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— **Franks & Zalev - This Week in Family Law**

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Introducing the Tort of Family Violence

A. v. A., 2022 CarswellOnt 2367 (S.C.J.) — Mandhane J.

The parties separated on July 2, 2016, after about 17 years of marriage. They had two children together — the eldest was 20 years old and the youngest was 18 at the date of the 11-day trial. Both children had been estranged from the Father since 2017.

The trial focused on four issues: equalization of property, child support, spousal support, and a rather novel and contentious claim: "the Mother's claim for damages in relation to the Father's alleged abuse during the marriage." The parties were unable to agree on their respective incomes for support purposes, the value of the Father's business, or either party's entitlement to post-separation accounting.

The parties were married in India, and they moved to Canada a few years later to pursue better economic opportunities. The Mother alleged that, for the duration of the marriage, she suffered consistent physical, verbal, emotional, psychological, and financial abuse at the hands of the Father.

Over the years, the Mother worked full time in a plastics factory, then a food court at Woodbine Racetrack, and then at a banquet hall. The Father also worked full time in the plastics factory, alternating day and night shifts with the Mother so one of them could care for the eldest child, and then as a truck driver. In 2008 or 2009, the father became a truck owner-operator, which resulted in a "huge increase" in his income. The parties moved to Edmonton, Alberta for two years to once again pursue better economic opportunities. The Father moved back to Brampton, Ontario in January 2014, and bought the matrimonial home, while the rest of the family moved back in July 2015. The parties stopped directly communicating at that point, and would relay messages through their children until they separated. After separation, the Father cut the Mother and the children off financially and refused to pay adequate spousal support.

On September 7, 2021, the Father was charged with two counts of assault against the Mother, as well as one count of uttering death threats. These charges were related to events during the marriage, but they did not factor into Justice Mandhane's analysis.

The Father filed an Application in August 2016 for joint decision-making authority, weekend parenting time, the sale of the matrimonial home, and equalization. The Mother filed her Answer seeking sole decision-making authority, primary residency, child support, spousal support, and equalization on October 19, 2016. The Mother was initially represented by counsel, but later became unrepresented. She delivered an Amended Answer on March 17, 2021, with a new claim for "general, exemplary and punitive damages for the physical and mental abuse suffered by the [Mother] at the hands of the [Father]." By the time of the trial, the parenting issues were no longer in dispute and the Father was paying monthly temporary child support for both children in the amount of \$1,113, based on an annual income of \$73,256.

Here's the interesting part. At trial, Justice Mandhane awarded the Mother \$150,000 in "compensatory, aggregated, and punitive damages for the **tort of family violence**." In doing so, she acknowledged that such a significant damage award was "well-outside the normal boundaries of family law." However, her reasoning for doing so was that the parties' marriage was not typical, as it was characterized by violent abuse and "a sixteen-year pattern of coercion and control." Justice Mandhane opined that such a pattern of abuse could not be compensated through an award of spousal support, especially since s. 15.2(5) of the *Divorce Act* specifically precludes the court from considering "misconduct" when making a spousal support award. As a result, she held that the Mother was entitled to a remedy in tort.

In considering whether the Mother's tort claim could be properly considered as part of the family law proceedings, Justice Mandhane pointed to the March 2021 amendments to the *Divorce Act*, which "explicitly recognized the devastating, life-long impact of family violence on children and families" and were applicable to the issue of parenting. She noted that, despite the legislation statutorily recognizing family violence, the *Divorce Act* did not create a complete statutory scheme to address all the legal issues that arise in a situation of family violence. Nor did the amendments provide a survivor of family violence the ability to obtain reparations for any harms flowing directly from the family violence beyond the economic consequences of the breakdown of the marriage.

Justice Mandhane considered that allowing family law litigants to pursue damages for family violence was an access to justice issue. In her view, "only an award in tort [could] properly compensate for the true harms and financial barriers associated with family violence" in cases where there was "a long-term pattern of violence, coercion and control." She noted that it was incumbent on case management judges to ensure that the claim is genuine at the pleadings stage when faced with tort claims in a family law context.

Herein lies one of our concerns. Given the frequency with which verbal, emotional, psychological, financial and physical abuse is alleged, it stands to reason that claims for damages for the tort of family violence may become a regular feature in an Application near you. And to suggest that it is incumbent on case management judges to ensure that the claim is genuine at the pleadings stage? What does that mean exactly? Does that mean an increase in summary judgment and pleadings motions? That does not sound optimal.

Justice Mandhane concluded that the common law should recognize a new foundation for liability for family violence based on existing case law related to spousal battery, explicit recognition of the harms associated with family violence in the *Divorce Act*, recent provincial legislation that removes other legal barriers facing survivors leaving violent relationships, developments in the American case law, and Canada's international law obligations related to women's equality.

Justice Mandhane then set out the test for this new tort, to be proven on the balance of probabilities. For a successful claim, the plaintiff must prove conduct by a family member towards the plaintiff, within the context of a family relationship, that:

- (1) is violent or threatening, *or*
- (2) constitutes a pattern of coercive and controlling behaviour, *or*
- (3) causes the plaintiff to fear for their own safety or that of another person.

Intention is *central* to the tort of family violence. When going through the three modes of possible liability, the plaintiff must establish either "that the defendant/family member *intended* to engage in conduct that was violent or threatening", "that the family member engaged in behaviour that was *calculated* to be coercive and controlling to the plaintiff," or "that the family member engaged in conduct that they *would know with substantial certainty* would cause the plaintiff subjective fear."

After liability has been proven, the relevant factors in assessing damages are the circumstances, extent, duration, and specific harm of the family violence. Aggravated damages may be appropriate where there is a betrayal of trust, breach of fiduciary duty, and relevant post-incident conduct, whereas punitive damages may be appropriate based on the social harm associated with family violence.

We know what you're thinking. It is the same thing we were thinking. Why a new tort? What's wrong with the already established torts of assault and battery? It seems Justice Mandhane thought of that as well. The tort of family violence is distinguishable from the torts of assault and battery due to the "cyclical and subtle" nature of the coercion and control found in family violence cases, and the involvement of "complicated and prolonged psychological and financial abuse." As noted by her Honour, assault and/or battery are generally focused on specific, harmful *incidents*, while the proposed tort of family violence is focused on long-term harmful *patterns* of conduct that are designed to control and terrorize. Good answer.

As a result, when attempting to establish family violence, a plaintiff will have to prove on a balance of probabilities that a family member engaged in a *pattern* of conduct that included more than one incident of "physical abuse, forcible confinement, sexual abuse, threats, harassment, stalking, failure to provide the necessities of life, psychological abuse, financial abuse, or killing or harming an animal or property." The family member's conduct must be detailed using specific examples.

Her Honour also expressed concern that narrowly focusing on the specific-event-based intentional torts of assault and battery would unfairly obscure the lived reality of family violence, and ultimately disregard the fact that conditions of terror, fear, coercion, and control are often created through years of psychological abuse punctuated with relatively few acts of serious physical violence.

She pointed to the relatively small number of spousal assault cases in which damages had been awarded as evidence of the difficulties of trying to address long-term family violence with existing intentional torts. She also noted that, in her view, the analysis required for existing intentional torts created a "real risk that triers of fact will miss relevant social context and engage in stereotypical reasoning about the proper comportment and behaviour of survivors when assessing credibility."

Justice Mandhane held that recognizing a new tort of family violence was consistent "with the compensatory goals of tort law," as well as "the overarching imperative to remove the economic barriers facing survivors that try to leave violent relationships and access justice." She noted that current legislative reforms do not adequately "change the overall financial dynamic associated with leaving an abusive relationship." The harms associated with family violence reach beyond the harms and financial barriers that can be compensated by an award of spousal support, and, survivors, particularly female survivors, are often the ones who bear the brunt of the negative financial and social impact of family violence.

Finally, her Honour held that recognizing the tort of family violence was consistent with not only "Canada's international human rights obligations under the *Convention on the Elimination of all Forms of Discrimination Against Women*," which recommends the implementation of legislative measures that ensure that survivors of violence have "access to justice and to an effective remedy," but "with the normative standard of personal responsibility in our society" as well.

Here, Justice Mandhane found the Mother to be a more credible witness than the Father. She preferred the evidence of the Mother, which was corroborated by accounts from two lay witnesses, and placed significant weight on the Mother's health records, which dated back to 2009.

With respect to the first mode of liability, Justice Mandhane held that the Father engaged in serious physical assaults in 2000, 2008, and 2013. She found that he also committed the tort of assault during those incidents. Regarding the second mode of liability, Justice Mandhane held that the Father was psychologically abusive towards the Mother from the beginning of the marriage and had subjected the Mother to weeks and sometimes months of "silent treatment" after physically and verbally abusing her until she complied with his sexual demands. The Father also made all of the financial decisions during the marriage and closely monitored the Mother's spending. After separation, he closed all of their joint accounts and unilaterally terminated the Mother's credit card that she used to purchase groceries so that she had no access to funds.

While Justice Mandhane found that the Father also committed the tort of intentional infliction of emotional distress, it is not clear that the tort of intentional infliction of emotional distress is available in family law proceedings: *Fan v. Zhang*, 2015 CarswellBC 3667 (S.C.). This tort is also not entirely satisfactory for situations of family violence because a requirement of the tort is a visible and provable mental illness — and that will not always be present in situations of family violence.

Justice Mandhane awarded \$50,000 in compensatory damages relating to the Mother's ongoing mental health disabilities (depression and anxiety) and her loss of earning potential due to the fallout of the family violence. She emphasized that this award was not to be confused with spousal support, as it was designed to compensate the harms that flowed directly to the Mother from the Father's family violence, and clarified that she would have ordered compensatory damages in the range of \$100,000 had it not been for the spousal support payable and a concern for "double-counting." Justice Mandhane awarded the Mother an additional \$50,000 in aggravated damages as a result of the "overall pattern of coercion and control and the clear breach of trust" in the marriage and post-separation, as well as a further \$50,000 in punitive damages to strongly condemn the Father's conduct. She noted that she "show[ed] restraint in [her] punitive damage award" due to the Father's outstanding criminal charges and potential punitive sanctions.

With respect to the other issues of child support, spousal support, and equalization of property, Justice Mandhane held that the Father owed \$20,788 in retroactive child support, and would pay monthly child support in the amount of \$802 for the youngest child until December 31, 2022. Section 7 expenses, other than the children's post-secondary education expenses, would be divided such that the Father paid for 65% and the Mother 35%. Justice Mandhane determined that the Father's income for support purposes was the average of his 2018-2020 income in the amount of \$86,136 and the Mother's income was imputed to \$30,000 on the basis of intentional underemployment.

Regarding the Father's spousal support obligation, he owed \$47,188 in retroactive spousal support and was to pay monthly spousal support in the amount of \$822 while child support was still payable, and then \$2,244 per month starting January 1, 2023, until he either retired from the workforce or celebrated his 65th birthday, whichever came first. In finalization of their property issues, the Mother was entitled to proceeds of sale from the matrimonial home and an additional \$24,680.

We admit that when we first heard of this decision, we had some questions about a new tort of family violence. However, aside from our expressed concern over a potential proliferation of claims for damages for the tort of family violence, we accept that this tort absolutely has a place in Canadian law. Not all family violence is physical violence so as to invoke the torts of assault or battery. Some family violence is far more subtle and often far more damaging and worthy of sanction.

Does Biology Matter?

T.K. v. C.E. (2021), 63 R.F.L. (8th) 1 (Sask. C.A.) — Jackson, Leurer, and Kalmakoff JJ.A.

TK and CE were in a female same-sex relationship. When they met online in 2014, TK was living in Saskatchewan, while CE was living in Ontario and working as a naturopathic doctor.

CE relocated to Saskatchewan to be with TK, and to start a naturopathic clinic together. CE was the doctor at the clinic, but both parties worked in the business, and it was very much a joint effort.

In 2017, the parties decided to have a child together. They agreed that CE would carry the child, as she was much younger than TK.

The parties separated after the child was born. Litigation ensued. The chambers judge, Justice Elson, determined that the evidence was too conflicted to decide the interim parenting arrangements on a paper record, and ordered an oral hearing. Pending the hearing, his Honour also put in place a shared 2-2-3 schedule on a without prejudice basis.

When the oral hearing came on before Justice Richmond, TK requested joint decision-making and a shared parenting arrangement, while CE sought sole decision-making and permission to move back to Ontario with the child. Apparently, the parties' naturopathic business had been hit hard by the pandemic, and there were significantly more job opportunities available for CE in Ontario, where she would also have help from her family.

After hearing three days of evidence and a day of argument, Justice Richmond found that it would be in the child's best interests to relocate to Ontario with CE.

TK appealed, and argued that Justice Richmond had made a number of errors, including that she improperly preferred the biological parent over the non-biological parent, and failed to place the evidentiary burden on CE to show that it would be in the child's best interests to relocate to Ontario.

In arguing that Justice Richmond gave a preference to CE because she was the biological parent, TK claimed that the following statements in the decision contravened s. 11 of the *Children's Law Act, 2020*, S.S. 2020, c. 2 (the "*CLA 2020*"), which provides that "the court shall make no presumption and draw no inference as between parents that one parent should be preferred over the other parent":

- "C.E. is [the child's] biological parent and [the child] has an extensive biological family in Ontario. Again, biological connection is but a factor to be considered." [para. 88 of Justice Richmond's decision]
- "T.K. displayed controlling behavior during the relationship, and I cannot be satisfied that she would promote [the child's] relationship with C.E. or her biological family if [the child] was to remain in T.K.'s primary care." [para. 91 of Justice Richmond's decision]

In rejecting TK's argument on this point, the Court of Appeal pointed out that these two sentences could not be looked at in isolation, and that it was clear from the reasons as a whole that her Honour was aware that TK was not to be treated differently simply because CE was the child's biological parent, and that there is no presumption in law in favour of a biological parent.

The Court of Appeal also pointed out that while a court cannot automatically prefer a biological parent, a biological connection to someone other than a parent can, depending on the facts in each particular case, still be a relevant consideration in parenting cases in Saskatchewan:

[15] Based on all of this, I am satisfied the judge was aware that she was not to give preference to C.E. over T.K. simply because C.E. is the biological mother of the child. I also see nothing in the *Interim Decision* that suggests that the judge ignored this legal requirement. Instead, **what the judgment reflects is that she took into account that the biological connections that the child may have to other persons are relevant considerations to take into account when carrying out the best interests analysis. The judge did not err in considering what parenting arrangement would best enhance these other relationships when making the parenting order.**

[16] Human experience is that, both as children and mature adults, people often find meaning in, or derive a sense of identity from, their connections with others. **Depending on all the circumstances, this may include biological relationships. . . .**

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[18] One of the reforms instituted by the *CLA 2020* was to remove the distinction between parents based on who has a biological connection to a child. The *CLA 2020* now demands that, *in a contest between parents*, the biological connection to a child that one parent has, but that the other does not, is not to be considered. In this regard, the legislation is intended to overcome preconceived notions or prejudices regarding biological choice. However, **the *CLA 2020* does not require that all connections a child may have must be disregarded. T.K. conceded in oral argument that this may include those associated with biological relationship. It is all, of course, very context specific.** [emphasis added]

Respectfully, it is somewhat difficult to reconcile the Court of Appeal's comments about the potential relevance of biological connections to extended family members with its statement that s. 11 of the *CLA 2020* is intended "to remove the distinction between parents based on who has a biological connection to a child." If a *parent's* biological ties to a child are statutorily irrelevant, how can biological connections to extended family be any different?

Perhaps the analysis would be more clear (or less concerning) if we simply used the term "extended family" instead of "biological family". That way, judges could still consider the important roles that grandparents, aunts, uncles, cousins, etc. often play in a child's life without regard to whether the child is biologically related to the extended family in question. It is hard to see the Court of Appeal's reasons as not favouring CE on account of the fact that she carried the child.

With respect to the issue of onus, s. 16 of the *CLA 2020*, which mirrors ss. 16.93 and 16.94 of the *Divorce Act*, establishes rules for determining who bears the burden of proof in relocation cases. It provides that:

16(1) If the parties to the proceeding substantially comply with an order, arbitral award or agreement that provides that a child spend substantially equal time in the care of each party, the party who intends to relocate the child has the burden of proving that the relocation would be in the best interests of the child.

16(2) If the parties to the proceeding substantially comply with an order, arbitral award or agreement that provides that a child spends the vast majority of time in the care of the party who intends to relocate the child, the party opposing the relocation has the burden of proving that the relocation would not be in the best interests of the child.

16(3) In any other case, the parties to the proceeding have the burden of proving whether the relocation is in the best interests of the child.

16(4) **The court may decide not to apply subsections (1) and (2) if the order mentioned in those subsections is an interim order.** [emphasis added]

In this case, Justice Richmond found that since Justice Elson's interim Order was "only intended as a stop-gap measure until the parties could proceed to a *viva voce* hearing, it [was] not appropriate to apply s. 16(1) and therefore, 'the parties to the proceeding have the burden of proving whether the relocation is in the best interests of the child' (s. 16(3))." TK argued that this was an error, and that "there was no reasonable basis to relieve C.E. of the burden imposed by operation of s. 16(1)."

As s. 16 of the *CLA 2020* is virtually identical to ss. 16.93 and 16.94 of the *Divorce Act*, and as this is one of the first cases where an appellate court has considered these provisions in detail, it is worth repeating the Court of Appeal's discussion in full:

[27] My consideration of T.K.'s argument on this point again begins with a review of the *CLA 2020*. **Section 16 assigns a burden in two sets of circumstances, which are described in subsections (1) and (2).** Section 16(1) is applicable where the parties to the proceeding "substantially comply with an order, arbitral award or agreement that provides that a child spend substantially equal time in the care of each party". When s. 16(1) applies, "*the party who intends to relocate the child* has the burden of proving that the relocation would be in the best interests of the child" (emphasis added). Section 16(2) is applicable where the "parties to the proceeding substantially comply with an order, arbitral award or agreement that provides that a child spends the vast majority of time in the care of the party who intends to relocate the child". When s. 16(2) applies, "*the party opposing the relocation* has the burden of proving that the relocation would not be in the best interests of the child" (emphasis added).

[28] **What unites s. 16(1) and s. 16(2) is that an onus is only assigned when the parties substantially comply with an "order, arbitral award or agreement". Court orders and arbitral awards are most often forged in the crucible of litigious dispute.** The *CLA 2020* defines the term "agreement" to mean "a written agreement signed by the parties" (s. 2(1)). Considering these sets of circumstances together, as I see it, **s. 16 reflects that where there is a strong foundation to assume that a parenting arrangement is in the child's best interests, that arrangement should generally be respected. This justifies placing an onus on the party seeking a change to it.**

[29] However, **s. 16(4) recognizes that the assumption that underpins the assignment of an onus under s. 16(1) and s. 16(2) may not exist when a parenting arrangement has been put in place via an *interim* order.** One reason for this is that the foundation for interim orders is sometimes different than that for final orders. In some cases, interim orders are the product of quick court processes where the parties are not able to put forward a complete evidentiary record. In most cases, the evidence is introduced by way of affidavits. The evidence is often contradictory or difficult to sort out. Most often there is no cross-examination on the affidavits. Sometimes interim orders become, in effect, final in nature. Every case is, of course, unique. However, **recognizing the limitations that may — but do not always — exist in the process leading to interim decisions or in their character, s. 16(4) grants to the court the ability to dispense with the application of the onus that would otherwise be engaged by s. 16(1) or s. 16(2).** [emphasis added]

This makes perfect sense, and the wording of s. 16(4) is really quite clear. As Justice Elson's Order was made without prejudice pending the *viva voce* hearing, it quite obviously did not represent a long-term arrangement that the parties had agreed, or the court had determined, was in the child's best interests. That being the case, there was simply no basis for the Court of Appeal to accept TK's argument that Justice Richmond ought to have placed the evidentiary burden entirely on CE. And, even if there had been, the Court of Appeal was satisfied that the judge had reached her decision by considering the evidence offered by both parties, so there was no basis for concluding that her decision was affected by the placement of the initial onus.

As the rest of the grounds of appeal that TK raised were really just an attempt to have the Court of Appeal reweigh the evidence, and as interim decisions are entitled to significant deference on appeal (see *Bolan v. Bolan*, 2013 CarswellSask 644 (C.A.) at paras. 6-7), the appeal was dismissed.

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