LEGAL BULLETIN

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The Impact of Family Violence on the Determination of a Child's Best Interests and Spousal Support

A.C. c. *K.C.*, 2023 ONSC 6017

Introduction

The case of *A.C.* v *K.C.*[1] is significant because it considers how family violence may shape a court's ruling on decision-making responsibility, parenting time, and spousal support. While the issue of child support was also considered in this case, the focus of this legal bulletin is on the role that family violence plays in determining a child's best interests and spousal support.

Background

The parties first met in 2010 in Australia and married in 2012.[2] They have one child together, a son born in 2013.[3] The mother also has a daughter from a previous relationship.[4]

The parties had an on-and-off again relationship that was rife with conflict. Following their marriage, the father engaged in a recurring pattern of violent, coercive, and controlling actions involving physical violence, along with threats to take away the child or to abandon the mother.[5]

The father was charged criminally twice—first in 2013, for threatening the maternal grandparents, and later in 2017 for assaulting the mother.[6] The first charge was withdrawn after the father entered into a peace bond, and the second charge was withdrawn after he completed the Partner Assault Response ("PAR") program and entered into another peace bond.[7] The parties separated for good in 2018.[8]

In 2009, the mother was diagnosed with Chronic Fatigue Syndrome. This diagnosis was consistent with the fact that she had a sporadic work history since before the parties first met.[9] The mother was unable to work consistently after 2012 because of health issues that were exacerbated by her experiences of family violence.[10] The mother claimed that her experiences of family violence resulted in persistent anxiety, and made it difficult for her to work continuously or consistently during the marriage and afterwards.[11]

1 2023 ONSC 6017.
2 *Ibid* at para 6.
3 Ibid at para 6.
4 Ibid at para 30.
5 Ibid at para 1.
6 *Ibid* at para 7.
7 *Ibid.*
8 *Ibid* at para 6.
9 *Ibid* at para 9.
10 *Ibid* at para 115.
11 *A.C.* v *K.C.*, *supra* note 1 at para 116.

In contrast, although the father initially had difficulty finding meaningful work following his immigration, he was able to become an investment advisor and now makes approximately $100,000 per year.[12]

At trial, the father sought sole decision-making authority in the areas of education and healthcare and an equal parenting schedule.[13] The mother sought joint decision-making responsibility, primary parenting, and ongoing spousal support.[14] Both parents testified, along with a social worker ("clinical investigator") with the Office of the Children's Lawyer ("OCL").[15]

The OCL Report revealed that the child sometimes refused to see his father for parenting time because he was scared of him.[16] The OCL Report also revealed that the child could remember his father twisting his mother's arm, and that he was "scared [the father] might do that to [his] mom again".[17]

Issues before the Judge

The issues before Justice Mandhane in this case were:

1. How the history of family violence should factor into the determination of the child's best interests for the purpose of determining parental decision-making responsibility and parenting time; and
2. Whether the history of family violence was relevant to determining each party's conditions, means, needs, and circumstances for the purposes of adjudicating the mother's claim for spousal support.[18]

Analysis of the Issues

Child's Best Interest

According to the *Divorce Act*[19] and the *CLRA*,[20] in determining a child's best interest the court must "give primary consideration to the child's physical, emotional and psychological safety, security and well-being", while considering "all factors related to the circumstances of the child", including any family violence.[21]

"Family violence" is defined broadly in the legislation as conduct by a family member towards another family member that is violent, threatening or that constitutes a pattern of controlling behaviour or that causes the other family member to fear for their own safety or for that of another person and, in the case of a child, "the direct or indirect exposure" to such conduct.[22]

Based on the mother's evidence and the OCL report, Justice Mandhane established that from 2012 to 2013, the Father engaged in family violence as he exhibited violent, threatening, and financially controlling behavior towards the mother and the child that left the mother and the child in fear for their safety.[23]

Justice Mandhane held that it was in the child's best interest for the mother to have sole **decision-making authority**. Her Honour was specifically concerned about the father's ability to make parenting decisions in the best interest of the child given his minimization at trial of the serious family violence the child experienced and his participation in the PAR program.[24]

When determining **parenting time**, Justice Mandhane relied on the AFCC-Ontario *Parenting Plan Guide*,[25] specifically as it relates to children who have experienced family violence. Her Honour summarized the Guide's key points as follows:

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12 *Ibid* at para 8.
13 *Ibid* at para 10.
14 *Ibid* at para 11.
15 *Ibid* at para 3.
16 *Ibid* at para 49.
17 *Ibid.*
18 *Ibid* at para 2.
19 RSC 1985, c 3 (2nd Supp).
20 RSO 1990, c C 12.
21 *Supra* note 19, ss 16(2)–16(3), *ibid*, s 24(2).
22 *Supra* note 19, s 2(1), *supra* note 20, s 18(1).
23 *Ibid.*
24 *Ibid* at paras 81, 83.
25 AFCC-Ontario, "Parenting Plan Guide and Template" (January 2020), online (pdf): *AFCC Ontario* <afccontario.com/wp-content/uploads/2021/12/AFCC-O-Parenting-Plan-Guide-Version-2.0-December-2021-.pdf>.

a. Children are harmed by exposure to conflict between their parents. High conflict between parents increases children's anxiety and negatively impacts healthy child development
b. Where there has been violence between the parents or abuse of the children by a parent, parenting plans should include provisions to protect the child, including transitions in neutral places and limited contact between the parents
c. Where one parent is perpetrating coercive, controlling violence over the other parent, dominating their partner or instilling fear, parenting plans should be court-mandated and include provision of support services for the victim and child, and interventions for the perpetrator
d. Even if one parent has been abusive, in the long-term the child will often want and benefit from a relationship with that person, provided that person has acknowledged and addressed their abusive behaviour and the child's safety and well-being are protected.[26]

Given the immense turmoil in the child's early life, his exposure to family violence, and his serious anxiety, Justice Mandhane ordered that the mother have primary parenting time with the child, with the father having parenting time on alternating weekends and over various holidays.[27] Furthermore, Mandhane J. ordered that the father's summer parenting time increase only after the father participated in counselling to address his behaviour.[28] Her Honour also held that it was in the child's best interests to minimize his parents interaction at exchanges of the child.[29]

Spousal Support

Section 15.2(5) of the *Divorce Act* and s. 33(8) of the *FLA*[30] provide that a spousal support order will generally be appropriate where it accomplishes one of the following goals:

- Recognize the economic advantages and disadvantages to the spouses arising from the marriage or its breakdown;
- Apportion any financial consequences arising from the care of any child, above any obligation for the support of any child;
- Relieve any economic hardship arising from breakdown of the marriage; and
- As far as is practical, promote the economic self-sufficiency of each spouse within a reasonable period.[31]

When considering the conduct of a spouse when making a spousal support order, s.15.2(5) of the *Divorce Act* says that courts must not take into consideration any misconduct of a spouse in relation to the marriage. The Supreme Court of Canada interpreted this provision in the context of allegations of spousal abuse in *Leskun v Leskun*:[32]

> There is, of course, a distinction between the emotional consequences of misconduct and the misconduct itself. The consequences are not rendered irrelevant because of their genesis in the other spouse's misconduct. If, for example, spousal abuse triggered a depression so serious as to make a claimant spouse unemployable, the consequences of the misconduct would be highly relevant (as here) to the factors which must be considered in determining the right to support, its duration and its amount. The policy of the 1985 Act however, is to focus on the consequences of the spousal misconduct not the attribution of fault.[33]

This means that while spousal support cannot be awarded based solely on the fault of one party, it can be awarded where the fault of one party causes the other party to experience economic need.

Section 33(1) of the *FLA* adopts different language from the *Divorce Act*, stating that "[t]he obligation to provide support for a spouse exists without regard to the conduct of either spouse, but the court may in determining the amount of support have regard to a course of conduct that is so unconscionable as to constitute an obvious and gross repudiation of the relationship."

Justice Mandhane held that it is possible reconcile

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26 *A.C.* v *K.C.*, *supra* note 1 at para 92.
27 *A.C.* v *K.C.*, *supra* note 1 at para 16.
28 *Ibid* at para 96.
29 *Ibid* at para 94.
30 RSO 1990, c F.3.
31 *A.C.* v *K.C.*, *supra* note 1 at para 104.
32 [2006] 1 SCR 920 [*Leskun*].
33 *Ibid* at para21.

the language in the *Divorce Act* and the *FLA*, *Leskun* and other caselaw. Her Honour provided the following general propositions about misconduct in spousal support claims:

- Pursuant to the *Divorce Act* and *FLA*, misconduct itself cannot disentitle a spouse to receipt of spousal support;
- Pursuant to the *Divorce Act* and *FLA*, misconduct itself cannot entitle a spouse to receipt of spousal support or to support at a higher range or for a longer duration;
- The emotional and psychological consequences of the misconduct can be considered if they are relevant to the other factors set out in s. 15.2(4) of the *Divorce Act* or s. 33(9) of the *FLA*; and
- At least in Ontario, unconscionable misconduct that is an obvious and gross repudiation of the relationship can be considered when determining the amount of support, but only if that conduct is relevant to the economic fallout of the marriage.[34]

In this case, Justice Mandhane concluded that the mother was entitled to both compensatory and needs-based spousal support.[35] The mother's role as the primary caregiver for the child advantaged the father because it allowed him to devote himself to retraining and to establishing himself as an investment advisor.[36] The mother was entitled to needs-based support because of her pre-existing disability, and because of the anxiety she developed because of the family violence she experienced.[37]

Given the mother's strong compensatory and need-based claims, Justice Mandhane ordered spousal support at the high end of the range of amounts suggested by the Spousal Support Advisory Guidelines ("SSAG").[38] Justice Mandhane held that while it was not necessary to resort to s. 33(10) of the FLA to arrive at this amount, that provision also supported an award at the high end of the SSAG range because "the Father's pattern of financial abuse, violence, coercive and controlling behaviour during the marriage" constituted an "obvious and gross repudiation of the relationship" that negatively impacted the mother's economic circumstances.

Takeaways

By prioritizing the child's well-being and acknowledging the coercive control exerted by the father, the court rightly deemed it in the child's best interest for the mother to have sole decision-making authority. Furthermore, the court's order of primary parenting time for the mother with certain safeguards, such as counseling for the father and minimizing interactions between the parties, aligns with the court's broader goal of shielding children from the detrimental effects of family violence, ultimately fostering stability and ensuring their safety and well-being.

In regard to spousal support, this decision underscores the legal system's commitment to providing equitable outcomes for victims of family violence, addressing their unique challenges in achieving economic self-sufficiency and relieving financial hardship resulting from the breakdown of the marriage. It also acknowledges that family violence may impact the amount of support awarded under s. 33(10) of the FLA.

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34 *A.C.* v *K.C.*, *supra* note 1 at para 111.
35 *Ibid* at para120.
36 *Ibid.*
37 *Ibid.*
38 *Ibid* at para123.

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