dependence, Justice Whitaker did not find that F was an alcoholic. He made no mention of M's drug use, of which we learned in the Court of Appeal's reasons.[1]

Justice Whitaker did not mention whether or not there was evidence of domestic violence in F's previous relationships or whether or not his two older children had witnessed or been the recipients of any domestic violence.

Finally, what is noticeably absent from Justice Whitaker's reasons is any reference to case law.

## M Appeal's Justice Whitaker's Decision

M appealed Justice Whitaker's decision on overnight access. Justices Benotto, MacFarland and Tulloch heard the appeal on March 31, 2015—eighteen and one-half months after Justice Whitaker's order. M raised three issues on appeal:

1. The trial judge gave insufficient reasons.

2. The trial judge's decision is not supported by the evidence.

[1] *M v F,* 2015 ONCA 277 at para 5

3. The trial judge erred by not making an order for custody in her favour and by "delegating" his authority to the assessor.

Writing for the panel, Justice Benotto, who has a great deal of experience in family law, dismissed M.'s appeal and wrote the decision of the court.

**Sufficiency of Reasons**

M argued that Justice Whitaker's reasons were insufficient. There are three rationales for providing reasons:

1. Public confidence in the administration of the justice system;

2. The importance of telling the losing party the reasons for having lost; and

3. Making the right of appeal meaningful.[2]

"The trial judge is not held to some abstract standard of perfection". But if the reasons are not reasonably intelligible to the parties and do not provide the basis for meaningful appellate review of the correctness of the trial judge's decision, then the trial judge committed an error of

[2] *Young v. Young*, 2003 CarswellOnt 63 at para 27 (CA)

law.[3] As an error of law the standard of review is "correctness", rather than palpable and overriding error"—the standard of review for an error of fact.

M submitted Justice Whitaker's reasons were insufficient for three reasons: he (1) failed to consider the mandatory criteria of subsection 24(2) of the *Children's Law Reform Act* , R.S.O. 1990, c. C.12; (2) failed to give proper weight to the allegations of domestic violence in accordance with Dr. Jaffe's report; and (3) failed to articulate the basis for his credibility findings.

***Sufficiency of Reasons: Did Justice Whitaker Fail to Consider the Mandatory Criteria of Subsection 24(2)?***

Addressing M's first reason, Justice Benotto quoted subsection 24(2) and summarily concluded that when Justice Whitaker's reasons are reviewed in their entirety it is clear that 24(2) guided his analysis. In fact, one would not have to review Justice Whitaker's reasons in their entirety to arrive at this conclusion. Justice Whitaker addressed the relevant provisions of subsection 24(2) when he considered Dr. Butkowsky's report, including the recommendations (which F was prepared to follow) and the uncontested fact that there had been no issues raised about F's competence or abilities as a parent, during access or otherwise.

[3] *R. v. Sheppard*, 2002 SCC 26 at para. 28, 39-42 and 55

***Sufficiency of Reasons: Did Justice Whitaker Fail to Give Proper Weight to the Allegations of Domestic Violence in Accordance with Dr. Jaffe's Report?***

Addressing M's second reason, Justice Benotto held that Justice Whitaker had considered the allegations of domestic violence finding that F likely had been violent towards M, but not in the three years before Justice Whitaker rendered his reasons.[4]

On closer scrutiny, Justice Whitaker's reasons on domestic violence between the parties are not quite that clear for two reasons. First, when Justice Whitaker finds that there had been no allegations of domestic violence in the three-year period before the commencement of trial, it is unclear whether or not he is referring to physical domestic violence or domestic violence in the three forms he identifies in his reasons: physical, psychological and emotional. [5] The confusion arises because it appears that F did commit, at least one act of domestic violence in the three-year period before the start of trial, which began in September 2013.

When reading the reasons of Justices Whitaker and Benotto together, it appears that F sent M a video of a husband giving a wife keys to a car, which blew up when the wife turned the keys in the ignition. F told M that it "gave him ideas". Justice Whitaker references the video without identifying when it was received; [6] however, Justice Benotto identifies it as part of the inappropriate conduct both parties engaged in during the litigation.[7] According to the timeline offered by Justice Benotto, the parties attempted to mediate the parenting issues between October 2009 and February 2010, and by June 2010, the parties were litigating, which suggests

[4] *M v F,* 2015 ONCA 277 at para 21
[5] *M v F,* 2013 ONSC 6089 at para 50 and 32
[6] *M v F,* 2013 ONSC 6089 at para 56
[7] *M v F,* 2015 ONCA 277 at para 6

that the litigation began no earlier than February 2010.[8] It therefore follows that the video was sent after February 2010, which is within three years of the trial before Justice Whitaker. If the video was, in fact, received in the three-year period before the trial, it is unclear why neither Justice Whitaker nor Justice Benotto considered sending the video an act of domestic violence, especially since Justice Whitaker's reasons suggest that he considers sending intimidating e-mails domestic violence.[9] Was this event part of the harassing, intimidating exchange between the parties and thus somehow negated by M's conduct despite the effect conflict between M and F was having on C? The answer to this question is not apparent from the courts' reasons.

There are other hints in the reasons of Justices Whitaker and Benotto suggesting that the psychological and emotional domestic violence between the parties continued up to the date of trial. Dr. Butkowsky completed two reports: one on August 10, 2011, the other in September 2012. Referring to Dr. Butkowsky's reports, Justice Benotto noted the change in C's behaviour from precocious and sociable to apprehensive, shy and somewhat fearful. This change occurred between the two reports, and Dr. Butkowsky attributed that change to "the child's continued exposure to instability, parental tension and conflict. [emphasis added]".[10]

In his reasons, Justice Whitaker makes reference to electronic correspondence exchanged between the parties that "demonstrated a sustained and persistent desire on each side to

[8] *M v F,* 2015 ONCA 277 at para 7
[9] *M v F,* 2013 ONSC 6089 at para 33
[10] *M v F,* 2015 ONCA 277 at para 10

undermine and damage the other's well-being and self-confidence". Whether or not these electronic correspondence were part of the "conflict" to which Dr. Butkowsky was referring is unclear from the reasons of Justices Whitaker and Benotto because neither provided dates of the correspondence, but it seems likely given the acrimony between the parties.[11] If F did engage in psychological and emotional domestic violence after September 2009, it is still unclear how Justice Whitaker could find no allegations of domestic violence in the three years before the trial.

On the issue of physical domestic violence, it is somewhat unclear how many acts of physical domestic violence Justice Whitaker found actually took place. After reviewing the allegations of domestic violence and considering the credibility of the parties and witnesses and the reliability of their evidence, Justice Whitaker concluded on a balance of probabilities "F is more likely than not to have committed an act of domestic physical violence against M [emphasis added]".[12] This suggests Justice Whitaker found F had not committed more than one act of physical domestic violence against M, without specifying which one; however, later in his reasons he acknowledges his "recognition that there have been incidents of domestic violence primarily the fault of the father".[13] The problem is he does not make a clear distinction between physical domestic violence and domestic violence in in general in his reasons, so we are left to wonder about the extent of Justice Whitaker's findings of domestic violence, especially physical. What is of more concern in his reasons is the fact that the extremely acrimonious communication

[11] *M v F,* 2013 ONSC 6089 at para 34
[12] *M v F,* 2013 ONSC 6089 at para 65 to 67
[13] *M v F,* 2013 ONSC 6089 at para 90

between the parties in emails and texts demonstrate psychologically and emotionally damaging conduct as well as harassment and intimidation. Presumably this conduct continued up to the date of trial. For some reason, Justice Whitaker does not consider this communication to be an act of domestic violence that would deter him from ordering overnight access despite the fact that the child is affected by the conflict between the parties. Presumably the reason for this is that Justice Whitaker found both parties at fault in regard to the communication between them. However what Justice Whitaker reasons fail to take into account is the impact of the historical act of domestic violence on M and the influence that may have had on her behavior.

Despite serious questions about domestic violence between the parties, Justice Benotto held that Justice Whitaker found the allegations of domestic violence "did not and would not impair the respondent's parenting of the child".[14] Although one could infer that Justice Whitaker made such a finding, in our view Justice Whitaker did not address this issue directly or in any depth. If indeed that was Justice Whitaker's decision it is important to note since it may be relied upon in other cases in which domestic violence and power imbalance play a significant part.

[14] *M v F,* 2015 ONCA 277 at para 21

***Sufficiency of Reasons: Did Justice Whitaker Fail to Articulate the Basis for His Credibility Findings?***

Addressing M's third reason, Justice Benotto held that Justice Whitaker had made sufficient credibility findings. He noted the lack of veracity of both parties and concluded that M's evidence should be preferred over F's in the event of a conflict.[15]

The Court of Appeal found Ms. Submissions on the insufficiency of Justice Whitaker's reasons wanting. Overall, Justice Benotto characterized M's submissions on this issue as an attack on his findings of fact framed to avoid the stringent standard of review applicable to errors of fact. Justice Benotto quoted and endorsed the views of Justice Doherty J.A. in *Law Society of Upper Canada v. Neinstein*:[16]

> I am dubious about the merits of arguments claiming that reasons for judgment are inadequate. Experience teaches that many of those arguments are, in reality, arguments about the merits of the fact finding made in those reasons. By framing the argument in terms of the adequacy of the reasons, rather than the correctness of the fact finding, an appellant presumably hopes to avoid the stringent standard of review applicable to findings of fact. Despite my scepticism about arguments that allege that reasons are inadequate, I am satisfied that the appellant has demonstrated that the reasons given by the Hearing Panel are so inadequate as to foreclose meaningful appellate review. The inadequacy of the reasons constitutes an error in law requiring an order directing a new hearing.[17]

[15] *M v F,* 2015 ONCA 277 at para 23
[16] *M v F,* 2015 ONCA 277 at para 25
[17] *Law Society of Upper Canada v. Neinstein*, 2010 ONCA 193 at para 4

M failed to persuade the court that Justice Whitaker's reasons are inadequate.[18]

## Decision not Supported by the Evidence

According to Justice Benotto, the thrust of M's submission was Justice Whitaker should not have awarded overnights to F. M submitted that Justice Whitaker did not place enough weight on Dr. Jaffe's evidence, a critique of Dr. Butkowsky's report. Justice Benotto held the trial judge's treatment of Dr. Jaffe's evidence was generous and expressed doubt that his evidence was, in fact, admissible.

The Mohan Test for Admissibility is summarized in the *Law of Evidence* as follows:

> Expert opinion evidence is presumptively inadmissible. It can be admitted only if the party calling it satisfies the following four preconditions to admissibility, on the balance of probabilities:
>
> 1. The expert evidence must be "necessary" in the sense that the expert deals with a subject-matter that ordinary people are unlikely to form a correct judgment about without assistance;
>
> 2. The expert evidence must be logically relevant to a material issue;
>
> 3. The witness must be qualified to offer the opinion in the sense that the expert possesses special knowledge and experience going beyond that of the trier of fact in the matters testified to; and

[18] *L. (H.) v. Canada (Attorney General),* 2005 SCC 25 at para 4; *C. (R.) v. McDougall, (sub nom. F.H. v. McDougall)* 2008 SCC 53 at para 55

> 4. The proposed opinion must not run afoul of any exclusionary rule apart entirely from the expert opinion rule ("the absence of an exclusionary rule")
>
> Even if these four preconditions are met, the trial judge, as the "gatekeeper," must decide whether the expert evidence is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence[19].

Citing Justice Wein in *Mayfield v. Mayfield* and Justice Epstein in *Sordi v. Sordi*, Justice Benotto endorsed a growing view that evidence critiquing an assessment report is rarely appropriate.[20] Such evidence fails the first branch of the four-part Mohan test. Critique evidence is unnecessary because the party seeking to admit the report could use it to cross-examine the critiqued expert and/or in preparation of argument.

One may also argue that such critique evidence is unnecessary because of the court's powers to take judicial notice of certain facts. When considering whether or not to take judicial notice of certain facts:

> a court ought to ask itself whether such "fact" would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute for the particular purpose for which it is to be used, keeping in mind that the need for reliability and trustworthiness increases directly with the centrality of the "fact" to the disposition of the controversy.[21]

In *L. (N.D.) v. L. (M.S.)*, 2010 CarswellNS 107 (Sup.Ct.), Justice Beryl MacDonald of the Nova Scotia Supreme Court addressed the issue of domestic violence in the context of a mobility

[19] David M. Paciocco and Lee Stuesser, *The Law of Evidence*, 7d ed (Toronto: Irwin Law Inc., 2015) at 208
[20] *M v F,* 2015 ONCA 277 at para 34
[21] *R. v. Spence*, 2005 SCC 71, 2005 CarswellOnt 6824 at para 65

case. The parties, divorcing parents, had a 6-year old child. The mother, who was unemployed and had dim prospects of employment in Nova Scotia, wanted to return to her home state of Missouri with the child to live with her parents. All of her supports and best chances of further education and employment were in Missouri. The mother alleged that the father and his family were abusive. When considering the effects of domestic violence on the child, Justice MacDonald took judicial notice of social facts gathered from the Department of Justice Canada's internet site and other sources:

> There is little reason to suppose that domestic violators, who regularly threaten, harass, demean, intimidate and control or attempt to control partners; who have poor impulse control and little ability to accept responsibility; and to resort to aggression and violence, will, in the absence of successful intervention, lose those characteristics when they are alone with children. As children become able to exert their own desire for control they may then be subjected to demeaning and intimidating conduct from a parent. In addition such parents are not particularly good role models because the way they treat intimate others may well be patterned by the children they raise thus repeating the cycle.
>
> …those who are the perpetrators of domestic violence, who remain untreated and who remain in denial are not good role models for their children. The fact that there is no evidence the perpetrator has actually harmed the child is an insufficient reason to conclude the perpetrator presents no risk to his or her child. One risk is that the perpetrator will continue to use violence in intimate relationships to which the child will be exposed in the future. Another is that the child may model aggressive and controlling behaviour in his or her relationships with others. [emphasis added][22]

The question remains whether or not and to what extent the court should exercise some caution when taking judicial notice of social facts. First, the "facts" may not be facts.[23] Based on social research there is reason to question some of the facts found by Justice MacDonald above. In

[22] *L. (N.D.) v. L. (M.S.),* 2010 NSSC 68 (Sup Ct) at para 23 to 35 and Schedule A
[23] *R. v. Spence*, 2005 SCC 71, 2005 CarswellOnt 6824 at para 51

particular, it is unclear that there is little reason to suppose domestic violators will in the absence of successful intervention lose those characteristics when they are alone with children. Referencing reviews on the co-occurrence of documented child maltreatment in families where there is adult domestic violence, Professor Edleson of the UC Berkeley School of Social Welfare notes "Over 30 studies of the link between these two forms of violence show a 40% median co-occurrence of child maltreatment and adult domestic violence in families studied…and a range of co-occurrence from as low as 6.5% and as high as 97%, depending on the samples studied".[24] Given the close association of the facts on domestic violence to the issue of overnights, it may not be appropriate for a court to make a finding of such social facts in the absence of evidence that can be cross examined upon. What is noteworthy in the case at bar was the history of unsupervised access; the fact that there was no history of violence to the child and also the fact that an expert who had the opportunity to meet the child and the parties over a period of time, recommended overnight access in order to promote the child's relationship with F.

Beyond the issue of necessity, Dr. Jaffe did not meet C, his opinion was based on limited information from M and her counsel, and Dr. Jaffe viewed his limited role as an expert "to raise concerns about Dr. Butkowsky's assessment for the court's consideration". As a result, Justice Whitaker had an obligation to determine if Dr. Jaffe's evidence was sufficiently beneficial to

[24] Jeffrey L. Edleson, "Should Childhood Exposure to Adult Domestic Violence be Defined as Child Maltreatment under the Law" in Peter G. Jaffe et al, eds, *Protecting Children from Domestic Violence: Strategies for Community* edited by 2004 (New York: Guilford Press, 2004) at 15

warrant its admission despite the potential harm to the trial process. Clearly Justice Benotto[25] did not believe Dr. Jaffe's evidence was sufficiently beneficial.

What Justice's Whitaker and Benotto failed to address adequately is Dr. Jaffe's "general rule of thumb"—there should be no overnight access if there is domestic violence generally.[26] The court failed to or perhaps purposely avoided engaging in a heated debated between two opposing schools of thought, summarized by Philip Epstein in his commentary on this case:

> Clearly, in Dr. Jaffe's considered view, issues of domestic violence between the parents almost invariably affect the child and, therefore, the issue of domestic violence has to be dealt with before a parenting plan can be formulated. That usually includes the perpetrator taking responsibility for his actions and engaging in appropriate treatment. On the other hand, the other school of thought is to look at the domestic violence and determine whether the domestic violence in that particular case will and does have an effect on the child and whether a parenting plan can still be devised in the face of the domestic violence even where it might be denied by the perpetrator.
>
> In essence, Dr. Jaffe and the adherents of his philosophy would say that the perpetrator of domestic violence must have very limited access. Dr. Butkowsky and his adherents would say that one is to look at these situations on a case-by-case basis and determine whether, in all of the circumstances, the best interests of the child are served by having a parenting plan that includes reasonable access. Or, put another way, domestic violence between the parents does not rule out access between the parent and the child.[27]

The Court of Appeal was able to largely side-step this debate by characterizing Dr. Jaffe's evidence as critique evidence. It may be that another expert who had the opportunity to meet

[25] *M v F,* 2015 ONCA 277 at para 13, 29-32
[26] *M v F,* 2013 ONSC 6089 at para 87
[27] Philip Epstein, "Epstein's This Week in Family Law", online: Fam. L. Nws. 2015-26 <https://nextcanada.westlaw.com>

the parties may have come to the opposite conclusion to that of Dr. Butkowsky for the very reason that there has been domestic violence between the parties and that the high degree of conflict had been and was damaging the child.

The general proposition that critique evidence is rarely appropriate may be correct, but the question remains whether or not such evidence still has some value and should be considered. In this case, the parties had sufficient wealth to retain two highly experienced and well regarded experts, but most parties will not be that fortunate. Given the court's rising dependence on sociological research and willingness to take judicial notice of general propositions based on such evidence, we respectfully think the court should seriously consider whether critique evidence is necessary to challenge an essential assumption of the critiqued expert, an essential assumption of the court based on sociological research (as illustrated in *L. (N.D.) v. L. (M.S.)* above) or both. The ability to cross-examine an expert on those assumptions may be insufficient to help the trier of fact make the correct findings of fact and inferences.

**No Order for Custody**

On the issue of custody, Justice Whitaker made no order. There were no issues raised with regard to F's competence or ability as a parent. The absence of an award of custody offered Justice Benotto the opportunity to remind the bench and the bar that an order for custody is not mandatory. Subsection 28(1)(a) gives the court discretion to award custody of or access to the child to one or more persons.

Justice Benotto notes that multi-disciplinary professionals have been urging the courts to move away from the terms "custody" and "access" to reduce conflict. In its December 1998 report "*For the Sake of Children*", the Special Joint Committee of the Senate and House of Commons recommended the terms not be used.[28] In practice, it is not uncommon for domestic contracts not to use the terms but to distribute the traditional powers of custody (including decision making over education, health and religion) between the parties. Alberta and British Columbia have each taken a decisive step and removed nearly all references to "custody" and "access" from their provincial family law acts.[29] Instead, the acts refer to "guardianship", "parental arrangements", "parenting responsibilities", "parenting time" and contact:

> Parental responsibilities
>
> 41 For the purposes of this Part, parental responsibilities with respect to a child are as follows:
>
> (a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child;
>
> (b) making decisions respecting where the child will reside;
>
> (c) making decisions respecting with whom the child will live and associate;
>
> (d) making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;
>
> (e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an aboriginal child, the child's aboriginal identity;

[28] Joint Chairs, the Honourable Landon Pearson and Roger Gallaway, M.P., *For the Sake of Children*, online: Parliament of Canada <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1031529&Language=E&Mode=1&Parl=36&Ses=1&File=57#conflict>
[29] *Family Law Act*, [SBC 2011] C. 25; *Family Law Act*, SA 2003, c F-4.5.

> (f) subject to section 17 of the Infants Act, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;
>
> (g) applying for a passport, licence, permit, benefit, privilege or other thing for the child;
>
> (h) giving, refusing or withdrawing consent for the child, if consent is required;
>
> (i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;
>
> (j) requesting and receiving from third parties health, education or other information respecting the child;
>
> (k) subject to any applicable provincial legislation,
>
> (i) starting, defending, compromising or settling any proceeding relating to the child, and
>
> (ii) identifying, advancing and protecting the child's legal and financial interests;
>
> (l) exercising any other responsibilities reasonably necessary to nurture the child's development.
>
> Parenting time
>
> 42 (1) For the purposes of this Part, parenting time is the time that a child is with a guardian, as allocated under an agreement or order.
>
> (2) During parenting time, a guardian may exercise, subject to an agreement or order that provides otherwise, the parental responsibility of making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child.[30]

Despite some efforts to replace “custody” and “access” with more neutral, child-focused terms, the *Divorce Act* still uses “custody” and “access”. Bill C-22: An Act to Amend the Divorce Act the Family Orders and Agreements Enforcement Assistance Act, the Garnishment, Attachment and

[30] *Family Law Act*, [SBC 2011] C. 25

Pension Diversion Act and the Judges Act and to Amend other Acts in Consequence passed second reading on February 25, 2003, but has progressed no further and appears to be dead.[31] Whether the changes to the provincial family law acts in British Columbia and Alberta have had their desired effect—reducing conflict--is an issue still unanswered.

## An Extraordinarily Expensive Trial for the Parties and the System

At the end of trial, M sought costs of nearly $800,000; F sought costs in excess of $900,000. It is unclear from the Court of Appeal's reasons if the parties sought full indemnity costs at trial. If not, the costs incurred in the litigation may have been significantly higher. Combined the parties had spent at least $1.7 million litigating a dispute that ultimately came down to overnight access. Justice Whitaker awarded F costs in the amount of $500,000.

The extraordinary expenses of litigation continued after the trial decision. Both parties retained new counsel. On a partial indemnity basis, the parties sought a combined $280,000 of costs. M sought $120,000; F sought $160,000. On the issue of costs, on appeal Justice Benotto understated "these amounts are out of proportion to the issues on appeal" and fixed costs in the amount of $40,000 inclusive of disbursements and HST, or less than one-fourth of his partial indemnity costs.

[31] Kristen Douglas, "Bill C-22: An Act to Amend the *Divorce Act*, the Family Orders and Agreements Enforcement Assistance Act, the Garnishment, Attachment and Pension Diversion Act and the Judges Act and to Amend Other Acts in Consequence", online: Parliament of Canada <http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?lang=E&ls=C22&Parl=37&Ses=2&source=Bills_House_Government>

**34 Days, Two Experts and an Overnight: a Critique of *M v F,* 2013 ONSC 6089 and *M. v. F.*, 2015 ONCA 277**

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The costs award in M. v F. was high by the Court of Appeal's standards. In the nearly two month period preceding the drafting of this paper, when it awarded costs the Ontario Court of Appeal made awards ranging from $3,000 to $35,000. The average award was $13,251.90 and the median award was $10,000. It seems that counsel and parties should lower their expectations of recouping significant costs at the Court of Appeal.

In the end, the parties spent in excess of $2 million in the proceedings to address overnight access.

These proceedings failed to meet the primary objective of the *Family Law Rules*: to enable the court to deal with cases justly, which includes:

> (a) ensuring that the procedure is fair to all parties;
>
> (b) saving expense and time;
>
> (c) dealing with the case in ways that are appropriate to its importance and complexity; and
>
> (d) giving appropriate court resources to the case while taking account of the need to give resources to other cases. [emphasis added]

The court is required to apply the *Family Law Rules* to promote the primary objective. In this case, not limiting the number of witnesses who testified on the central issue was perhaps the clearest failure, especially given Justice Whitaker's comments on their lack of impartiality and the value of their testimony. The witnesses were of such limited value that Justice Whitaker did

not even bother referring to their evidence, with the exception of one witness, Mr. Moncada, who could not testify about the ongoing relationship between the parties or between F and C.

Philip Epstein noted that in his opinion there were two judges who had the opportunity and responsibility to limit the length of the trial. Justice Whitaker, and the Trial Management Judge. Both judges have received significant criticism as a result of this trial.[32] That criticism, at least from learned counsel, seems based on the outcome and not on the process. Although we know that almost all of the lay witnesses called on the central issue proved to give evidence that was not useful to the court, we do not know what, if any, powers the court exercised to reduce the length of the trial to meet the primary objective. The question is also whether if the court had attempted to curtail the evidence of any of these witnesses, any such attempts would have been grounds for appeal. Nevertheless, the trial, which ran from September 27, 2012 to May 1, 2013 offered several opportunities for Justice Whitaker to reign in the parties.

Blame for the lengthy trial on overnights should not rest at Justice Whitaker's and the Trial Management Judge's feet alone. Although he was required to apply the Family Law Rules to promote the primary objective, the parties and their lawyers, two experienced and well-respected counsel, were required to help Justice Whitaker promote it.

It is probably unrealistic to rely upon parties (especially parties such as these) to temper their desire to be heard and to attempt to persuade a court to their own point of view. To clients their

[32] Philip Epstein, "Epstein's This Week in Family Law", online: Fam. L. Nws. 2015-26 < https://nextcanada.westlaw.com>

issues are often all consuming and seem deserving of all the resources of their counsel for which they are willing to pay and all of the resources of the court for which they only pay partially indirectly as taxpayers. In addition to Justice Whitaker, a court clerk, court report and court services officer were occupied for 34 days. A courtroom was also occupied for 34 days to hear the parties' matter. Perhaps it is time that parties of means bear some of the costs of court directly in appropriate circumstances. Apart from the money expended on legal fees, the only consequence to M for resisting overnight access was a $500,000 costs award. It is worthy of note that F did not recover his costs in the matter because of the acrimonious manner in which the trial was conducted. At present there is no mechanism for recouping overspending of scarce judicial resources by highly acrimonious and bitter parties.

**Conclusion**

Counsel and trial judges as well as case conference judges have a clear responsibility to reign in warring parties. The result of continuing bad behavior may result in neither party achieving the result he or she wants despite spending vast amounts of resources. This case demonstrates and telegraphs to the bar and to the bench the fact that the single most important issue in the determination of access and custody disputes is the test of the best interests of the child articulated in the *Children's Law Reform Act*, s. 24(2), and that the report of an expert who has had the opportunity of meeting the parties and the child will be given a great deal of weight.

This case also underlines the fact that different assessors have different philosophies in regard to issues of custody and access. It seems apparent even from the sparse information available in the Court of Appeal decision and the judgment of Justice Whitaker that Dr. Butkowsky and Dr.

Jaffe articulated very different fundamental propositions in regard to what role a parent who had been physically abusive should be encouraged to play in the life of his or her child. That difference should not have been canvassed for the first time at trial but should have been canvassed by counsel at the time the assessor was chosen with full understanding and explanation to both clients of the potential different results in the recommendations and assessment of different experts.

This case may be the high water mark for the fact that findings of a high degree of conflict between the parties, previous domestic violence and continuing inappropriate behavior of both parties even during the trial will not mitigate against overnight access when the child had spent significant time with the father and an expert who has met the parties is of the view that the child needs overnight access for proper bonding and development of the parent-child relationship.

The critique report which was based on methodology was discounted entirely because the expert had no opportunity to meet the parties or the child. A pure question of principle will not be applied without reference to the specific parties and their children.

Although it is disturbing that findings of domestic violence had little impact on entitlement to access, it is clear from the decision of Justice Whitaker that neither party behaved well towards the other. He criticized both M and F's behavior as evidenced in their electronic communication, which he found to be abusive, and he was critical of M for surreptitiously installing a security system to video tape the father without his consent. Justice Whitaker found M's conduct to be abusive. It is difficult to determine what impact this finding of fact had in mitigating the impact of the historical physical violence. A close reading of the case leads to the conclusion that Justice

Whitaker chose to make both parties 'losers' in different spheres. He did not give mother custody, ensured that there was a mediation-arbitration process in place to monitor the implementation of the parenting plan and although F was successful in obtaining overnight access, Justice Whitaker did not award him full costs.

Arguably by failing to make an order for custody and by imposing reliance on a mediator arbitrator in order to assist with the implementation of Dr. Butkowsky' s report, the trial judge determined that both parties had behaved so negatively that neither of them could be trusted to implement a plan that was in the best interests of the child. Dr. Jaffe's criticism that this recommendation would simply allow the perpetrator of domestic violence to have a new arena was essentially ignored.

Justice Benotto's decision suggests that after an extensive trial and many witnesses, the decision of a trial judge is very unlikely to be overturned if there are some reasons and evidence that address the issues in dispute. While her judgment is clearly supportive of the role of the trial judge who sat through these lengthy proceedings, the question remains what the role of a judge in this kind of high conflict case should be. Is the judge merely an umpire who accepts all the evidence, allows counsel to make determinations of how many witnesses to call and the relevance of witnesses without comment and offers a forum for the warring parties to call evidence not necessarily probative to the issues at trial, or should the judge play a more active role, managing the conduct of the trial and attempting to shorten proceedings that are disproportionate to the issues being determined? This question is not addressed by the Court of Appeal.

The takeaway for counsel and clients who wish to act responsibly in these circumstances is to encourage even clients who have been the subject of domestic violence to behave reasonably with the other parent both in regard to the implementation of access and by not to engaging in toxic electronic communication or other bad behavior.