

Family Violence: A Review of Cases under the *Family Law Act*

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Background

On March 18, 2013 the new *Family Law Act*¹ (“FLA”) in British Columbia came into force, including new sections on the best interests of the child test regarding family violence (s. 37); the assessment of family violence (s. 38); and the new duty for family dispute resolution professionals (s. 8) to assess for the presence of family violence. [See attached Appendix for selected FLA sections.]

In addition a detailed definition of family violence was included in the *Family Law Act* (s. 1) to provide direction and guidance to the family justice system for interpretation of what constitutes family violence.

The July 2010 discussion paper, *White Paper on Family Relations Act Reform: Proposals for a new Family Law Act*, proposed the new family law legislation would benefit from the inclusion of the following areas in order to assist the court in addressing family violence:

Safety

Research shows that separation and divorce are events that increase the risk of family violence occurring.² The proposed changes to the law will increase the court’s ability to deal with family violence by:

- identifying children’s safety as an overarching objective in the best interests of the child test;
- including the impact of family violence and consideration of civil or criminal proceedings relevant to the safety or well-being of the child as best interests factors;
- defining family violence and legislating risk factors to be considered in parenting cases that involve violence; and
- clarifying the grounds for protection orders and providing for criminal law sanctions for breaches.³

The *Family Law Act Transition Guide*⁴ provides as background to the new family violence legislation that:

Section 37 provides an overarching direction to “ensure the greatest possible protection of the child’s physical, psychological and emotional safety” and provides a list of facts to consider when determining what is in a child’s best interest. The expanded list modernizes the *Family Relations Act* to better reflect current social values and research.⁵

And that:

Important changes to the best interest of the child factors include...inclusion of family violence as a factor. The addition of family violence addresses an important gap in the law and recognizes that violence – even if directed exclusively at the spouse – can still be harmful to the child.⁶

Furthermore, the *Transition Guide* backgrounder notes that:

Section 38 provides guidance for decision-makers on how to assess family violence as a factor in considering the best interests of the child...This approach is designed to produce a more nuanced risk assessment and avoid one-size-fits-all approach regarding parenting arrangements in cases where there has been family violence. Research shows that family violence is not all the same. This approach takes into account research showing that different types of violence carry different levels of future risk.⁷

The other significant inclusion in the *Family Law Act* was the expansion of the definition of “family violence” to address a range of abuse that could be considered family violence. Inclusion of psychological, emotional and control-based violence, such as stalking and harassment, intimidation, threats, unreasonable restrictions, financial abuse and intentional damage to property, broadens the once-narrow categories of violence as just physical abuse or sexual abuse.

In addition to the broader definition of family violence, the definition of “family member” has also been extended in the FLA to include a wide range of persons that may face safety concerns and require protection. Parts 9 and 10 of the FLA further cover family violence in the context of making Protection and Conduct Orders.

As “family dispute resolution professionals” under the *Family Law Act*, we are now also required to take additional training to increase our skills and knowledge regarding the research, services, assessment strategies and general understanding of family violence.

There is an abundance of research in the area of family violence and more specifically violence against women and children.⁸ In British Columbia, we have had many tragic cases of spousal homicide where women (and often their children) have been murdered. A few such tragedies were the Vernon Massacre (1996), the Merritt Murders (2008), and the Lee Inquest (2008). Just last month, the violent attacks in Langley B.C. on a mother and her children and the death of a mother in Clearwater B.C. again heightened the need for a coordinated response from all systems to address family violence. All of these cases occurred either immediately post-separation or when women were preparing to separate from their spouses.

This background provides only a brief snapshot of the impetus and goals of the inclusion of family violence in the *Family Law Act*.

The unknown was how these new sections addressing family violence would be interpreted and treated by the Court in family law matters. How would lawyers put forward arguments based on the family

violence provisions, if at all? What, if any, trends would emerge from the inclusion of family violence before the Court? The ultimate question is: are safety concerns being addressed for family law clients? The case review below endeavours to provide some insight into these issues.

Case Review: Trends and Treatment of Family Violence

Courts have now had the ability to engage, interpret, assess and determine cases involving family violence under the *Family Law Act* for over a year. The emerging themes summarized below identify some of the cases in which family violence had been claimed by one or both parties. While the focus of the summaries below is to highlight cases that identify family violence in sections 1, 37, and 38 of the *Family Law Act*, the judicial treatment of family violence under Part 9 – Protection from Family Violence and Part 10 – Division 5 – Orders Respecting Conduct is also captured in some of the cases. However, my co-presenter has prepared a more extensive review of case summaries in her paper on Protection Orders and some effort has been made to not duplicate cases.

I. Expanding the Definition of Family Violence

A review of cases involving family violence indicates that the courts have made determinations of family violence based on the expanded definition provided for under s. 1 of the FLA, including the dynamics of emotional and psychological abuse and harassment. In addition the courts have accepted the failure to meet economic requirements, such as the failure to pay child support or provide financial disclosure, and the resulting impacts of such failures on a party as a basis for family violence. The contents of verbal and text communication have also been held to fall within the expanded definition. Courts have also considered the impact of the determinations they would be making as it related to the potential of their judgments to put litigants at risk for family violence.

Litigation Harassment/Emotional and Psychological Abuse

***Dawson v. Dawson*, 2014 BCSC 44 (CanLII)**

In *Dawson*, the court, in determining that it was appropriate to grant a Protection Order under the *Family Law Act*, considered the nature of the actions by Mr. Dawson against his ex-spouse Ms. Corfield that would fall within the definition of “family violence”. The court also considered whether Ms. Corfield fell within the meaning of an “at-risk family member”. The court held that Ms. Corfield was an “at-risk family member” and that the family violence she experienced by Mr. Dawson was “likely” to occur. The court considered the previous assault against Ms. Corfield in 2007 by Mr. Dawson which was described by the (Provincial) court as “a brutal attack on a defenceless victim”. In addition, the court considered the conduct of Mr. Dawson subsequent to 2007 and in particular the extensive litigation Mr. Dawson had commenced against Ms. Corfield. This included several court applications, including applications made to the Court of Appeal and leave sought to the Supreme Court of Canada (leave was dismissed).

The court also considered the resulting impact of the court’s determination in the case at bar and the likelihood that the court’s decision would only instigate the continued harassment by Mr. Dawson of Ms. Corfield unless a Protection Order was granted.

Mr. Dawson's level of litigation was determined to be harassment. A Protection Order and an Order declaring Mr. Dawson a vexatious litigant were granted by the court.

The following is the court's discussion of Mr. Dawson's harassment (emphasis added):

[48] In argument, Ms. Corfield pointed out that there is reason to conclude that Mr. Dawson remains preoccupied with, if not obsessed by, this litigation. **She argues that if she is successful on this application and as a result the litigation is at an end, there is reason to be concerned that his anger and hostility will seek another outlet, and to the extent that is so, the prospect of family violence directed to her will increase. I accept that is a possibility.**

[49] Moreover, family violence includes "psychological or emotional abuse of a family member, including...intimidation, harassment, coercion or threats". Mr. Dawson's conduct in this litigation since the dismissal of his application for leave to appeal to the Supreme Court of Canada can fairly be described as harassment of Ms. Corfield. Absent the order sought being made, it is likely to continue.

[50] For all of the foregoing reasons, I am satisfied that family violence is likely to occur and that it is appropriate to make the orders sought in paragraphs 4 and 5 of Part 1 of Ms. Corfield's notice of application.

Economic Impact and Family Violence Assessment

Chancellor v. Chancellor, 2013 BCSC 1519 (CanLII)

In *Chancellor*, the court considered the basis for continuing the terms of a previously-granted Restraining Order. In doing so, the court discussed the impact the court's pending determination regarding property matters might have on the "risk of family violence" for Ms. Chancellor.

The court observed the following (emphasis added):

[64] This litigation has been acrimonious. On September 23, 2009, Ms. Chancellor was granted two without notice orders. One of the orders granted her exclusive occupancy of the former family home. The other order prohibited Mr. Chancellor from approaching the home and prohibited him from molesting, harassing or communicating with her otherwise than in writing or through counsel, and then only for purposes of the court proceeding. The order contains what is commonly referred to as a "police assistance clause". As eluded to above, on October 20, 2011, Mr. Justice Groves, this time with the consent of Mr. Chancellor, imposed a similar restraining order limiting Mr. Chancellor's ability to communicate with Ms. Chancellor. Mr. Chancellor seeks to have these orders terminated.

[65] Several provisions of the *Family Law Act*, S.B.C. 2011, c. 25, are relevant to this aspect of the matter. First, s. 183(4) provides that unless the court orders otherwise, a

protection order expires one year after it is pronounced. Section 184(1) provides that the court “must consider” at least any history of family violence, whether any family violence has been repetitive or has escalated, any psychological or emotional abuse, the current status of the relationship between the family members, any circumstance of the family member against whom such an order is to be made that may increase the risk for family violence, and the “at-risk” family member’s perception of the risk to her own safety or security.

[72] **In the context of this application, Ms. Chancellor is the “at-risk” family member within the meaning of that phrase in the *Family Law Act*. She continues to express fear of Mr. Chancellor. Given the background, and in particular the matters referred to above, I accept that she is afraid of Mr. Chancellor.** A second matter that the court must consider pursuant to s. 184(1) of the *Family Law Act* is “any circumstance of the family member against whom the order is to be made that may increase the risk of family violence by that family member”. **The determination of who is entitled to the Suomi apartment building is a matter that has significance for the parties beyond the mere economic implications of the decision. The economic implications are significant in and of themselves. I have no doubt that Mr. Chancellor will be very disappointed at the outcome of his application. That is a circumstance which “may increase the risk of family violence”.** I am satisfied that it is appropriate to continue the restraining order until May 1, 2014. The order will terminate that day, unless an application is made to extend it prior to that date. The order will be in the same terms as the October 20, 2011 order of Mr. Justice Groves.

***M.W.B. v. A.R.B.*, 2013 BCSC 885 (CanLII)**

In *M.W.B. v. A.R.B.*, the court engaged in analysis connecting the “obstructive” behaviours of the Respondent mother regarding the parties’ finances which the court then determined impacted the “economic security” of the parties’ child. The court held that this impact indirectly “harmed the children’s psychological and emotional well-being and economic security”. In addition, the court held that the Respondent mother’s failure to adhere to parenting arrangements and court orders increased the litigation costs for the parties. The court found the Respondent mother’s actions in whole a form of emotional abuse and harassment which fell within the definition of family violence.

The court outlined the following:

[87] ...the Respondent’s intransigence and obstructive conduct continued to interfere with a timely sale of the commercial property.

[134] In addition to the Respondent’s obstructionist behaviour exacerbating the Claimant’s overall financial vulnerability, it interfered with the Claimant’s ability to protect his legal and equitable interest in the commercial property.

[141] I find the Respondent knew the sale of the commercial property would allow the Claimant to discharge debts and normalize his finances and that she wished to inhibit a profitable sale of the commercial property, even to her own detriment, to cause the Claimant financial harm.

The court held (emphasis added):

[199] I find the Claimant's litigation conduct, related both to the selling of the commercial property and to parenting arrangements, considered in their totality, is a form of emotional abuse and harassment that constitute a form of family violence.

[206] If a parent's abusive conduct harms the well-being of the other parent to the extent they may have to go on stress leave, this negatively impacts the child's economic security.

In addition, the court detailed the impact of the Respondent's conduct on the Claimant father (emphasis added):

[200] The Respondent's conduct and needless litigation has forced the Claimant to incur litigation expenses, damaging his financial well-being and health. This hindered his capacity to preserve parenting time with the children. Litigation has used up much of his emotional and financial resources.

[208] The Respondent knew or ought to have known the impact her conduct was having on the Claimant's financial situation; the Claimant made it clear to her. From this, I infer the Respondent is prepared to let her anger at the Claimant influence her to act in a way that indirectly harms the best interests of the children. I find the Claimant will not conduct himself in that way; the litigation history proves otherwise.

[209] In summary, I find that the Respondent has directed violence at the Claimant that has indirectly harmed the children's psychological and emotional well-being and economic security. Without a change of principal residence for B.B., I anticipate the Claimant could expect to face the same continuing pattern, usually subtle, sometimes overt, of oppositional behaviour and interference. Without intense counselling, I doubt the Respondent will be able to change her behaviour. She has no respect for professional opinion and apparently little regard for court orders.

As a result of the above finding, the court also held that the Claimant father would better facilitate access and that the best interests of the parties' child would be met if her principal residence was with her father.

Failure to Pay Child Support as Family Violence

J.C.P. v. J.B., 2013 BCPC 297 (CanLII)

In *J.C.P. v. J.B.*, the court held the “deliberate” and “calculated” failure by Mr. P to pay child support as ordered fell within the definition of family violence. The context and resulting impact of Ms. B in not being able to rely on receipt of regular child support and the efforts Ms. B. was required to obtain child support are also reflected in the court’s finding of family violence. In addition, Mr. P had engaged in sending “inappropriate” texts, emails and communication to Ms. P.

The court stated (emphasis added):

[15] With respect to Mr. P.'s failure to pay child support on time and in the full amount, I am satisfied that this failure, combined with his other actions and words, constitutes family violence. **I am satisfied that his failure to pay was a calculated and deliberate act designed to inflict psychological and emotional harm and to control Ms. B.'s behaviour. I am satisfied that Mr. P.'s goal was to destabilize Ms. B.'s parenting of S.**

However, the court was clear that a failure to pay child support would not always be deemed family violence. It appears from the court’s decision that the context of said failure would need to be assessed, which would include the nature of the conduct by the payor and the impact on the recipient. In this case the court stated (emphasis added):

[18] While I am of the view that the failure to pay child support will not often constitute an act of family violence, **when the failure is the result of a determined decision not to pay, knowing the impact it would have on Ms. B., who had limited income**, and my rejection of Mr. P.'s explanation for failing to pay, I have concluded that **this was designed to inflict psychological and emotional trauma to Ms. B. and is therefore an act of family violence.**

Inappropriate Communication and Behaviour with Children

Where a parent has engaged in inappropriate communication or behaviour with the children the following decisions have held the conduct falling with the definition of family violence.

D.J.F. v. V.J.F., 2013 BCSC 2019 (CanLII)

In *D.J.F. v. V.J. F.*, the court discussed the following incident regarding the Claimant’s communication with the children and the nature of the content:

[53] ...his inappropriate behaviour towards both the respondent and the children, including texting E. about the incident regarding the respondent when she was a teenager and the way in which he chose to advise his daughters of the existence of their step-brother...

[54] I have concluded that certain aspects of the claimant’s conduct amounts to “family violence” within the context of ss. 37(2) (g) and 38(g) of the *Family Law Act*. I refer in particular to his communications with E. in relation to the incident relating to her mother when she was a teenager and his conduct relating to needless litigation which the respondent has had to endure. See: *M.W.B. v. A.R.B.*, 2013 BCSC 885 (CanLII), 2013 BCSC 885 at paras. 199-211.

***D.N.L. v. C.N.S.*, 2013 BCSC 809 (CanLII)**

In *D.N.L. v. C.N.S.*, the court finds that even though it may not be the intention of the Respondent, his behaviour and communication resulted in emotional harm and psychological abuse to the child. The court stated (emphasis added):

[58] Under s. 1 of the FLA, “family violence” also includes “psychological or emotional abuse of a family member, including ... intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property”. I have found that when angry, the respondent has made ill-considered comments to the child that her mother is in therapy, or is manipulating her, or is responsible for the failure of her parents to communicate with each other. **I find that while the respondent does not intend to subject the child to psychological abuse, his derogatory outbursts and demeaning comments concerning the claimant disturb the child, elevate her level of anxiety, diminish her trust in her father, and set back his efforts to build a relationship with her, and thereby cause her emotional harm**

II. Single Incidents of Family Violence

In the following case the court considered single acts of family violence that occurred in the past between the parties and came up with two different analyses for two different determinations. In *Dawson*, the court addressed the “likely” threshold test for family violence in making a Protection Order. In *C.P. v. B.C.*, the court considered whether an act of violence would “impair” a parent’s ability to care for the children under the best interests test. In *Dawson*, the court held that the single act of violence may have a “predictive quality” while in *C.P. v. B.C.*, the court held that there would not be “any impairment” in the father’s ability to care for his children. It is important to note that in *Dawson* the single act of physical violence was described as “extremely serious” and “potentially lethal”.

***Dawson v. Dawson*, 2014 BCSC 44 (CanLII)**

In *Dawson*, the court, in determining whether a Protection Order should be granted in light of a single act of physical family violence, discussed the following (emphasis added):

[44] **The fact that there has been an act of physical family violence, even a single act of physical family violence, may provide a sufficient basis to conclude that family violence is likely to occur in the future. Although the passage of time may serve to reduce the probative force of such evidence, to the extent the circumstances giving**

rise to the earlier act of violence remain at large, the predictive quality of that earlier act may not be diminished with the passage of time. Moreover, it seems to me that when assessing the “likely” threshold set out in s. 183(2)(a) regard should be had to the gravity of the harm that might follow from an act of physical family violence.

[45] Dealing with the latter point first, the earlier act of violence in this case was extremely serious; indeed, it was potentially lethal. Given the protective purpose of orders under Part 9 of the *Family Law Act*, it is reasonable in my view to apply what might be termed a sliding scale to the threshold. The potential for very serious acts of violence is sufficient to engage the provisions of the Act, even if those acts of violence are, in absolute terms, not particularly likely.

C.P. v. B.C., 2013 BCPC 112 (CanLII)

In *C.P. v. B.C.* the court describe the single incident of family violence in the following (emphasis added):

[7] Following their separation, an incident of violence occurred. On May 8, 2008, Mr. C.P. was highly intoxicated and decided to confront Ms. B.C.(1). He first telephoned her, calling her many derogatory names. She hung up on him, telling him that she would talk to him the next day when he was sober. Approximately 15 minutes later, **Mr. C.P. drove to her home and pushed his way inside. He felt that Ms. B.C.(1) had another man in the home, which she did not. He began searching the house and yelling at her. Ms. B.C.(1) took his keys away and called his parents to retrieve him. Mr. C.P. remained upset and began throwing items around the house. He grabbed her by the face. She was frightened and said “what are you going to do, hit me?” This caused him to grab her face harder and push her up against the counter. He then let her go. His parents arrived and took him away.**

In assessing the impact of the family violence on the child’s safety the court stated (emphasis added):

[104] Mr. C.P. engaged in one act of family violence, which occurred approximately five years ago. **It was a frightening incident, but fortunately it was isolated, short in duration, did not involve K.J.C. and did not result in physical injury to Ms. B.C.(1). Mr. C.P. engaged in and successfully completed counselling as ordered. In my view, the only lingering effect of this act of violence is its’ contribution to the ongoing communication difficulties between the parties.** To be clear, their communication difficulties go much deeper than Ms. B.C. (1)’s continued discomfort as a result of the May 2008 incident, but it is a contributing factor.

In this case the court held that (emphasis added):

[106] **There is no evidence to suggest that the act of family violence indicates any impairment in Mr. C.P.’s ability to care for K.J.C. and meet K.J.C.’s needs.**

[107] Other than challenges in communication with Ms. B.C.(1), which can hopefully be overcome through counselling and family dispute resolution, **there is no evidence to suggest it would be inappropriate for the parties to cooperate on issues affecting K.J.C.**

III. Individual vs. Social (Systemic) Context of Family Violence

The inclusion specifically of family violence in the *Family Law Act* was to modernize the family law legislation in British Columbia and to reflect the research and social context of family violence in society. For example, this is reflected in the expanded definition of family violence and within the new Protection Order regime. However, the challenge within family law cases is how to reference systemic impacts and dynamics of family violence as they may manifest in and inform individual family law matters.

It remains early days with the *Family Law Act* in regards to the interpretations and analysis that may emerge from the court regarding the social context of “family violence”.

J.R.E. v. 07-----8 B.C. Ltd., 2013 BCSC 2038 (CanLII)

In *J.R.E. v. 07-----8 B.C. Ltd.*, Claimant’s counsel appears to put forward arguments in reply, albeit reflected as cursory and limited in nature in the reported decision, of the broader gendered nature of family violence dynamics, which ultimately the court strongly rejected. The court observes the need for “personal responsibility” and for a focus on individualized analysis of evidence in each case.

The court stated the following:

[18] Were I to conclude that J had fabricated her allegations simply to gain advantage; it would be a simple matter to reject her view. I doubt that to be the case; I think her views are sincerely held (a view held by Dr. Aube, at p. 37 of her report), but to date completely uncorroborated or proven. What is the court to do in that circumstance? **My view is that it is to recognize that at some point personal responsibility must come into play and that if, as here, the applicant feels vulnerable but independent agencies have investigated and found no basis for the fear, then she must be expected to act on her concerns and take steps herself (as she is absolutely entitled) to reduce the fears. In other words, rather than expect the court to impose sanctions and controls on D, she could remove herself and the children from the home and establish her own and independent residence. Should D attempt to intrude into that residence he would obviously be prevented from doing so.**

In response to submissions made by counsel for the Claimant, the court stated:

[22] ...at least two further submissions that must be addressed. In reply she argued that (and I paraphrase) ‘...**there is a gender issue here...**’ and that, **basically, in every heterosexual relationship the man may so dominate the relationship, or is so capable of dominating, that intimidation is a likely result. I reject that perspective completely.**

At best it is unhelpfully general, but at worst it is sexist. Courts are and must be evidence-based. The court will find, or not, violence or its elements based on the evidence presented in each case.

IV. Best Interests of the Child and Family Violence

Several cases illustrate the balancing act the court engages in when assessing family violence in light of children's best interests under s. 37 of the *Family Law Act*. In particular, weighing the considerations in Section 37(2)(h) of "whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs".

***N.A.F. v. C.D.M.*, 2013 BCSC 2294 (CanLII)**

In *N.A.F. v. C.D.M.*, although there existed some evidence of family violence which was undisputed between the parties and the Claimant mother N.F. stated she did have a concern regarding her own safety needs of the Respondent father C.M., she did not fear for the safety of the children. The court in addressing these facts held the following (emphasis added):

[47] The differences in the parties' evidence as to the incidents of violence cannot be resolved on this application. **The question is the extent to which the undisputed incidents are relevant to C.M.'s ability to parent the children, or support a conclusion that it would not be in the children's best interests to be in C.M.'s care.** N.F. herself suggests that her allegations of violence are not relevant to C.M.'s parenting ability. **She states in her notice of family claim that she "does not fear for the safety of the children in the presence of the respondent - just her own safety."** It is appropriate to take into account that the parties and the children continued to reside in the same home following the incidents.

[49] **I accept C.M.'s submissions that there is no evidence that the children's safety, security or well-being is at issue while the children are with him.**

***L.A.I. v. K.B.Z.*, 2014 BCSC 652 (CanLII)**

In *L.A.I. v. K.B.Z.*, the court did not alter the existing parenting arrangement order that was made, which provided for a week on and week off parenting schedule. The presence of prior family violence as between the parties was considered; however, the only specific conduct that was addressed was the alienating conduct by Mr. Z. In order to remedy the alienation that had occurred by the father and to address the behaviour and relationship issue of the parties' son C. with his mother Ms. I, the court ordered that Ms. I may enroll the parties' son C. into the necessary counselling to assist with these issues.

In balancing between the prior family violence and C's best interests, the court stated (emphasis added):

[98] **I have also considered the implications of the evidence of family violence on C.'s best interests. Fortunately, the allegations of threats, assaults and property**

damage that were being made by the parties seem to have ceased once they began living separately. Although I note the evidence of Ms. I.'s ongoing fear of attending Mr. Z.'s home to drop C. off, I do not consider the threat of family violence to require any modifications of the orders that would otherwise be appropriate at this point.

[99] I also cannot identify any meaningful difference between my conclusions after applying these provisions of the *Family Law Act* and those that I would have reached under the former legislation. Neither party has advanced any other objective than C.'s best interests, so there is no significance to the fact that it is now the only consideration, and the added factors in s. 37(2) that I have described would have been relevant on the facts of this case in any event. **I do find it helpful to have the same thing that I repeatedly told the parties during the trial now expressed explicitly in s. 37(4) -- that the conduct of the other person was relevant only to the extent that it affected C.'s best interests.**

***B.K.G. v. H.S.G.*, 2013 BCSC 1942 (CanLII)**

In *B.K.G. v. H.S.G.*, the court addressed the Claimant mother's allegations regarding the family violence she had experienced:

[34] The mother contends that her husband controlled her manner of dress and her financial autonomy. My impression was that there was likely some truth in these allegations. Some of these assertions must be seen in a cultural context, however. I was not surprised to hear that the father was concerned about the modesty of his wife's attire. Many things in the relationship were governed by cultural traditions. The marriage itself was arranged of course.

The mother sought to have supervised access for the father; however the court did not find evidence of harm towards the child. The court observed (emphasis added):

[48] I must bear in mind that under the FLA, s. 37(4), a person's conduct is only to be considered if it substantially affects a factor listed in s. 37(2), and only to the extent that it effects that factor. Section 16(9) of the *Divorce Act* is to similar effect. The real question before me is to determine what parenting arrangements are in the best interests of the child, bearing in mind all relevant circumstances, including those set out in s. 37(2). The inquiry into the past conduct of the parties is not an end unto itself.

[49] I must decide whether the father is prone to violence as the mother asserts, and whether, on that basis, only supervised access should be allowed, at least for some interim period of time. **Section 37(3) of the FLA requires that the order I make protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.**

The court determined that evidence of physical violence against the child by the father was in the past and was limited. Based on the review of the best interests factors the court held that the child would remain in the custody of the mother but that it was also in the child's best interests to have a relationship with her father and his family.

A.B. v. T.R., 2013 BCSC 1798 (CanLII)

In *A.B. v. T.R.*, the court held that the daughter T.'s witnessing of the family violence between her parents had caused her to experience anxiety. The court stated the following (emphasis added):

[33] Accordingly, I conclude that T. witnessed angry exchanges between her mother and father. She perceived her father to be aggressive and threatening. Many of these incidents occurred after he had been drinking. He drank frequently and to excess, which caused T. to experience anxiety. Indeed, in one of his emails, he acknowledged that he had a problem with depression and drinking which required treatment. The culmination of these events over time has been that T. feels manipulated, exploited and confused by her father's actions and that she is now fearful of him and very angry with him. As a result, she does not want to have contact with him until she is satisfied that he has taken treatment and feels she can be safe with him.

[34] I have no doubt that the Father does not appreciate the effect that his behaviour has had on his daughter. Nevertheless, I am led to the inescapable conclusion that T. freely and truthfully expressed her wishes to Dr. Posthuma. There is no reason in the circumstances of this case not to consider her views.

The court held that (emphasis added):

[35] Having come to this conclusion, I must consider whether I have the jurisdiction to make an order to vary the Agreement. I have concluded that I can make such an order. **There is no question that if I take into account those matters set out in s. 37(2) of the *Family Law Act*, I would come to a conclusion that it would be in T.'s best interests not to have contact with the Father at the present time, except under circumstances which will not cause her the level of anxiety she is now experiencing.**

[37] In these circumstances, I must consider the best interests of T. and make an order that will promote her personal health and well-being and will take into account the effect that the family violence has had on her, even though it was directed towards her mother.

P. v. S. & S., 2013 BCPC 181 (CanLII)

In *P v. S. & S.*, although previous assaults had occurred by D.P. against S.S., an assessment of family violence and specifically best interests factors for the parties' child N. resulted in the court ordering that both parents would have access to N.

The court reviewed the following (emphasis added):

[18] D.P. admitted that his relationship with S.S. was abusive in the past.

[19] **The day before N. was born he assaulted S.S. and was in custody for the birth. The charge resulted in a no contact order and a conditional discharge. There was a second charge in relation to S.S. in April 2007, but the case was not pursued. He has a conviction for driving while impaired in April 2007 his driver's license continues to be suspended and he owes \$10,000 to ICBC for the motor vehicle accident.**

[60] In making this interim order with respect to guardianship and parenting arrangements, I have considered N.S.'s best interests only. To determine that I have considered N.S.'s needs and circumstances as listed in s. 37(2) of the FLA and have assessed the family violence considerations listed in s. 38 of the FLA.

[61] **I know the father was convicted of assault in January 2007, I know there was another charge in April 2007 which was not pursued. I am told there have been no further charges. I accept the relationship is on and off and better now with both parents admitting to ongoing difficulties:** The father has completed 2 anger management programs, attended individual and couples counseling. The mother has attended similar counseling and parenting courses. They each appear very aware of their limitations, very willing to have a safety plan in place, and in no denial with regards to need for continual support and progress in the relationship. They do not live together. **I have heard no evidence of physical violence directed to N.S. The Ministry has returned D. to D.P.'s primary care and N. to S.S.'s primary care. Given all of these circumstances, I am satisfied N.S. can spend time with each of her parents.**

V. Declaration of Family Violence

L.S. v. G.S., 2014 BCSC 187 (CanLII)

In *L.S. v. G.S.*, the Respondent father sought a declaration from the court that the Claimant mother's actions to retain the children in Israel "constituted family violence" (para. 22).

The court stated (emphasis added):

[24] The issue of family violence must be considered in the context of any application to establish or change guardianship, parenting arrangements or contact with a child. Orders governing those matters are in place and no variation application is before me. **Although purely declaratory relief is not contemplated by s. 37, it might be available under the court's general jurisdiction in equity, but that is always a matter of discretion:** *Glacier View Lodge Society v. British Columbia (Minister of Health)*, 2000 BCCA 242 (CanLII), 2000 BCCA 242 at para 7.

[25] The respondent simply seeks a declaration with no immediate consequences except perhaps to provide further grounds for his claim to financial compensation. Longer term consequences cannot be predicted because I don't know if or how the respondent may try to use such a finding to his advantage in future applications.

The court did not find any evidence that the children suffered any harm as a result of the Claimant mother's actions. The court held that:

[26] ...The provisions in the FLA relating to family violence are intended to address a serious social issue and to protect children and spouses from actual harm or danger. Their meaning and application should not be stretched to the point they become just another weapon in a largely financial war between the parties.

Looking ahead

The inclusion of family violence in the *Family Law Act* has already broadened the judicial treatment of violence in family law matters. The definition and interpretation of family violence continues to expand and the courts, in some cases, are engaging in complex discussions of the impact on parties and their children as result of violence. In particular, economic and financial abuse issues and resulting hardship for recipients and children are being analysed in some judgments. In addition, the courts are making nuanced connections in some cases between the impacts of harassment, control and emotional and psychological forms of family violence on parties.

However, to date, the court decisions have not been able to address or incorporate judicial notice of the social context of family violence in the assessment and consideration of claims of violence. In addition, the best interests factors in particular s. 37(2) (h) for the most part result in the preservation of parenting time, access or contact with the person responsible for family violence.

Evidence, evidence, evidence – continues to resonate in the decisions. The court's need for reliable, sometimes corroborating, evidence of family violence results in many allegations of family violence not being accepted by the court. Furthermore, mutual allegations of family violence often result in the court identifying the couple as "high conflict" and therefore mutually offending.

The conversations that have emerged are useful and important. The goal moving forward is to continue these conversations, complicate our arguments, incorporate social context and ultimately move towards answering the question of whether safety concerns are being addressed for our family law clients.

Notes

¹ SBC 2011, c. 25

² See Footnote from original text. “FN 20 - Risk is greatest “just before, during and immediately after separation”: British Columbia Ministry of Public Safety and Solicitor General, “Violence Against Women in Relationships Policy,” at 11, online: http://www.pssg.gov.bc.ca/victim_services/publications/policy/vawir.pdf (last accessed: June 23, 2010). See also Canadian Centre for Justice Statistics, Statistics Canada, *Spousal Violence After Marital Separation*, by T. Hotton, (June 2001) at 2 and 3. This study shows that family violence begins after separation in just over 1/3 of relationships.”

³ White Paper on *Family Relations Act Reform*; Proposals for a new Family Law Act. Ministry of Attorney General, Justice Services Branch, Civil Policy and Legislation Office, July 2010, see link at: <http://www.ag.gov.bc.ca/legislation/shreddocs/fra/Family-Law-White-Paper.pdf> at p. 6.

⁴ Continuing Legal Education Society of British Columbia: August 2012.

⁵ *Supra* note 3 at p. 64.

⁶ *Ibid.*

⁷ *Supra* note 3 at 66.

⁸ See: <http://www.jibc.ca/news/jibc-releases-landmark-report-domestic-violence-prevention-and-reduction-bc>; materials from West Coast LEAF Charter Equality Values in Family Law webinar, <http://www.westcoastleaf.org/index.php?pageID=262&parentid=29>; FREDA Research Centre at Simon Fraser University, <http://fredacentre.com/reports/reports/>; and Ending Violence Association of BC, http://endingviolence.org/?s=family+violence&submit=Go&post_type%5B%5D=publication

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