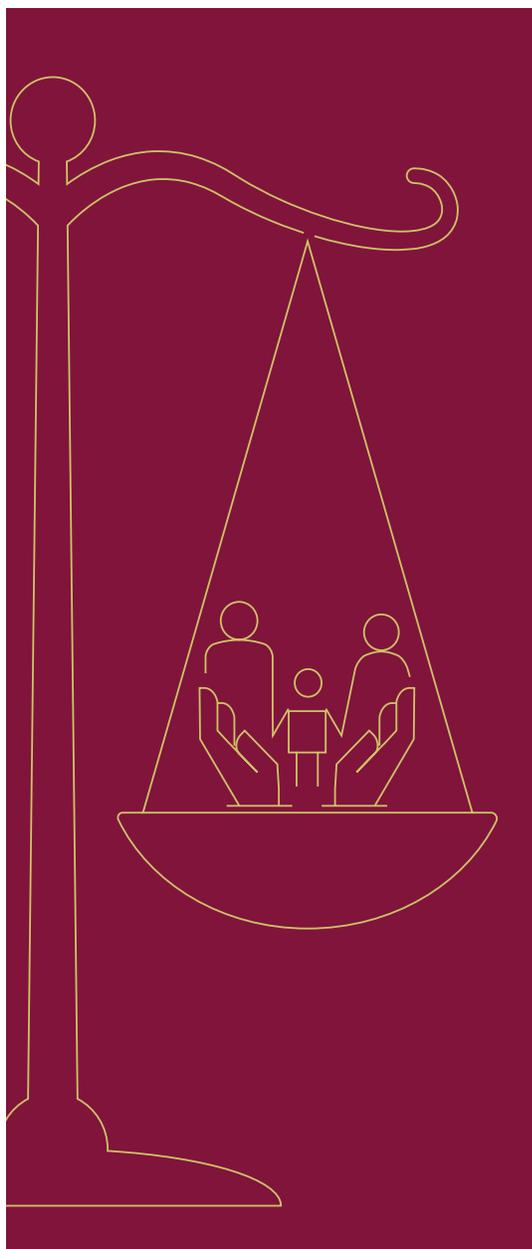


LEGAL BULLETIN

McLellan v Birbilis October 24, 2021: Family Violence and Parental Alienation: <https://canlii.ca/t/jk559>



Introduction

The Superior Court of Justice (Family Court) case¹ that follows was selected for two reasons. First, it addresses the substantive and procedural changes in the *Children's Law Reform Act*, 24(3)² since it was amended. Second, it illustrates the Superior Court's application of these principles in determining the best interests of the child within the context of family violence and counter claims of parental alienation.

Background

This case involves the parenting plan of child, A, age 6. The parties began living together in 2008 and separated 2017, when A was 18 months old. While there have been various parenting arrangements since the separation (including father's supervised parenting time), the child has remained in her mother's primary care since the separation. Following an investigation by the Office of the Children's Lawyer ("OCL") in 2018, the parenting plan was amended on consent to the current schedule which is as follows: A is in her father's care from 4:15 until 7:30 p.m. every Wednesday and one day on the weekend from 9:00 a.m. until 4:00 p.m. The OCL clinician recommended the father's parenting time increase contingent on his engagement in psychiatric assessment and follow through on all recommended treatment. In this application, the father sought an expansion

¹ *McLellan v. Birbilis*, 2021 ONSC 7084 [Tellier J]

² *Children's Law Reform Act*, RSO 1990, c. C. 12.

to his parenting time to include overnight parenting time with A, with phased increases, such that by phase three, A would be in his care alternate weeks from Thursday until Monday, and overnight every Wednesday. He also sought joint decision-making responsibility. In the alternative, he requested parallel decision-making responsibility, with the mother having responsibility for final decision-making for A's education and the father having final decision-making responsibility for all health decisions. The mother supported expanded parenting time for the father on major holidays; however, she proposed any further expansion on parenting time be contingent on his engagement in psychiatric assessment, follow through on all recommended treatment, and sustained ability to regulate his emotions. She disagreed with joint or parallel decision-making.

The mother alleges that the father was physically and psychologically abusive toward her during the marriage and that abuse was perpetrated in the presence of

A. She also alleges that the father made disparaging remarks about her to or in the presence of A, has continued to demonstrate limited capacity to regulate his emotions in A's presence (most notably, anger), and has continued to harass her. The mother expressed concerns related to the father's current mental health.

The father counter alleged the mother has mental health issues, has alienated A from him, and has exaggerated and lied about his abusive behaviour and mental illness. At trial, Justice Tellier found that there was a history of family violence perpetrated by the father, including physical and verbal assault towards the mother and family members in the presence of A, and the mother had provided A with a safe, secure, and child-focused home which met her physical and emotional needs. Further, Justice Tellier found that despite the history of family violence, the mother had continued to attempt to resolve problems related to A's relationship with her father. These factual findings all informed Justice Tellier's parenting orders.

The Impact of Family Violence on Remedy

Justice Tellier included an excellent discussion on how findings of family violence should inform the court's decision respecting parenting plans and decision-making responsibility, highlighting the procedural and substantive changes resulting from the recent legislative amendments. Specifically, section 24(4) of the CRLA requires the court to consider the impact of family violence on parenting orders, and section 24(3) frames how the court will take family violence into account, including to shield a child from harm/exposure to conflict, but also to protect others (in this case, the mother). Justice Tellier is clear that in these

circumstances "an order for joint decision making is unworkable and not in A. best interests". She decides against splitting the domains of education and health related decisions because they are often intertwined rather than discrete and uses the following example – "a child who is discovered to have ADHD and whose educational professionals believe the child's behavior is so unmanageable and unsafe in the school setting that consideration should be given to medicating the child. The parents disagree about whether to medicate the child during the school year. Does this decision fall under the rubric of education decision-making

authority or health? Clearly it is both. Given A.'s young age, such overlaps may well arise and, if they do, based on the history of conflict here, this could all too easily lead to acrimony and renewed litigation. That is contrary to the child's best interests". Justice Tellier also refers to section 24(3)(j)(ii) of the CLRA which directs the court to consider the appropriateness of making an order that would require persons in respect of whom the order would apply to co-operate on issues affecting the child in the context of family violence. Her conclusion is that given the findings regarding the family violence and its impact that joint decision-making is unworkable and is contrary to the child's best interests.

In cases where there has been family violence, care should be given to create safety in formulating a parenting plan.

In recognition of children's sensitivity to parents' feelings and the dynamics between them, Justice Tellier highlighted the importance of ensuring there are provisions in the parenting order regarding how A would move between her parents; who could be present at the child's activities or lessons, and whether parents should attend medical appointments and parent-teacher interviews together or separately. Justice Tellier commented that these kinds of "companion provisions"—such as detailing when and if the parents can attend activities together—will be needed in many cases that involve family violence.

Thus, Justice Tellier structured the parenting order to allow the mother to maintain control of A's extracurricular activities and stipulated the parents would not attend events at the same time unless the mother felt safe doing so. To protect the child from exposure to conflict and to minimize opportunities for further conflict between parties, this applied to parent-teacher interviews and health-related appointments.³ Additionally, the parenting order did not prohibit the mother from scheduling activities for A on father's parenting time; citing A's participation in extracurricular activities as important for her development and should not be sacrificed because it occurs during the father's designated parenting time.⁴

Justice Tellier addressed A's safety during parenting exchanges by allowing exchanges to continue in the mother's driveway unless the father reverted to discussing parenting issues or behaving in a hostile or disrespectful way towards the mother during exchanges. If this were to occur, exchanges would return to a supervised setting.⁵

³ *Ibid* at para 131, 132.

⁴ *Ibid* at 129.

⁵ *Ibid* at para 133, 134

Impact of Family Violence on the Surviving Parent’s Testimony

Justice Tellier accepted that there are myriad reasons why victims of family violence do not or cannot leave their abusive relationships and fear is certainly one of them.

Additionally, when the mother mis-stated or omitted something in her narrative, the court was understanding to her situation. In her decision, Justice Tellier wrote:

“Any previous omission is likely emblematic of her suppression from memory of every single traumatic event she endured as a psychological defence or survival mechanism. This phenomenon of memory repression as a means of avoidance and denial of past trauma is recognized by the Supreme Court of Canada in relation to victims of sex assault.”⁶

Allegations of Parental Alienation in the Context of Family Violence

The father alleged the mother had alienated A from him by withholding his parenting time and being unreasonable. When considering the child’s best interests, Justice Tellier cited s. 24(3)(c) of the Ontario provincial *Children’s Law Reform Act*⁷ (which applied in this case as the parents were not married, however, identical language is found in 16(3)(c) of the federal *Divorce Act*⁸ which would apply to married parents), that directs the court to look at each parent’s willingness to support the development and maintenance of the child’s relationship with the other parent. Justice Tellier referred to evidence put forward from the mother where she had supported the father’s relationship with A. For example, by she located a “Daddy and Me” program that provided the father time with A in the mother’s absence in a supportive environment. On one attendance, the father left the program with the child without notifying the mother where they went or that he had left. The mother was

frightened because during that time the father had threatened to take A away from her and she believed he was acting on those threats.⁹

In another instance, the mother facilitated contact between A and the father on Skype. When the father complained he did not have enough time with A, the mother increased the frequency of the Skype contact. The father demanded, however, that the calls continued until he was ready to end them, resulting in calls that lasted three to four hours. The court noted that A was too young to be engaged in a call of that duration¹⁰ and identified this behaviour as “more controlling than it is child focused” given the child’s development and age.¹¹ The mother eventually reduced the Skype contact because it had a negative effect on A.

⁶ *Ibid* at para 75 citing *M(K) v M(H)*, 1992 SCC 31 at para 103.

⁷ *Supra*, note 2, s. 24(3)(c).

⁸ *Divorce Act*, RSC 1985, c 3, s 16(3)(c).

⁹ *Ibid* at para 138.

¹⁰ *Ibid* at para 140.

¹¹ *Ibid* at para 141.

Justice Tellier found the times that the mother had temporarily restricted the father's parenting time--that happened on several occasions during a Children's Aid Society investigation of the father's girlfriend--was not punitive or malicious; rather, it was borne out of genuine concern for the child's physical and emotional wellbeing.¹² Further, most of the adult conflict that A has been exposed to in her

life had been instigated by her father.¹³ The mother demonstrated that she was committed to developing a healthy and positive relationship between A and her father.¹⁴ The mother acknowledged the father could be a good parent when he is in a good mood and expressed genuine compassion for the father's mental health challenges, some of which were likely borne out of childhood trauma that he himself had experienced.¹⁵

Summary

This case was selected to highlight the consideration of family violence in parenting decisions. The court was sympathetic to the circumstances of the mother who experienced family violence when it came to providing evidence for the court. Furthermore, the court was also understanding that the mother's fear of the father was a factor in her decision to remain in the relationship. Despite a counter-allegation of parental alienation from the father, the court found that the mother's restriction of parenting time was borne out concern for the child. Moreover, the mother held a genuine interest in maintaining a healthy and positive relationship between the child and the father; therefore, there was no finding of parental alienation.

the father's parenting time contingent on his engagement in treatment and demonstrated consistent ability to regulate his emotions. Justice Tellier indicates in her decision that the court is open to reviewing parenting time in the future based on an oversight of a treatment plan, objective reporting on full compliance with positive outcomes. Father is also encouraged to enroll in a parenting course such as Caring Dads (see <https://caringdads.org/>).

Finally, in cases where there has been family violence, the court should make an order that prioritizes the child's safety and best interests, minimizes potential for conflict between the parents and the child's exposure to conflict. This was accomplished in this case by providing the mother with final decision-making and control over A's activities, and expanding

¹² *Ibid* at para 177.

¹³ *Ibid* at para 176.

¹⁴ *Ibid* at para 178.

¹⁵ *Ibid*.

This bulletin was prepared by:
Au-Yeung, A., Bala, N., Heslop, L., Scott, K.L., & Jaffe, P.G.



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