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— Franks & Zalev - This Week in Family Law

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What is an "Obvious and Gross Repudiation of a Relationship"? (And What Isn't)?

A.C. v. K.C., 2023 CarswellOnt 16616 (S.C.J.) — Mandhane J.

About a year-and-a-half before Justice Mandhane released her decision in *A.C. v. K.C.*, she released her ground-breaking (or perhaps earth-shattering, depending on your point of view) decision in *Ahluwalia v. Ahluwalia* (2022), 68 R.F.L. (8th) 255 (Ont. S.C.J.), which we discussed at length in the March 21, 2022 (2022-10) edition of *TWFL*.

Before we delve into Justice Mandhane's decision in *A.C.*, we will revisit a few of Justice Mandhane's and the Ontario Court of Appeal's comments in the *Ahluwalia* decisions, as they touch on the interplay between intimate partner violence and spousal support claims. Both Ahluwalia and *A.C.* highlight the ongoing struggle in family law proceedings of how to adequately remedy the harms caused by intimate partner violence — which the Ontario Court of Appeal described in *Ahluwalia* as the "cancer" of domestic relationships.

As a reminder, in *Ahluwalia*, Justice Mandhane created the new tort of Family Violence after finding that neither the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.) (the "*Divorce Act*") nor the common law create a complete statutory scheme to sufficiently address situations of alleged coercive control (as opposed to specific incidents of violence) because spousal support orders are narrowly focused on *compensation*, rather than fault and misconduct.

As her Honour noted, s. 15.2(4) of the *Divorce Act* does not include "family violence" as one of the factors the court is to consider in making a spousal support order, and s. 15.2(5) of the *Act* specifically prohibits the court from considering *any* misconduct of a spouse in relation to the marriage in making a spousal support order:

> **Spousal misconduct**
>
> 15.2(5) In making an order under subsection (1) [spousal support order] or an interim order under subsection (2) [interim spousal support order], **the court shall not take into consideration any misconduct of a spouse in relation to the marriage**. [emphasis added]

While not discussed in *Ahluwalia*, s. 33(10) of the *Family Law Act*, R.S.O. 1990, c. F.3 (the "*Family Law Act*"), contains a similar clause:

> **Conduct**
>
> 33(10) The 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.

We will be returning to the wording of these provisions later, so keep them in mind.

Returning to *Ahluwalia*, Justice Mandhane found that, in such unusual cases, where there is a long-term pattern of violence, coercion and control, only an award in tort can properly compensate for the true financial harms and barriers associated with family violence. Her Honour then recognized the new tort of Family Violence to address patterns of coercive and/or controlling behaviour in the domestic context and awarded the wife damages of $150,000 ($50,000 each of general, aggravated and punitive). Justice Mandhane then considered the wife's statutory claims and determined that the husband owed the wife $67,976 in retroactive support and $1,624.20 a month in prospective support.

The husband appealed Justice Mandhane's decision and, as we discussed in the July 17, 2023 (2023-28) edition of *TWFL*, the Ontario Court of Appeal allowed the appeal, declined to recognize the tort of Family Violence as part of the law of Ontario, and set aside that portion of her Honour's decision ((2023), 88 R.F.L. (8th) 1 (Ont. C.A.)). We understand that the wife has applied for leave to appeal to the Supreme Court of Canada (and an extension to do so).

In its decision, the Court of Appeal held that the court should first apply the statutory framework, which, in the vast majority of family law cases, will include the *Divorce Act* and/or the *Family Law Act* (or such similar provincial legislation) and it is only *after* determining the statutory claims that the court should consider any other claims advanced, including any tort claims. As the court noted, in cases involving spousal support and tort claims, a compensatory spousal support award under the *Divorce Act* and/or the *Family Law Act* may very well impact the amount of possible tort damages.

In other words, the court may be able to remedy — in full or in part — the inequities arising from family violence through the operation of the statutory claims, including child support, spousal support and claims for property division (including, as the Court of Appeal noted, claims for an unequal division of property (for example, under s. 5(6) of the *Family Law Act*)).

While we are not mind readers (although that would make our lives *so* much easier), it seems that Justice Mandhane may have had the Court of Appeal's comments in *Ahluwalia* in mind when writing her decision in *A.C.*, and in considering whether the history of family violence in that case was relevant to determining the amount of spousal support to be awarded.

The parties in *A.C.* met in Australia in 2010 and married in July 2012. They separated in August 2018.

The parties have one child together, who was born in January 2013 and was 5-years-old at the time of the separation and 10-years-old at the time of the trial (the "child"). The wife also had a child from a previous relationship, who was 18-years-old at the time of the trial (the "older child").

Despite having been married for six years, the parties had an on-again/off-again relationship, and they only actually lived together for a total of about 19 months, including about one month before the child was born and about 18 months when the child was seven or eight years old. When the parties were not living together, the husband would generally visit the wife and the children on weekends.

The husband had immigrated from Australia to Canada and had difficulty finding meaningful work at the beginning of the parties' relationship, but he later became an investment advisor. At the time of the trial, the husband was 41 years old and was earning about $100,000 a year.

The wife had been diagnosed with Chronic Fatigue Syndrome in 2009 and had a sporadic work history since before the parties met. She had a few casual, part-time jobs before and during the relationship, but she had not worked since the separation. In addition to the minimal income she earned during the marriage, the wife supported herself and the children at first, through long-term disability payments and later, through proceeds from an insurance settlement that she received in 2015 and Canada Pension Plan disability benefits. At the time of the trial, the wife was 43 years old and was continuing to receive disability benefits.

The wife's largely unchallenged evidence was that the husband was emotionally, physically and financially abusive towards her and the children during the relationship. Justice Mandhane recounted the wife's evidence about a number of instances of abuse

perpetrated by the husband against the wife, the wife's family and the children, including the following (the husband's evidence was largely that he "could not recall" these instances of abuse — never a good answer):

> • In March 2013, the husband threatened the wife's parents, saying that he would "kill them," "slit their throats," "burn their house down," "watch them die in the fire," and then "dance on their graves." While the husband denied threatening to "slit their throats," he admitted that he had threatened to kill them. The husband uttered these threats while the wife was standing nearby with the infant child in her arms. The wife reported the husband to the police, and the husband was charged criminally with uttering threats. [para. 35]
>
> • In October 2014, the husband tried to grab the child out of the wife's arms, and when the wife resisted, he held her by the neck and pinned her against the kitchen cupboards. The older child then kicked the husband, which prompted him to remove his hands from the wife's throat. As the wife tried to leave the kitchen, the husband yelled after her, "You haven't seen my backhand yet." [para. 38]
>
> • In May 2017, while the wife was holding the child, the husband came up behind the wife, grabbed her wrist, twisted it, and knocked the child's body hard against the kitchen cupboards such that he started crying. The wife was concerned that the husband was going to break her wrist and she screamed loudly, "Get your hand off me. Back off. Stop." The husband complied; however, the older child had already called the police. When the police attended at the house, the wife told the officers what had happened, and asked them not to arrest the husband. The police arrested the husband anyway and he had to leave the house. [para. 43]

Justice Mandhane found that the husband was violent, threatening and financially controlling in relation to the wife and the children. The husband's violence caused the wife and the children to fear for their own and each other's safety.

Justice Mandhane accepted the wife's evidence that her experiences of family violence during the marriage exacerbated her disability, resulted in persistent anxiety, and had made it difficult for her to work continuously or consistently during the marriage and afterwards.

While this case dealt with parenting, child support and spousal support, it is Justice Mandhane's spousal support analysis that is of particular interest to us — in particular, the impact of the history of family violence on the wife's spousal support claim. (As there is no mention of an equalization claim in Justice Mandhane's decision, we assume that no such claim was advanced.).

The wife made a claim for spousal support under both the *Divorce Act* and the *Family Law Act*. Justice Mandhane began her analysis by reviewing the objectives of spousal support as set out in s. 15.2(6) of the *Divorce Act* and s. 33(8) of the *Family Law Act*, which she summarized as follows:

> • 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 the breakdown of the marriage; and
>
> • As far as is practical, promote the economic self-sufficiency of each spouse within a reasonable period.

Justice Mandhane properly noted that, in determining the appropriate spousal support order, she had to take into consideration the "condition, means, needs and other circumstances of each spouse", including the factors listed in s. 15.2(4)(a) - (c) of the *Divorce Act* and s. 33(9)(a) - (m) of the *Family Law Act*.

Justice Mandhane paused here to consider the extent to which she could consider the husband's abusive conduct when making her spousal support order.

Prior to the 1985 *Divorce Act*, s. 11 of the 1968 *Divorce Act* directed the court to have "regard to the conduct of the parties and the condition, means and other circumstances of each of them" in determining the appropriate spousal support order. The

1985 *Divorce Act* sought to eliminate misconduct as a relevant consideration, and, as you will recall from earlier, s. 15.2(5) of the *Act* now provides that "the court ***shall not*** take into consideration any misconduct of a spouse in relation to the marriage" in making a spousal support order.

However, as Justice Binnie noted in *Leskun v. Leskun* (2006), 34 R.F.L. (6th) 1 (S.C.C.), there is a distinction between the misconduct *itself* and the *consequences* of misconduct, which may be a proper consideration:

> [21] 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. [emphasis added]

Section 15.2(5) of the *Divorce Act*, with the benefit of the Supreme Court of Canada's guidance in *Leskun*, is straightforward and easy to apply. The misconduct itself cannot be considered in the spousal support analysis, but the *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 *Family Law Act* (or your favourite provincial equivalent).

Things get a bit more complicated with s. 33(10) of the *Family Law Act*, which provides that a spouse's conduct is irrelevant to the obligation to provide support, but that 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." Courts have interpreted this to mean that the conduct must be *exceptionally* bad, must be such as could reasonably be expected to destroy the marriage, and must have persisted in the face of the other spouse's virtual blamelessness. See *Kurmis v. Kurmis*, 2018 CarswellOnt 17034 (S.C.J.) at para. 28; *Smith v. Smith*, 2013 CarswellOnt 13918 (S.C.J.) at para. 91 ("*Smith*"); *Menegaldo v. Menegaldo*, 2012 CarswellOnt 6030 (Ont. S.C.J.) at para. 63; and *B. (S.) v. B. (L.)* (1999), 2 R.F.L. (5th) 32 (Ont. S.C.J.) at para. 9.

There are very few reported cases that apply s. 33(10) of the *Family Law Act* and, in the majority of the cases that do, the court found that the claimant had not met the very high bar of establishing a course of conduct that was so unconscionable as "to constitute an obvious and gross repudiation of the relationship." For example, in *Smith*, Justice Gordon found that the wife's alleged affair with the parties' mutual friend during the marriage was likely only one factor that led to the parties' separation, and that the wife's conduct did not rise to the level of being a "gross repudiation" of the marriage. That is an extraordinary concept — that an intimate extramarital relationship is not a "gross repudiation" of a marriage, especially when one considers the provisions of the *Divorce Act* meant to strengthen marriage and promote reconciliation, and given that an extramarital affair is one of the few bases to evidence marriage breakdown under the *Divorce Act*.

In *A.C.*, Justice Mandhane considered whether s. 15.2(5) of the *Divorce Act* and s. 33(10) of the *Family Law Act* conflict in terms of whether unconscionable spousal misconduct will be a relevant factor when determining the amount of spousal support payable, and ultimately concluded that it is possible to interpret the provisions consistently with one another. Her Honour found that, taken together and interpreted consistently, the provisions lead to the following general propositions:

> [111] . . .
>
> • 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*.

> • 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. [citations omitted]

We agree with the first three points, but not the fourth, in which Justice Mandhane reads in a limitation that the court may consider a course of conduct that is so unconscionable as to constitute an obvious and gross repudiation of the relationship under s. 33(10) of the *Family Law Act only* where the course of conduct is relevant to the economic fallout of the marriage — in an apparent attempt to interpret s. 33(10) consistently with s. 15.2(5) of the *Divorce Act*. But, respectfully, there is no basis to simply "read in" that concept or those words. There are differences in the support provisions of the *Divorce Act* and the provincial acts, and that is fine, subject only to possible constitutional challenge. If the legislature had intended to limit the application of s. 33(10) of the *Family Law Act* in such a way, they would have made that clear in the wording of the provision. While different enactments of the same legislature are deemed to be as consistent as the provisions of a single enactment and deemed to make up a coherent system [*Dundas v. Schafer* (2014), 50 R.F.L. (7th) 37 (Man. C.A.)], there is no presumption of legislative consistency across the acts of different levels of government.

For what it's worth, we do think that s. 15.2(5) of the *Divorce Act* and ss. 33(10) of the *Family Law Act* conflict. And that's ok; it is for Parliament or the provincial legislature to make any changes. The former ought to take precedence where the *Divorce Act* applies. Section 15.2(5) of the *Divorce Act* provides that, in making a spousal support order, the court is not to take into consideration ***any*** misconduct of a spouse in relation to the marriage — not even conduct that is "so unconscionable as to constitute an obvious and gross repudiation of the relationship." While we have not come across any decisions, aside from Justice Mandhane's decision in *A.C.*, in which the court specifically considered the issue of whether these provisions conflict with each other, we note that, in *Sivarajah v. Muralidaran*, 2016 CarswellOnt 13566 (S.C.J.), Justice Kiteley found that the *Divorce Act* took precedence and, as a result, declined to apply s. 33(10) of the *Family Law Act* in the case before her. Therefore, much of the discussion in *A.C.* regarding s. 33(10) is *obiter* as the section was inapplicable.

Once Justice Mandhane had established the extent to which she could consider the husband's abusive conduct in making a spousal support order, she reviewed the condition, means, needs and other circumstances of the parties, and had no difficulty concluding based on the nature of the parties' marriage that the wife was entitled to spousal support on both compensatory and non-compensatory grounds. During the marriage, the husband was mostly focused on re-training, securing employment and working outside the home. In contrast to the husband, the wife was unable to work consistently due to her childcare responsibilities, her disability and her experiences of family violence. The wife's role as the child's primary caregiver was beneficial to the husband's career as it allowed him to devote himself to retraining and to establishing himself as an investment advisor.

The wife clearly had a need for spousal support, due to her disability and the anxiety she had developed on account of the family violence she experienced.

Given the wife's strong compensatory and non-compensatory claim, Justice Mandhane ordered the husband to pay the wife spousal support at the high-end of the *SSAGs* range from the date of separation (based in the parties' respective incomes, there was no spousal support owing for 2019 and 2020, and relatively modest support owing for 2021). Her Honour declined to impose a termination date for spousal support and, instead, ordered that it be reviewed in three years.

Although Justice Mandhane did not need to resort to s. 33(10) of the *Family Law Act*, as she had already considered the emotional and psychological consequences of the husband's abusive conduct as they related to the spousal support factors set out in the *Divorce Act* and the *Family Law Act*, and had found that the wife was entitled to spousal support at the high end of the *SSAGs* range, she did so anyway. Her Honour found that the husband's "pattern of financial abuse, violence, coercive and controlling behaviour during the marriage was an 'obvious and gross repudiation of the relationship' that had a detrimental impact on the [wife's] economic circumstances" that offered further support for the spousal support order.

With respect, these comments were unnecessary, and we fear that Justice Mandhane's finding that s. 33(10) of the *Family Law Act* applied in this case, and the absence of any real analysis with respect to this finding, will only further muddy the waters on the issue of when, if at all, a party's conduct (as opposed to the consequences of their conduct) will be relevant to the determination of the amount of the spousal support order. And that is not the direction we want to be heading in. Again, it is hard to suggest that an extramarital affair — or a pattern of extramarital affairs — is not a gross repudiation of a marriage whereas a pattern of coercive and controlling violence is. We do not at all mean to diminish that which is the cancer of domestic relations; we simply note that the concepts do not sit well together.

Where there are allegations of intimate partner violence, we strongly encourage counsel to focus on the emotional, psychological and physical consequences of the abuse, and how it relates to the factors set out in s. 15.2(4) of the *Divorce Act* and s. 33(9) of the *Family Law Act*, rather than trying to pursue an argument under s. 33(10) of the *Family Law Act*. Justice Mandhane's decision in A.C. provides an excellent roadmap for how the court can craft a spousal support order that compensates the victim for the consequences of abuse, without having to resort to s. 33(10).

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