FAMLNWS 2026-08

Family Law Newsletters
March 02, 2026

— Franks & Zalev - This Week in Family Law

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The Violence Was Admitted. The Analysis Was Not

***S.E. v. R.E.*, 2025 CarswellNB 388 (C.A.) — Quigg, Green and Baird JJ.A.**

There is something remarkable about a trial judge finding no evidence of family violence when the father admits to punching furniture on multiple occasions, punching a hole in a wall, and physically restraining the mother in the child's presence in June 2023. Yet that is exactly what happened in *S.E. v. R.E.*. The New Brunswick Court of Appeal allowed the mother's appeal, admitted fresh evidence, set aside the trial judgment, and ordered a new hearing before a different judge.

The decision is a blunt reminder that a proper family violence analysis under the *Family Law Act*, SNB 2017, c. 5 (the "*Family Law Act*") — or under any federal or provincial statute for that matter — is not optional, not discretionary, and not satisfied by simply labelling such admitted conduct "childish and inappropriate." A proper analysis is required. The analysis must be done, and it must be done properly. A measured and proper analysis is the only way to avoid the dangerous myths of family violence: *K.M.N. v. S.Z.M.* (2024), 98 R.F.L. (8th) 275 (B.C. C.A.).

The family's history was international. The mother was an Iranian-born software engineer, a British citizen, and worked in Palo Alto, California. The father was a British Army Major seconded to the Canadian Armed Forces, posted in New Brunswick. Their child, born in 2017, had lived in Malaysia, Oman, Japan, England, California, and New Brunswick.

Following a June 2023 kitchen confrontation, the mother obtained an Emergency Intervention Order under New Brunswick's *Intimate Partner Violence Intervention Act*, SNB 2017, c 5. The Order was later vacated by consent, and the litigation proceeded under the *Family Law Act*.

By the time of the trial, the child was travelling between California and New Brunswick on a four-week rotation and was enrolled in school in New Brunswick by agreement — the youngest child with the most frequent flier points.

After a three-day hearing, the application judge granted the father primary care, reduced the mother's parenting time, ordered shared decision-making, and gave the father final authority over educational decisions.

The trial judge's reasoning rested heavily on credibility findings against the mother. The judge found she "tended to interpret most events and statements involving the Father as if he was trying to coerce or manipulate her" and characterized her evidence as "hyperbolic."

Critically, the judge also concluded there was insufficient evidence of the child's alleged behavioural issues. She accepted the father's evidence that, apart from nightmares, sleeping issues, and "some minor incidents" at daycare and school, the child

"generally did not exhibit behavioural problems." (Apart from my broken arm, my arm is totally fine?) That finding became central on appeal.

The mother appealed on multiple grounds, including the judge's argued failure to properly engage with family violence. The Court of Appeal allowed the appeal and ordered a new trial.

The Family Violence Problem

The trial judge concluded: "In the absence of evidence of family violence as defined in the *Act*, I find that any further analysis under section 50(4) of the *Act* is unnecessary." That statement doomed the judgment.

The father denied harming or threatening the mother, but admitted to punching furniture on multiple occasions and punching a hole in a wall in 2015. The mother alleged additional incidents: wrist-grabbing, holding a fist near her face, biting her hand, threats, property damage, and the June 2023 restraint in the child's presence. The trial judge characterized the conduct as dated, insufficiently specific, childish, and isolated. As for the June 2023 incident, she concluded the father used "reasonable force" to protect himself and that neither party was defined by this behaviour.

The Court of Appeal readily determined that this analysis did not remotely satisfy the statutory framework. Under the *Family Law Act*, "family violence" includes conduct that is violent or threatening, indicates a pattern of coercive and controlling behaviour, or causes fear. It expressly includes damaging property. Section 50(4) requires the court to consider the nature, seriousness, frequency, pattern, exposure of the child, and resulting harm or risk.

This was not a credibility contest or disagreement. It was a failure to apply a mandatory statutory framework. Appellate courts have consistently treated this as a reversible error — see e.g. *K.M.N. v. S.Z.M.* (2024), 98 R.F.L. (8th) 275 (B.C. C.A.), which we discussed in the July 15, 2024 (2024-27) edition of *TWFL*, where the British Columbia Court of Appeal held that failure to conduct a proper statutory family violence analysis is a material error. See also *Shipton v. Shipton* (2024), 5 R.F.L. (9th) 17 (Ont. C.A.), where the Ontario Court of Appeal set aside a relocation decision after finding that the trial judge misapprehended and improperly discounted evidence of coercive control, thereby tainting the best interests analysis.

The New Brunswick Court of Appeal was quite direct: the application judge failed to explain why admitted property damage and physical restraint did not fall within the statutory definition of family violence. The judge's failure to provide reasons for excluding or excusing this conduct was inconsistent with the objectives of the *Act*. The court emphasized that a family violence analysis must be conducted "in tandem" with the best interests analysis. It is not a preliminary hurdle to be dismissed before moving on. It is an integrated, important and inexorable component of the inquiry.

The Supreme Court's guidance in *Barendregt v. Grebliunas* (2022), 71 R.F.L. (8th) 1 (S.C.C.), framed the analysis. Domestic violence allegations are notoriously difficult to prove; they often occur behind closed doors and lack corroboration. Yet findings of family violence are a critical consideration in the best interests analysis. The suggestion that family violence has nothing to do with parenting ability is, as the court put it, untenable. Any suggestion otherwise evidences very dated reasoning and defies common sense; it is the old thinking that violence was not an issue if not directed at the child.

The Saskatchewan Court of Appeal made a similar point in *Friesen v. Friesen* (2023), 88 R.F.L. (8th) 37 (Sask. C.A.), recognizing that family violence need not result in physical injury to have significant consequences for a child, and that even indirect exposure can have lasting impact. And in *Ahluwalia v. Ahluwalia* (2023), 88 R.F.L. (8th) 1 (Ont. C.A.), the Ontario Court of Appeal acknowledged the pervasive and damaging nature of coercive control in intimate partner relationships. The jurisprudence is settled: courts must engage *meaningfully* with allegations of family violence, assess credibility, make findings of fact, and assess the impact on the child within the statutory framework. The trial judge did not do so here.

The Hearsay Intervention

The trial judge's treatment of the evidence compounded the problems. During cross-examination, the mother testified that she sought the Emergency Intervention Order after the child disclosed that the father had hit the child multiple times. That evidence

was admitted without objection from the Court, though the father denied the allegations. However, during re-direct, when counsel attempted to elicit what the child said about missing the father, the judge intervened and flagged hearsay concerns.

Here, the Court of Appeal identified two problems. First, the reasons were silent on the child's disclosure of physical abuse. Given that the disclosure formed part of the mother's explanation for seeking emergency relief, the judge was required to make findings — whether accepting, rejecting, or discounting the evidence. This was also a problem in *K.M.N. v. S.Z.M.* (2024), 98 R.F.L. (8th) 275 (B.C. C.A.). Second, children's disclosures are not *automatically* inadmissible hearsay. In fact, courts routinely admit such evidence under traditional or principled exceptions — anyone remember *R. v. Khan*, 1990 CarswellOnt 108 (S.C.C.)?

The inconsistency compounded the problem: the judge admitted the child's disclosure of being hit when it came up in cross-examination, but intervened on hearsay grounds to exclude evidence about the child's feelings during re-direct. That uneven intervention affected evidence central to the statutory family violence inquiry. Again, such uneven treatment was also discussed by the Ontario Court of Appeal in *Shipton v. Shipton* (2024), 5 R.F.L. (9th) 17 (Ont. C.A.).

The Fresh Evidence

The trial judge accepted the father's evidence that, apart from nightmares and minor incidents, the child did not exhibit behavioural problems. She rejected the mother's concerns as "hyperbolic" (just a step away from "histrionic"). She noted there were no incidents reported by school or afterschool care.

The fresh evidence contradicted that finding. School incident reports documented the child telling peers "I'm going to kill you" on two occasions, pushing another child to the ground, and displaying aggressive behaviour that led to referral to a behavioural intervention program. But an Affidavit from the father in January 2024 stated there were no serious and ongoing behavioural issues. Some of these incidents predated the hearing and were not disclosed to the mother. Post-trial communications showed the father writing to the intervention centre that the child's "mistakes keep coming."

The Court of Appeal admitted the additional evidence and relied on it in concluding that the credibility findings and best interests analysis rested on an incomplete record. What the reasons *don't* do is expressly engage with the *Palmer* criteria for the admission of fresh evidenced on appeal as clarified in *Barendregt v. Grebliunas* (2022), 71 R.F.L. (8th) 1 (S.C.C.). Under *Barendregt*, the due diligence inquiry focuses on why the evidence was not available at trial and safeguards finality and order. Some of the incident reports predated the hearing, raising the obvious question of whether they could, with reasonable diligence, have been adduced at first instance.

That said, *Barendregt* also recognizes that the due diligence requirement is not so rigid when considering a best interests analysis and may yield in exceptional circumstances, particularly where appellate intervention has already been justified or where the interests of justice outweigh strict finality. The Court of Appeal appears to have treated the undisclosed incidents as undermining a foundational premise of the trial decision: that there were no serious behavioural concerns.

The court did not speculate on whether the omission was concealment or oversight. It held that the failure to disclose ongoing behavioural issues undermined the judge's findings concerning the child's emotional stability in the father's care. Given the statutory emphasis on emotional and psychological safety, reinforced in *Barendregt*, that evidentiary gap mattered a great deal and severely undercut the decision below.

And What Does this All Mean?

The Court of Appeal allowed the appeal and ordered an expedited rehearing before a different judge, noting the impending expiry of the father's contract with the armed forces and the child's visa status. The costs award to the father was set aside. The mother received $3,500 in costs for the motion and appeal.

At its core, this case is about the integrity of the statutory analysis — or lack thereof. When legislation requires courts to assess family violence through a defined framework and to prioritize a child's safety, courts must demonstrate that the analysis was

actually done. That principle has been clear since the amendments to both the *Divorce Act* and provincial family law statutes came into force.

Parenting cases involving family violence allegations are difficult by nature — evidence is often contested, emotions run high, and judges are making high-stakes decisions under time pressure. But admitted acts of property damage and physical restraint are not ambiguous facts. When a party admits to punching furniture and physically restraining the other in the child's presence, and a judge concludes "nothing to see here" with little analysis — *something* is fundamentally wrong.

The question is not just whether such decisions will be corrected on appeal. Trial courts must catch and properly analyze these errors in the first place. This mother was fortunate to have the resources to retain counsel to press the issue on appeal. Not all litigants are similarly situated.

I Might Be Able to Pay You Tuesday for Some Legal Services Today

***Kirby v. Woods* (2025), 21 R.F.L. (9th) 272 (Ont. C.A.)**

In the October 6, 2025 (2025-36) edition of *TWFL*, we covered *Kirby 1* and *Kirby 2*, two decisions dealing with anonymization and the interaction between the *Hague Convention on the Civil Aspects of International Child Abduction*, the *Immigration and Refugee Protection Act*, and the *Convention Relating to the Status of Refugees* when a recognized refugee child is the subject of a return application. How's that for a run-on sentence.

The Court of Appeal has now released a third — and presumably final — decision in *Kirby*; so now we have a trilogy. This time, the focus is not on constitutional principles or international law tensions, but on something far more common and often overlooked: costs in *pro bono* cases.

As noted in our earlier comment, the Court of Appeal in *Kirby 2* set aside the application judge's return order and remitted the parenting issues back to the Superior Court. After the appeal was argued but before it was decided, the application judge released her costs decision from the original *Hague* hearing, finding the father wholly successful and awarding him $75,000 in costs on a substantial-indemnity basis. Accordingly, once the appeal decision was released, the Court of Appeal invited submissions not only on the costs of the appeal, but also on whether the trial-level costs award should stand.

The mother sought $40,000 for the appeal and to have the application judge's $75,000 costs award reversed such that the father would be required to pay her that amount for the hearing in the court below. The father argued for no costs in either direction, citing the public importance of the appeal, his limited resources, and the fact that both sides were represented on appeal by *pro bono* counsel.

The Court of Appeal rejected that position and confirmed that ordinary costs principles apply even where one or both sides are represented by *pro bono* counsel. Relying on *1465778 Ontario Inc. v. 1122077 Ontario Ltd.*, 2006 CarswellOnt 6582 (C.A.) the court reiterated that *pro bono* representation does not transform litigation into a cost-free exercise. Modern costs law recognizes purposes beyond indemnity and it is entirely proper, and consistent with the spirit of "volunteerism," for *pro bono* counsel to receive reimbursement from the losing party.

To the contrary, the court emphasized that *pro bono* counsel "should be subject to the ordinary costs consequences to allow counsel to receive some reimbursement for their services." Costs discourage unreasonable litigation conduct and promote access to justice by making it more feasible for lawyers to volunteer time in deserving cases. Thus the availability of costs enhances, rather than undermines, the viability of *pro bono* work. More counsel will agree to act *pro pono* if there is a chance of recovering costs at the end of the *pro bono* rainbow.

The court also rejected the argument that costs should be denied because the case raised novel issues. The central legal principle — the rebuttable presumption of ongoing risk following a positive refugee determination — had already been established in *A.M.R.I. v. K.E.R.* (2011), 2 R.F.L. (7th) 251 (Ont. C.A.) and *M.A.A. v. D.E.M.E.*, 2020 CarswellOnt 10620 (C.A.). Complexity

alone does not justify insulating a party from costs, particularly where the successful appellant prevailed because the application judge committed reviewable errors of law.

Nor did the father's good faith or limited means justify a departure from the ordinary rule. Good-faith litigation does not displace the usual rule that costs follow the event. The father's financial circumstances warranted a modest reduction in the overall award, but not a denial of entitlement. The Court ordered a combined award of $80,000 to the mother — $30,000 for the appeal and $50,000 for the application — rather than the $40,000 plus $75,000 she sought.

Although *Kirby*'s central issue — how refugee status interacts with the child-abduction treaty — will not arise often, the opportunity to act for a deserving family-law litigant who cannot afford counsel arises regularly. For many family lawyers, *pro bono* work is part of professional life. When deciding whether you have the capacity to take on these files, it is worth considering from the outset whether costs may be recoverable if the case is run properly and the client succeeds. Meaningful costs awards are possible, but only if the retainer is structured accordingly and counsel is mindful of the principles in *1465778*. These include:

1. **Structure the arrangement at the outset.** Even where the client is not paying legal fees, any costs awarded legally belong to the client. However, counsel may enter into advance fee arrangements directing recovered costs to the lawyer, avoiding a windfall and ensuring clarity.

2. **The successful-party presumption applies with less force in *pro bono* cases.** A judge may award costs to a successful *pro bono* litigant, but such awards are not automatic, and fairness does not require identical treatment of pro bono and non-pro bono litigants.

3. **The "costs follow the event" rule is also tempered, especially on interlocutory motions.** Where costs are payable forthwith, it may be unfair to require an unsuccessful non-*pro bono* litigant to pay immediate costs to a *pro bono* party.

In the end, *Kirby 3* underscores that *pro bono* litigation operates within the ordinary costs framework, albeit with modest adjustments, rather than outside it. With careful planning at the outset, successful outcomes can yield meaningful cost awards that help sustain *pro bono* work, while the courts retain the flexibility needed to balance access to justice with fairness between *pro bono* and non-*pro bono* litigants.

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