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

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"How the myth wipes out the fact" — John Steinbeck

K.M.N. v. S.Z.M. (2024), 98 R.F.L. (8th) 275 (B.C. C.A.) — DeWitt-Van Oosten, Dickson and Horsman, J.J.A.

Issues: British Columbia — Parenting — Best Interests of the Child — Family Violence

This is an important case about what a court must — and must not — do when faced with allegations of family violence relevant to the best interests of a child:

- A court *must* meaningfully engage with the allegations of family violence by analyzing the evidence, making findings of fact, and considering how this affects the best interests of the child.
- A court *must not* limit its analysis to alleged violence against the child.
- A court *must* consider alleged violence against a parent and how that impacts the other parent's ability to care for the child.
- A court *must not* engage in myth-based reasoning about family violence, for example, that mothers regularly allege violence against fathers to gain a tactical advantage in a family law case.

This case involved serious allegations of family violence.

The parties were married for five years and had one child, who was about three-years-old when the parties separated in September 2020. Between March 2020 and January 2023, the Father was charged with 10 offences arising out of his relationship with the Mother: three counts of assault; one count of uttering threats; one count of criminal harassment; one count of mischief; and four counts of failing to comply with his bail order. Among other things, the Mother alleged at trial that the Father head-butted her on two separate occasions (once before and once after separation), yelled at her, called her demeaning names, threw objects at her, and broke her phone during a parenting exchange (which he blamed on the Mother). Some of these incidents occurred in front of the child, including the head-butting. He also hit the child in the head.

After the Father head-butted the mother for the second time, the Mother left the matrimonial home in Chilliwack, B.C. and moved in with her family in Nanaimo, B.C., about 3-4 hours away.

The Father started a claim in the Supreme Court. While the parenting schedule changed several times leading up to trial because of the recurring family violence, the Father never had more than two overnights a week with the child.

The Father applied for an interim order requiring the Mother to return to Chilliwack with the child. While he was successful, the judge, in reviewing the "serious and troubling incident of family violence", granted primary care of the child to the Mother

and parenting time to the Father every weekend from Saturday morning to Sunday evening. A few months later, his parenting time was again increased to two overnights per week.

The Father's parenting time was reduced to one overnight per week after he was charged criminally for breaking the Mother's mobile phone during a parenting exchange. The court reduced his parenting time to two two-hour visits a week and ordered it be supervised after he repeatedly withheld the child, requiring the Mother to obtain a Court Order that the child be returned to her care. The child also disclosed to the Mother and a third party that the Father hit her on the head, resulting in the Father entering into a peace bond, though this was later withdrawn by the Crown after the Ministry of Children and Family Development investigated the allegation and did not identify any child protection concerns.

A parenting assessment was completed before trial by Dr. Elterman. Interestingly, it does not appear that any recommendations about the schedule were made; instead, Dr. Elterman recommended that both parties engage in counseling and other therapeutic programming, and to obtain an updated report to consider what further changes need to be made so that the child can "again have [two] parents in her life". No update was obtained for the trial.

An eight-day trial was held in October 2022. The primary issue was the parenting schedule. The Father sought a shared parenting schedule. As a result of the family violence, the Mother, who was self-represented at trial, sought a continuation of the supervised parenting schedule until the Father could demonstrate that he no longer presented a risk to the child's emotional, physical and psychological safety.

The trial judge sided with the Father and ordered a 12-week step up schedule resulting in the Father having the child from Friday afternoon until Monday evening (i.e. 6/14 nights) — and none of the Father's time was supervised:

[72] The [Father] as of recent date [has] been limited to short periods of parenting time without overnight parenting time. **There is no valid reason that the [Father] should not have longer periods of parenting time; eventually equal parenting time. Having considered all of the evidence, equal parenting time is in the best interests of the child. No danger to the child has been found in the evidence called by the [Mother], in the dealings with MCFD or in the opinion expressed by Dr. Elterman.** That said, because of the period the child has not spent overnight periods with her father, a gradual approach into overnight parenting time periods, and their length, will be necessary. [**emphasis added**]

But had the trial judge really "considered all of the evidence"?

The Mother appealed the trial judge's Order. She argued that the trial judge failed to analyze the best interests of the child in accordance with the analytical framework mandated under B.C.'s *Family Law Act*, had failed to meaningfully engage with the Mother's allegations, and engaged in impermissible myth-based reasoning about family violence.

The Court of Appeal agreed that the trial judge made an error in principle, set aside his Order and ordered a new trial:

[83] More specifically, I agree with the mother that the judge failed to conduct a meaningful analysis of the allegations of family violence as advanced by her, in accordance with ss. 37 and 38 of the *FLA*. That analysis was a necessary prerequisite to properly assessing the best interests of the child and fundamental to a fully-informed resolution of the contested parenting issues.

[84] In my view, there is also merit to the mother's submission that in determining the parenting issues, the judge did not adequately protect against the potential for myths or stereotypes about intimate partner violence to influence his reasoning process, including a belief that women commonly raise allegations of violence postseparation and in the context of family law litigation for the specific purpose of gaining an upper hand.

[85] I am satisfied the judge's erroneous approach to family violence irreparably tainted his assessment of the best interests of the child and ultimately, the mother's case as a whole. Consequently, a new trial is necessary, other than with respect to the granting of a divorce.

The Court of Appeal began its analysis by reviewing the best interests provisions in the B.C. *Family Law Act*, S.B.C. 2011, c. 25 (the "*FLA*"). (While the references arguably should have been to the *Divorce Act*, since the best interest and family violence provisions of both statutes are similar, nothing turned on this.)

Although we have all seen these — or similar provisions — given their import to the case, we repeat them here. The *FLA* states:

1. In this Act:

.....

"family violence" includes, with or without an intent to harm a family member,

- (a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
- (b) sexual abuse of a family member,
- (c) attempts to physically or sexually abuse a family member,
- (d) psychological or emotional abuse of a family member, including
 - (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,
 - (ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,
 - (iii) stalking or following of the family member, and
 - (iv) intentional damage to property, and
- (e) in the case of a child, direct or indirect exposure to family violence;

.....

37(1) In making an agreement or order under this Part [Care of and Time with Children] respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.

(2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:

- (a) the child's health and emotional well-being;
- (b) the child's views, unless it would be inappropriate to consider them;
- (c) the nature and strength of the relationships between the child and significant persons in the child's life;
- (d) the history of the child's care;
- (e) the child's need for stability, given the child's age and stage of development;
- (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise the person's responsibilities;
- (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;

(h) whether the actions of a person responsible for family violence indicate that the person may be impaired in the person's ability to care for the child and meet the child's needs;

(i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;

(j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

(3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.

(4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.

38. For the purposes of section 37(2)(g) and (h) . . . a court must consider all of the following:

(a) the nature and seriousness of the family violence;

(b) how recently the family violence occurred;

(c) the frequency of the family violence;

(d) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member;

(e) whether the family violence was directed toward the child;

(f) whether the child was exposed to family violence that was not directed toward the child;

(g) the harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence;

(h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring;

(i) any other relevant matter. [emphasis added]

Next, the Court of Appeal engaged in a detailed review of the record and the trial judge's reasons. Despite the numerous allegations of family violence raised by the Mother in her evidence, many of which had been disputed or minimized by the Father, the trial judge made no findings of fact, nor did he even reference several of the incidents of violence:

[87] In setting out the "factual background" to the case, the judge referred to the September 2020 incident that resulted in criminal charges. **He did not set out the circumstances surrounding that incident or importantly, make any related findings of fact.** He mentioned only the father's evidence, who claimed that the headbutting was accidental. He referred to the reasons of the associate judge who considered the September 2020 event for purposes of an interim parenting order, but did not make his own findings of fact.

[88] The "factual background" contains no mention of the family violence alleged to have occurred in March 2020 or May 2021, or any acts by the father that have given rise to a charge of criminal harassment. **The reasons for judgment contain no substantive analysis of the relevant surrounding circumstances, or any related findings of fact.** I note that the trial record includes evidence of text messages sent by the mother in March 2020 (six months pre-separation and before the start of any family law proceedings), in which she disclosed to a third party that she had been assaulted by the father while

the child was with her. As such, there was contemporaneous evidence of this alleged event having occurred. There is no mention of this evidence in the judge's reasons. [emphasis in original; **emphasis added**]

[We pause here to comment about these text messages. It is unclear from the decision the purpose for which these text messages were admitted into evidence. These are prior consistent statements, which are presumptively inadmissible as hearsay and "oath-helping". There are exceptions to this rule against prior consistent statements — when a witness's credibility is impeached, for example to respond to a suggestion that the witness recently fabricated the events in dispute. However, even if these text messages were properly admissible to rebut allegations of recent fabrication, they are only relevant to the witness's credibility, and are *not* evidence of the actual underlying events — i.e. that these assaults by the Father occurred. See *R. v. Stirling*, 2008 CarswellBC 506 (S.C.C.); *R. v. Dinardo*, 2008 CarswellQue 3452 (S.C.C.); *R. v. Cain*, 2018 CarswellNS 364 (S.C.C.); *R. v. Gill*, 2018 CarswellBC 1733 (C.A.). In fact, it is an error of law to use a prior consistent statement as evidence of truth: *R. v. Ward*, 2008 CarswellNfld 191 (C.A.); *R. v. D.T.*, 2014 CarswellOnt 552 (C.A.); *R. v. M.(A.)*, 2014 CarswellOnt 15263 (C.A.); *R. v. Zou*, 2017 CarswellOnt 1157 (C.A.). But we've talked about this before. (A prior consistent statement. Ha!)]

The Court of Appeal continued:

[89] After setting out the "factual background", the judge addressed the "evidence at trial". **There is no analysis of the mother's testimony surrounding alleged acts of physical violence or threats directed towards her in the family home. Nor did the judge state any conclusions in respect of that evidence.** The judge reviewed video evidence adduced by the mother which recorded some of the child exchanges postseparation. He noted in his reasons that the mother alleged that on one of these occasions, the father broke her cell phone: at para. 34. **However, nowhere did he explore the evidence specific to the breakage, or importantly, make any related findings of fact.** He referred only to the father's explanation for the breakage, which effectively put the blame on the mother: at para. 47.

.....

[97] From that point until he stated his conclusion on the best interests of the child at para. 72, **there is no mention, express consideration, analysis, or factual finding made in respect of the mother's evidence about the father's physical aggression and demeaning conduct towards her, both during the marriage and after separation. There is no mention, consideration, analysis, or factual finding about the presence of the child when that physical aggression and demeaning conduct is said to have occurred.** The judge cited the evidence of the father's brother, who testified that he lived with the parties for one year and did not see any evidence of physical abuse: at para. 65. **However, the reasons reflect no meaningful analysis of the mother's testimony about incidents of alleged abuse towards her, physical or psychological, and/or evidence that carried confirmatory potential. The mother's evidence, of course, grounded the claims of family violence and her position on the parenting issues.** [emphasis added]

It was also an issue that the trial judge relied on findings in reports by third parties without making any findings of fact of his own. Specifically, the trial judge relied on Dr. Elterman's conclusion in his report that it was "unlikely" that any of the events supporting the Mother's allegations that the Father harmed the child occurred, and that it was "unlikely" that the Father had intentionally hit the child. The trial judge had also relied on a report by MCFD which he claimed found that the Mother coached the child to report that her father hit her. (It turns out that the report did not actually say the child was coached — another problem).

Ultimately, the Court of Appeal was concerned that the trial judge had effectively delegated his fact finding duties to third parties, which was an error: *Children's Aid Society of Sarnia-Lambton v. S. (D.R.)*, 1995 CarswellOnt 672 (Prov. Div.); *Children's Aid Society of Sarnia-Lambton v. L. (K.)*, 1998 CarswellOnt 2685 (Prov. Div.); *C.A.M. v. D.M.* (2003), 43 R.F.L. (5th) 149 (Ont. C.A.); *Strobridge v. Strobridge* (1994), 4 R.F.L. (4th) 169 (Ont. C.A.); *Behrens v. Stoodley* (1999), 3 R.F.L. (5th) 8 (Ont. C.A.); *P.R.H. v. M.E.L.* (2009), 71 R.F.L. (6th) 235 (N.B. C.A.); *Mattina v. Mattina*, 2018 CarswellOnt 11675 (C.A.); *S.F.D. v. M.T.*, 2019 CarswellNB 370 (C.A.); *King v. Borserio* (2018), 12 R.F.L. (8th) 1 (B.C. C.A.). Assessments are mere tools to assist the court in fact-finding — not the fact-finding itself.

Finally, the Court of Appeal also agreed with the Mother that the judge "did not adequately protect against the risk that the Father's position at trial was grounded in myths or stereotypes about family violence allegations in family law proceedings, and that those unfounded assumptions contributed to the outcome" [para. 84].

The Father's theory at trial was that the Mother fabricated allegations of family violence for strategic purposes — to obtain an advantage in the litigation and to justify restrictions to his parenting time. The trial judge agreed with the Father, finding that the Mother's reports to the police "became a weapon" against the Father. Implicit in this finding is that the Mother fabricated allegations about the Father.

This was a problem.

To find that the Mother fabricated allegations, the trial judge also had to find: (1) that the incidents of family violence did not happen; and (2) that the Mother lied about these incidents to the police to have the Father charged. But it was not possible for the judge to find she lied, having made no findings of fact as to whether the family violence actually took place.

Without making the necessary factual findings, the Court of Appeal was concerned that the trial judge essentially fell victim to the myth that women falsely (and "commonly") allege violence in family law proceedings:

[120] In her article entitled "*The Myth of False Allegations of Intimate Partner Violence*", Professor Koshan suggests there is a "longstanding and pervasive" myth that women falsely allege family violence in family law proceedings:

. . . For example, when women report violence to the police, apply for protection orders, or raise [intimate partner violence] in family proceedings, they are often met with the accusation that they are fabricating the violence to gain an upper hand in family disputes.

[Jennifer Koshan, "The Myth of False Allegations of Intimate Partner Violence" (8 November 2023), online: <ablawg.ca/2023/11/08/the-myth-of-false-allegations-of-intimate-partner-violence>]

[121] Other myths or stereotypes said to reveal themselves in family law proceedings include:

. . . a credible woman would disclose violence early; a credible women would report the assault to the police; a credible women would leave the relationship; violence against a woman by a man does not have an impact on the children and has nothing to do with his parenting ability; there is now family violence symmetry — women are just as "guilty" as men; and abuse will likely stop once the relationship ends so there is no risk of future harm.

[Donna Martinson & Margaret Jackson, "Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases" (2017) 30:1 Can J Fam L 11 at 34.]

The court was clear that such myths have no place in our legal system:

[122] Whether and the extent to which these myths and stereotypes exist and operate in practice was not a matter raised at the trial or fully argued before us. However, the law is clear that trial judges must assiduously guard against the potential for myths and stereotypes or unfounded or generalized assumptions about human behaviour — in whatever form — to affect their reasoning process. Doing so takes on heightened importance in the context of alleged family violence. As recently accepted by the Ontario Court of Appeal in *Ahluwalia v. Ahluwalia*, 2023 ONCA 476:

[1] Intimate partner violence is a pervasive social problem. It takes many forms, including physical violence, psychological abuse, financial abuse and intimidation. In Canada, nearly half of women and a third of men have experienced intimate partner violence and rates are on the rise. What was once thought to be a private matter is now properly recognized for its widespread and intergenerational effects.

See also *Michel v. Graydon*, 2020 SCC 24 at para. 95.

The court then went a step further: even if a parent's allegations of family violence are not accepted by a trial judge, it is an illogical leap to say that a parent fabricated those allegations to gain an advantage in a family law case without any evidence in support of such a finding. As the Supreme Court of Canada recognized in *Barendregt v. Grebliunas* (2022), 71 R.F.L. (8th) 1 (S.C.C.), domestic violence allegations are very difficult to prove because they often take place behind closed doors and lack corroborating evidence. Therefore, as the Court of Appeal in *K.M.N.* explained, the failure to prove it on a balance of probabilities does not mean it did not happen and it certainly does not mean that it was falsely alleged:

[125] Given the theory advanced by the father, it was incumbent on the judge to carefully assess the allegations of family violence and to ensure that if the mother's evidence about physical and psychological abuse towards her and/or the child was to be given little or no weight, as suggested by the father, that determination was the result of reasoned fact-finding specific to the asserted incidents rather than potentially unfounded assumptions about a woman's motivation for alleging family violence in the context of family law proceedings. See, for example, *Guo v. Li, Li, and Zhang*, 2019 ONSC 2726 at paras. 183, 186, and *K.K. v. M.M.*, 2021 ONSC 3975 at paras. 175, 221, aff'd 2022 ONCA 72. In the latter cases, theories about fabricated allegations for the specific purpose of gaining an advantage in the litigation process were explicitly identified, analysed and resolved with reference to the evidence.

[126] In *Ahluwalia*, the Ontario Court of Appeal acknowledged there will be cases in which claims of family violence are shown to have been made for strategic reasons (at para. 120). I take no issue with that proposition. However, whether that has happened in a given case requires that the judge assess the credibility and reliability of the assertion as part of a thorough fact-finding process. To approach allegations of family violence on the assumption (explicit or implied) that these allegations are routinely made for tactical reasons, is impermissible and will give rise to reversible error.

[127] In the circumstances of this case, there is merit to the mother's submission that in determining the parenting issues, the judge did not adequately protect against the risk that the father's position was grounded in myths or stereotypes about family violence allegations in family law proceedings, and that those unfounded assumptions contributed to the outcome. Assuming the father continues to advance his theory about fabricated allegations for the specific purpose of gaining an upper hand, the judge who presides over the new trial will need to carefully assess the merits of that claim to ensure that the best interests of the child are determined without reference to, or reliance upon, misconceptions about post-separation disclosure of intimate partner violence.

The court set aside the Order and ordered a new trial, cautioning the new trier of fact to "carefully assess the merits" of the family violence allegations and not fall prey to myths and stereotypes. In the meantime, the court ordered that the Father's parenting time be supervised.

Family violence is an extremely challenging issue for lawyers and courts to grapple with, for the very reasons stated in *Barendregt*. But that does not mean it can be ignored or glossed over. The *Divorce Act* requires a court to deal with allegations of family violence when assessing the best interests of the child, and this requires making findings of fact about whether the violence occurred, the risk of recurrence, and the risk it presents to the emotional, physical and psychological safety of a child.

This decision also makes it clear that the days where we concerned ourselves only with violence directed at or even in the presence of a child are long gone (as they should be). The Supreme Court of Canada [*Barendregt* at para. 143] has recognized that children can experience harm through indirect exposure to family violence, and that it is "untenable" that family violence has nothing to do with a perpetrator's parenting ability.

The Saskatchewan Court of Appeal recently expanded on this in *Friesen v. Friesen* (2023), 88 R.F.L. (8th) 37 (Sask. C.A.):

- a. family violence need not cause physical injury to have a significant impact; the effects of family violence are insidious and are not usually visibly manifested;
- b. a child, including a very young child, will be affected by family violence, even if they are not the direct victim of the violence or present to see or hear the violence;

c. perpetration of family violence can be harmful to a child's physical, emotional, and psychological well-being and development, and it can have a myriad of negative short-term and long-term impacts on the child; and

d. the effects of family violence can continue to be experienced by victimized parents and children long after the parents separate.

As the Court of Appeal confirmed in *K.M.N.*, courts are therefore required to consider family violence regardless of whether it occurred to or in the presence of the child:

[99] The judge's ultimate conclusion about the best interests of the child is stated at para. 72 of his reasons. I agree with the mother that on the face of that paragraph, **the conclusion was reached without advertent or demonstrated consideration of the mother's evidence about violence or controlling behaviour directed by the father** towards her, either pre- or post-separation, and the possible indirect impact of that behaviour on the child. The MCFD investigation and Dr. Elterman's opinion, both referred to in para. 72, only addressed violence directed towards the child, not indirect exposure to physical and/or psychological abuse alleged to have been directed towards the mother. [**emphasis added**]

Lawyers and courts struggle with family violence cases for good reason. As noted by the Supreme Court of Canada and the Ontario Court of Appeal, family violence is endemic, pervasive, insidious — and, at the same time, usually happens behind closed doors without witnesses. And, at the same time, there are situations (though not remotely as common as some might want to believe) where such allegations are weaponized: *Shaw v. Shaw* (2008), 62 R.F.L. (6th) 100 (Ont. C.J.). What is a trial judge to do? Listen to the evidence, consider the evidence, apply the burden of proof and make factual findings.