

Date of Release: February 21, 1996

No. S3462/F5171  
Duncan Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

<b>BETWEEN:</b>	)	
	)	
<b>P.G.F.</b>	)	
	)	<b>REASONS FOR JUDGMENT</b>
<b>PLAINTIFF</b>	)	
	)	
<b>AND:</b>	)	<b>OF THE HONOURABLE</b>
	)	
<b>R.K.K. and</b>	)	
<b>L.C.K.</b>	)	<b>MR. JUSTICE K.C. MACKENZIE</b>
	)	
<b>DEFENDANTS</b>	)	
	)	

Counsel for P.F.:	Maureen A. Sullivan
Counsel for the Superintendent of Family and Child Service:	Alix L. Reid
Counsel for L.K.:	John T. Martin
Family Advocate:	Patrick S. Finnegan
R.K.	Appearing in Person
Place and Dates of Trial:	Duncan, B.C. January 30 & 31, February 1 & 2, 5 to 9, 1996

1           This dispute is over the custody of 11½-year-old S.K., presently residing in the foster home of H.B. and her husband in Duncan following S.'s apprehension by the Superintendent of Family and Child Service on April 20, 1995. The parties seeking custody are S.'s father, R.K.; S.'s paternal grandmother, P. (P.) F., and

the Superintendent. S.'s mother, L.K., also initially sought custody but her claim is now limited to access.

2 R. and L. K. separated within a year of S.'s birth on May 7, 1984. They were divorced in 1987.

3 S. is a special needs child. An assessment by Queen Alexandra Centre for Children's Health (Ledger House) in Victoria in August 1995 concluded that his general intellectual potential is in the "Mildly Deficient Range, located at the first percentile for his age group". He has minimal functional literacy and numeracy. The Ledger House report recommended a modified education program in a "structured and nurturant" small group setting. S. is hyperactive and has difficulty with concentration. This condition has been improved with Ritalin, medically prescribed after he was placed in care. S. needs help in improving his social interaction skills as well as achieving intellectual advancement consistent with his potential.

4 S. has had an unsettled childhood since birth. In the first few months S., moved back and forth between his parents and P.F. and her second husband, T. L.K. was 18 when S. was born. R. and L. were unable to cope with a baby. Their relationship fell apart. L. left the Duncan area and followed a variety of jobs throughout B.C. By the late fall of 1984, S. came to P. and T.'s home to

stay. The arrangement was formally recognized by a Provincial Family Court order for a one-year term which granted custody of S. jointly to P.F., R.K. and L.K., with day-to-day care and control to P. The order provided specified access for L., and access for R. as agreed between himself and P.

5 S. remained in P.'s care until December 1992, when he was 8½. L. rarely, if ever, saw the child over that 8-year period. R. resided mainly in the Duncan area and for part of the period he stayed with P. and T. He saw S. incidentally over the years, but took no consistent parenting role. T.F. appears to have performed the role of substitute father, although S.'s care rested primarily with P. R. obtained an order for sole custody of S. as part of the divorce decree in February 1987. P. was not a party to those proceedings.

6 In December 1994, T.F. suffered an aneurism and died after a short period of hospitalization in Victoria. While P. was at the hospital in Victoria with T., S. was left with a baby sitter. At the initiative of R.'s older brother, G., and his wife, A., S. was taken from the baby sitter and went to live with R. and his then girlfriend, Marika. P. was furious when she learned what had happened while she was still at the hospital in Victoria. However, R. had a custody order and she was presented with a fait accompli. P. was successful in obtaining an order for access every second

weekend, which she exercised regularly over the years that S. was with R.

7           S. remained with R. and Marika, who was followed by Tina, until the relationship with Tina broke up in March 1995 and R. was left on his own. When R.'s girlfriend left, he was unable to look after S. and he gave S. into the care of his brother, G., and his wife. The relationship between G. and his mother, P., had deteriorated into one of intense hostility. G. refused to allow P. any contact with himself or his family in exercising access to S. P. insisted on access and G. was advised by social worker Mark Stocks that he could not refuse access. G. told Mr. Stocks that he was unwilling to keep S. on those terms, and S. was taken into care.

8           S. was in a receiving home from April 20, 1995, when he was apprehended from G.'s care, until early July when he went to H.B.'s foster home, apart from a brief period in early May when an attempt to place him in another foster home was unsuccessful. In July, S. was sent to Ledger House in Victoria for assessment and he was there off and on for several weeks. Apart from the time at Ledger House, he has remained in the B. foster home since. S. is doing well. H.B. and her husband both like S., and barring unforeseen developments, they would like S. to remain with them. The Superintendent has no plans to move S. again and the B. foster home

is prospectively a long-term placement if the Superintendent is granted custody.

9 P.F., R.K. and L.K. all have had supervised access to S. since he was apprehended. The supervision requirement has been imposed because of difficulties with P.F., and to avoid family members pressuring S. while custody remains in issue.

10 R.K. appeared in person in these proceedings. He has been employed over the years mainly as a truck driver. During much of the time that S. was in his care from 1992 to 1995, he was working irregular hours on long hauls. He has been unemployed since October 1985 and he hopes to obtain work in the Duncan area on highway maintenance which would involved more regular hours closer to home. Admittedly, at present he does not have a home suitable for S. Since his divorce from L. he has had at least two relationships which have broken down. When he had S. in his care it was the girlfriends who took the primary burden of looking after S., and the breakdown of the second of those relationships was the factor which precipitated S. being taken into care. I think that R. has good intentions insofar as S. is concerned, but his will and capacity to turn those good intentions into reality has been woefully lacking. I note that despite the fact that R.K. has been unemployed since October 1995, he exercised none of his available access visits with S. in November or December, including Christmas.

Mr. K. said that he had commitments in northern Vancouver Island which kept him out of town over the Christmas season, but I have difficulty in accepting that his commitments were so pressing that he was unable to see S. at all over a two-month period.

11 R.K. asks for a temporary order for custody with the Superintendent so that he will have the opportunity to apply for custody when circumstances permit him to take S. into his care. However, as was noted in argument, S. has been waiting for 11½ years for R. to provide a stable home, and R.'s circumstances now are essentially no better than they were at the time of S.'s birth. There is little basis for optimism that R. will turn his situation around sufficiently to be able to look after S. in the foreseeable future, and the continued uncertainty involved in a temporary order is not in S.'s best interest. At present I do not think that R.K. can sustain the responsibilities of a custodial parent, and regrettably there is little beyond Mr. K.'s profession of good intentions to suggest any change in the foreseeable future. I think that the most that can be reasonably hoped for is that R.K. will exercise more and consistent access to S. If S. remains in his present setting, I am satisfied that his reasonable access will be accommodated without difficulty. Social Services personnel and H.B. all recognize the benefit to S. from a stronger relationship with his father, and I am satisfied that they will facilitate and encourage access. S. likes and respects his father, and R.K.

should be given every encouragement to exercise regular access. It is up to Mr. K. to demonstrate his good intentions and exercise the access that is available to him.

12 L.K. does not seek custody of S. in these proceedings. I am satisfied that more access is available to her than she is presently prepared to exercise. Again, the initiative lies with her to try to get her life in order and spend more time with her son.

13 The most contentious issue in this case involves P.F.'s claim for custody. The other parties to these proceedings, R.K., L.K. and the Superintendent, all oppose custody being given to P.F. Mr. Finnegan, the advocate appointed to represent S., supported S.'s present arrangement in preference to Mrs. F.'s custody. He submitted that placing S. in her custody would put his well-being at risk.

14 At first glance, Mrs. F. would seem to have a strong case for custody. She was S.'s primary care-giver for 8½ years, from the time he was a baby. She is in her early 50's and in good physical health. She appears to have adequate financial resources and she has a two-bedroom apartment which could accommodate S. A number of friends and acquaintances strongly support her claim to custody and have written letters on her behalf. Several of those friends gave

evidence testifying to her interest and ability in caring for children. They gave positive assessments of S. while he was in her care and during access visits after he was staying with R.

15           A darker picture emerges from the evidence of family members, child care workers, and a custody and access report prepared by Dr. Larry W. Waterman, a psychologist. Dr. Waterman recommended that Mrs. F. not be given custody of S.

16           P.F. by all accounts has had a difficult life and she is unquestionably a survivor. She was pregnant at 14 and gave her first child, a daughter, up for adoption. She had 5 more children, all sons, born during her late teens and early 20's. She left school as a consequence of her first pregnancy and has, therefore, limited formal education. The demands of raising her children left her no opportunity to acquire any specialized occupational skills. Her first husband, M.K., was absent much of the time because of his work and he was also apparently an alcoholic. The demands of raising 5 sons fell almost entirely upon her. The family moved from Alberta to Duncan. She worked at unskilled jobs such as taxi dispatching and waitressing in bars to support the family financially. She separated from M.K. when the boys were in their teens, leaving them with him. Over the next several months her oldest son, G., and youngest son, K., came to live with her in her apartment.

17           The home environment was stormy. It is conceded on all sides that the boys were more than a handful and P.F. had to fight for what little order there was in the home. Mrs. F. admits that she used physical force in attempts to keep the boys in control. G. and R. said that the boys were subject to physical abuse beyond the limits of normal discipline, escalating as they got older until they were big enough to defend themselves. G. recounted one instance where P. threw a fork at him the 10-foot length of the dinner table and the tines stuck in his arm. R. said on one occasion P. choked him so hard that he saw bubbles and she stopped only when G. forced her away. They also said that all the boys were regularly cuffed, slapped and sometimes kicked by P. Mrs. F. said the fork incident was accidental; she was shaking it at G. and it slipped from her hand. She had no recollection of the choking incident with R.

18           A.K., the third oldest son (younger than G. and S. and older than R. and K.), was called by counsel for Mrs. F. under subpoena. His recollection was that the boys were difficult to handle and P.'s use of physical measures was not excessive in the circumstances. He said that as the older boys reached their teens, G. and S. particularly would fight with their mother and she was hit by the boys as well as hitting them in the course of these altercations. A. appears to have been given a rough time by his older brother, G. A.'s recollection of the fork incident is

similar to P.'s although he does not recall the fork sticking into G.'s arm.

19 G. and his mother are intensely hostile, and R. is also at odds with her particularly with respect to S. There is some degree of exaggeration in the evidence of G. and R., but generally I am satisfied that they were both physically and verbally abused by P. when they were growing up, particularly as they got older. I think A. has softened his recollections of a very painful childhood, partly to avoid reliving the pain and partly out of a desire to remain relatively neutral and disengaged from the bitterness and recrimination within the family. While he lives in Duncan with his family and is on civil terms with his mother, there is little social contact. I accept R.'s evidence with respect to the choking incident. I do not think that P.'s evidence is reliable. Her evidence followed A.'s, and I think she tailored her evidence to support his because it was less critical of her than that of the other boys. I conclude that P. physically and verbally abused her sons while they were in her care, generally when she lost control. The incidents occurred within the family setting when there were no non-family witnesses.

20 P.F.'s involvement with S.F. is also disturbing. S.F., T.F.'s son by a previous marriage, lived with P. and T. after their marriage in 1982. [S.F.]'s childhood and teenage years were very

troubled, culminating in his conviction and incarceration for armed robbery in December 1993, when he was 17. [S.F.] was apprehended or taken into care at least 3 times from P. and T., all when S. was also in the home. Finally the Superintendent of Family and Child Service was awarded permanent custody by order dated April 24, 1991. The history is summarized in an affidavit of a social worker, Donna Johnston, dated April 23, 1991. [S.F.]'s first apprehension was at age 9 when he was taken into care in part on the basis of an allegation by P. that he had sexually touched S. About 18 months later he was apprehended again following an allegation by P. that he had attempted to have sex with a dog. P.'s evidence, and her story at the time of apprehension, was that she had received this information from a neighbor. However, P.'s version is contested by R. who said he was present when the incident occurred, that P. drew it to his attention, and that R. observed [S.F.] fully clothed playing with the dog in the yard and attempting to take a ball from the dog's mouth. He observed no sexual dimension to the incident at all, nor does he recall any involvement of a neighbor. S.F. has no recollection at all of the first alleged incident, and his recollection of the incident with the dog is the same as R.'s. R.'s recollection generally was that [S.F.] was a little boy who got along quite well with S. who was then just a toddler.

21 P.F. repaired her relationship with S.F. following [T.F.]'s death. After [S.F.] was charged with the robbery, P. attended court regularly during bail applications, remands and the trial as well as visiting him while he was incarcerated. [S.F.] obviously feels indebted to her and he repaid that debt by asserting that she had cuffed him only once on the back of the head and he had never been excessively disciplined. He said he never saw P. strike S. or shout at him. That is in conflict with the evidence of all the other witnesses. Even P. concedes that she shouted at S. and spanked him on occasion although she denies that any discipline was excessive. The only issue on which [S.F.] contradicts P. is concerning the incident with the dog. On that issue his evidence is supported by R. and I accept it. The implications of that finding should be considered in the context of other scandalous allegations of sexual misconduct made by Mrs. F. Otherwise S.F. was not a credible witness.

22 In the fall of 1994, after the death of both of her parents, P.F. appeared on a T.V. show and alleged that her father had allowed his friends to fondle her when she was a little girl. She also alleged that she was gang-raped at age 14 and her parents did nothing about it. She claimed that her first pregnancy resulted from the gang rape. She also charged that her mother had had a sexual relationship with P.'s first husband, M.K., both before and after P.'s marriage to him. According to a local newspaper account

in April 1995, she told the reporter that she was raped by her father's friends after he had sold her to them for beer money. P. attributed the inconsistency between this version, and her evidence at trial that the rape had been by several unidentified boys while in the home of a neighbor, to a mistake by the reporter. The newspaper account also states that following P.'s pregnancy allegedly as a result of the gang rape, her parents wanted to sell the baby for \$10,000. None of these allegations surfaced during her parents' lifetime, and the first that any member of the family heard about them was through the T.V. broadcast. The allegation that P.F.'s eldest child was fathered by an unknown rapist is contradicted by the file of the Alberta Child Welfare Branch in connection with the adoption which, while not identifying the father by name, describes him sufficiently that his identity must have been known. P.F. denies that this file information came from her and implies that it must have been false information supplied by her parents.

23 P.F. may have had painful episodes in her early life but I think that her accounts both on T.V. and to the newspaper are false. The motive apparently was to obtain sympathy by portraying herself as a victim, notwithstanding the slur on her parents' memory and the embarrassment to other members of her family. I think the allegations of sexual misconduct by S.F. while he was in her care are also false and damaging. I conclude that Mrs. F. is

capable of deceit and manipulation to satisfy some underlying need or compulsion. She is adept at rationalizing inconsistencies between conflicting statements of herself and others. She has made unfounded and spiteful allegations against other family members which has contributed to their alienation from her.

24 Dr. Waterman diagnosed P.F. as having a personality disorder, under the residual category of "Personality Disorder Not Otherwise Specified" pursuant to the Diagnostic and Statistical Manual of Mental Disorder, 4th ed. or D.S.M. - IV. Dr. Waterman relied for his diagnosis on certain psychological tests administered at his direction. He also gave weight to information supplied by other family members and social workers adverse to her.

25 Counsel for Mrs. F. arranged for her to be assessed by Dr. Kenneth Lilley, a psychiatrist, and Dr. Ronald S. Penner, a psychologist. Both Dr. Lilley and Dr. Penner concluded that the psychological tests provided insufficient evidence for a diagnosis of personality disorder but they were careful to make clear that they did not attempt to resolve the conflicting versions of events between Mrs. F. and others. They assumed that Mrs. F.'s version was reliable and left the question of the credibility of her account to the court. I have concluded that Mrs. F. is not a truthful witness, and the absence of credibility in her account lends support for Dr. Waterman's diagnosis. But whether or not

Mrs. F. has a recognized personality disorder, the issue is whether it would be in the best interests of S. to be placed in her care. Dr. Waterman has recommended against giving custody to her and I think that there is a sound basis for his recommendation.

26 Mrs. F. tries to convey the impression that S. did well while he was in her care. The record does not support that contention. Up to age 3 S. was involved in an infant development program in Duncan. From the age of 3 to 5½ when S. started kindergarten, he was not involved in any structured activities. An attempt to place him in a pre-school program when he was 4 was abandoned after a short period because he was too disruptive with the other children. An assessment by a learning assessment program psychologist in 1991, when S. was in his second primary year, contains the following:

S. is considered to be an outgoing, good natured boy who makes an effort. However, his attention span is short, he is immature for his age, he is impulsive, and often confused. He does not attend to oral directions and he has occasional temper outbursts in response to frustration and in response to social difficulties with his peers. At home, Mrs. F. finds him to be very dependent and not yet able to play by himself or with peers for more than a few minutes at a time.

27 In 1991 S. was assessed by Dr. A. Hoffer for hyperactivity and diagnosed with a potential milk allergy. The history taken by Dr.

Hoffer from P. and T. F. recounts that the hyperactive condition started about age 3 and became progressively worse. There were a number of serious behavioural problems. Mrs. F. said the hyperactivity was alleviated by taking S. off milk products but that is not supported by Dr. Hoffer's records. In a report dated August 25, 1992, 8 months after his initial recommendation Dr. Hoffer said:

"Over the last six weeks this patient has not done as well as before, and he has become quite hyperactive and restless. He also has been losing his temper more often and has also started habits which were surprising to his grandparents, for example becoming more aggressive, and he was sexually aggressive. There was no question, from what I observed in the office, that he in fact has become quite a bit more hyperactive."

28 S. moved from P. to R. the following December and S. continued to have major difficulties. But it is clear that those difficulties were present long before the move and Mrs. F.'s evidence glosses over those difficulties.

29 The child care workers who have supervised the access visits since S. was apprehended and the social worker supervising the file have several concerns about his relationship with his grandmother. In general they are of the opinion she is over-controlling and manipulative, and that she is inconsistent in matters of discipline. She treats him as much younger than he is, cutting his

food and tying his shoes, for example, which he is quite capable of doing for himself. He appears to regress in behaviour when he has been with her.

30           A particular concern is that Mrs. F. and S. engage in a pattern of cuddling and kissing which the child care personnel consider inappropriate. Some of them see sexual overtones in this behaviour. In the past there have been complaints that S. had touched girls inappropriately at school. The problem has been put in the context of S. lacking an appreciation of the boundaries of appropriate behaviour and generally lacking in skills in social interaction. On the evidence, I am inclined to discount any sexual dimension to the cuddling and kissing between S. and his grandmother, but it is a pattern appropriate for a very young child and not for a boy who is 11 years old. Because of his learning difficulties and lack of social skills, S. is particularly vulnerable to relationships which reinforce his immaturity. He needs consistent support which, while recognizing his limitations, encourages him to advance in development as much as possible. On the whole of the evidence before me, I do not think that P.F. meets those objectives. Whatever the formal psychological diagnosis, I am satisfied that P.F. is a person who puts her own needs ahead of those of others and that she lacks a capacity for self-criticism. She sees nothing to criticize in her relationship with S. and brushes off all criticisms by others.

31 Mrs. F. may relate to children best when they are young. Problems appear to intensify as they become older and more self-assertive and independent. If S. is placed in her custody I think she will tend to inhibit his development to maintain his dependence upon her in order to satisfy her own needs.

32 In recent months Ritalin has had a calming effect on S. and improved his ability to concentrate. Mrs. F. was not supportive of this medication when it was first prescribed, and while in her evidence she agreed that it should be continued, albeit with some reluctance, I am not satisfied that she would make sure that S. continued to take it regularly if he were in her care.

33 Currently S. is still unable to read more than a few simple words and he requires considerable one-on-one assistance. Mrs. F. has been in conflict with Social Services personnel at least since S. was placed in care and she does not acknowledge that they are motivated by good intentions and the best interests of S. I think that if S. is placed in her care the conflict will continue and she will undermine efforts to assist S.'s development when they are in conflict with her own need for his continued dependence. Her antipathy to other family members will make access by those family members very difficult. As S. gets older and naturally becomes more self-assertive, his needs will continue to be subordinated to

hers and I think she will continue a strategy manipulation and determined deviousness to prevail.

34 Mrs. F. could make a very positive contribution to S.'s development if she was prepared to limit her role to that of a caring grandmother, but her overreaching, for whatever reason, is destructive. I have no doubt that there is a strong bond of affection between S. and his grandmother, but if Mrs. F. is given custody of S. I think that bond will be increasingly perverted as he gets older. The consequences will be very detrimental to his development and well-being.

35 In the result, I conclude that it would not be in the best interests of S. to be placed in the custody of Mrs. F.

36 I am satisfied that S.K. was in need of protection and properly apprehended pursuant to s. 9 of the *Family and Child Service Act* when he was taken into care on April 20, 1995. I conclude that neither of S.'s parents nor his grandmother, P.F., should be given custody of S. It would not be in his best interests and would place his development and well-being at substantial risk. S. requires a stable and secure home environment which will be responsive to his special needs and maintain constructive relationships with the school and social agencies whose involvement is necessary to his progress. The prevailing

climate of uncertainty is detrimental to S.'s best interests, and that climate can only be changed through a permanent order.

37           Accordingly, the Superintendent is granted permanent custody of S. pursuant to s. 14 of the *Family and Child Service Act*. I understand that the order will become a continuing custody order by operation of law pursuant to the provisions of the *Child, Family and Community Service Act*, 1994 S.B.C. Chap. 27, and that R.K. will have an opportunity to apply for custody of S. at some future date pursuant to the provisions of that legislation should his circumstances change to the extent that he is able to provide a suitable and stable home for S.

38           In the light of the difficulties surrounding access which are not likely to be settled by the custody order, I have been asked by counsel for the Superintendent to make an order with respect to access pursuant to the *parens patriae* jurisdiction of the court. Accordingly, I conclude that there should be an order for access in the following terms: R.K. is granted reasonable unsupervised access to S. L.K. is granted reasonable day time access to S., with overnight access being permitted only in the discretion of the Superintendent. Access to S. by P.F. is to be supervised in the discretion of the Superintendent until the Superintendent is satisfied that Mrs. F. is prepared to accept the rules of access

and not attempt to undermine his placement or alienate S. from others who are involved in his care or exercising access.

"K.C. MACKENZIE, J."

Vancouver, B.C.  
20 February 1996