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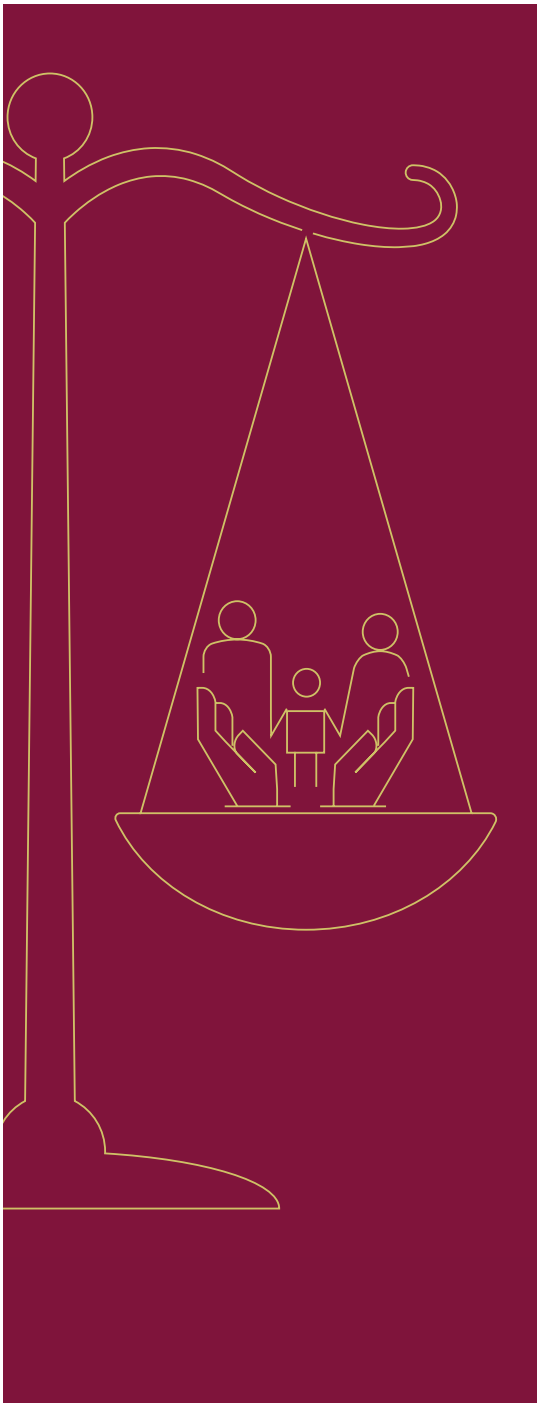
LEGAL BULLETIN

A Bulletin from the Atlantic Chapter of the Family Violence – Family Law Community of Practice



Introduction

The Atlantic Community of Practice for *Supporting the Health of Survivors of Family Violence in Family Law* is housed at the Muriel McQueen Fergusson Centre, on behalf of the Alliance of Canadian Research Centres on Gender-Based Violence. Bulletins produced for this project are intended to provide information on current cases, publications and legislative changes that impact the practice of family law where violence is a factor. The Supreme Court of Nova Scotia ruled in favour of a mother's primary parenting of the child in a case where family violence was a consideration in *Pennell v. Larkin, 2022* NSSC 233. At trial, the Court admonished the lawyers for failing to seek a resolution prior to coming before the Court, and strongly encouraged that they do so before continuing the matter. The culture of negotiation, advanced by the Supreme Court of Canada, may see judges ordering survivors of family violence to pursue an agreement prior to having their matter heard.

Family Dispute Resolution

The Divorce Act ("the Act")

In 2020 the *Divorce Act*, RSC 1985, c 3 (2nd Supp) was amended to include provisions that encouraged family dispute resolution between the parties to avoid litigation, and provisions that addressed family violence as a serious factor in consideration of the best interest of the child.

Section 7.8 of the Act obligates judges to consider orders pending or in effect that would impact the outcome of parenting relief. Specifically, civil protection orders, child protection orders or agreements, criminal undertakings and recognizances (no contact orders) are to be considered and brought to the parties for their review. Section 7.3 of the Act obligates parties, "to the extent it is appropriate to do so," to "try to resolve the matters that may be the subject of an order under this Act

through a family dispute resolution process." Section 7.7 of the Act obligates lawyers to discuss reconciliation with their clients, and to encourage them to seek family dispute resolution out of court, "unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so."

Family dispute resolution has the potential to resolve matters more amicably, to find solutions that fit the needs of the family, and to avoid both emotional and financial costs. However, in circumstances where family violence has created power imbalances and trauma for the survivor, mandated family dispute resolution puts survivors at risk of re-traumatization and coercion.

SCC Jurisprudence

The Supreme Court of Canada has several landmark cases that impose a culture of negotiation in family law matters, but always with the caveat that family violence may pose an exception to this practice.[1] SCC jurisprudence also addresses the provisions in the Act pertaining to family violence, making family violence a focus of consideration in the test of best interest of the child.[2]

PENNELL v. LARKIN, 2022 NSSC 233

Court Recommended Negotiation

The parties sought a variation of a Consent Order regarding the issues of parenting time and child support of their five-year-old son. The Consent Order, granting Ms. Pennell primary parenting, had been reached via a settlement conference notwithstanding the fact that Mr. Larkin had been charged with five accounts of assault on Ms. Pennell. Subsequently, the charges were dropped and the parties reconciled. After separating for a final time, Ms. Pennell brought forward a motion to vary the Consent Order, and Mr. Larkin brought forward a Motion seeking shared parenting time. When the trial commenced, Mr. Larkin had been charged with a new assault on Ms. Pennell, and had been under sanctions including a prohibition of direct communication with her.

Reciting the *Parenting and Support Act*, 2015, c. 44, s.2 ("PSA")[3] and quoting from *Bouvier*, the Court challenged counsel regarding the possibility of a negotiated settlement:

> Thus, given the strong statements contained in the PSA and the Bouvier decision about the benefits of attempting to resolve family disputes especially when children are involved, and also creating dialogue to help restructure family relationships in a positive way, I informed counsel that should they wish some time to have some additional time to discuss whether any of the issues could be resolved before the parties gave their oral evidence, I would give them that opportunity. To counsels' credit, they agreed that this would be helpful and expressed their appreciation to be given that opportunity. […] Minutes after breaking, counsel made a further request to not come back during the afternoon to allow them more time to explore settlement. They advised that the parties intended to meet at Ms. Pennell's lawyer's office that afternoon and were hoping that some, if not all, of the issues would be resolved. The further said they were confident that, if all matters could not be settled, the hearing could still be completed in the remaining two days and undertook to advise me of what progress was made by the end of the day. I agreed to their request.

As a result of the negotiation a number of issues were resolved. On the face of it, this is a positive

[1] *Colucci v. Colucci*, 2021 SCC 24 ("*Colucci*"), "Parents should be encouraged — absent family violence or significant power imbalances — to resolve their disputes themselves outside the court structure" (para. 69); *Association de médiation familiale du Québec v. Bouvier*, 2021 SCC 54 ("*Bouvier*"), "…the protection of vulnerable individuals is assured … by a set of special norms — some of which are legislated, while others reflect usages in practice or are found in the standard mediation contract — that provide spouses, parents and children with [translation] "procedural safeguards" while at the same time protecting public order" (para. 6).

[2] *Barendregt v Grebliunas,* 2022 SCC 22 ("*Barendregt*"), at paras. 143-186.

[3] The parties were not married, so their matters fell under provincial legislation which tracks the language of the divorce act pertaining to family dispute resolution and the role of family violence in considerations of the best interest of the child.

outcome; however, it begs the question whether the "special norms" contemplated in *Bouvier* intended to protect vulnerable individuals engaging in family dispute resolution, were even a point of consideration for the judge or the lawyers. One is left wondering how this out-of-court negotiation impacted Ms. Pennell, and what if any pressure she may have felt as a survivor of violence at the hands of Mr. Larkin, to compromise what she felt was in the best interest of their son.

Considerations of Intimate Partner Violence

On the second day of trial, the issue remained whether their son should be in the primary care of Ms. Pennell or in a 50/50 shared arrangement between the parties. While they agreed to joint decision making, Ms. Pennell wanted to be able to have final decision making in the event of an impasse, and Mr. Larkin wanted resolution to be through a professional third party. In weighing the evidence, the Court took into consideration the provisions regarding family violence in the PSA and the SCC's jurisprudence in *Barendregt*.[4] The judge decided in favour of Ms. Pennell, granting her primary parenting time and final decision making, noting:

> Here, the parties disagree on the extent to which there was family violence in their relationship. In her affidavit sworn to on April 14, 2022, Ms. Pennell gave detailed accounts of four physical assaults which she says were perpetrated against her by Mr. Larkin between December 2015 and July 2017 and another which occurred in May 2021 when Braylen was around. Her sister, Brittany Pennell, also filed an affidavit in which she confirmed that she directly observed Mr. Larkin assault Courtney Pennell on one occasion and was present to deal with the aftermath of other assaults. She attached to her affidavit pictures taken of the injuries allegedly suffered by Courtney Pennell from these assaults. [103]

The Court quotes from *Barendregt*, noting that family violence often goes unreported. It points out that there are social and legal barriers for survivors to report incidents of family violence, and perhaps most poignantly, "proof of even one incident may raise safety concerns for the victim or may overlap with and enhance the significance of other factors, such as the need for limited contact or support."[5] After crediting her veracity and acknowledging the corroborating evidence by way of her sister's affidavit, the Court states:

> As noted earlier, especially in light of Mr. Larkin's recent guilty plea for assaulting Ms. Pennell, I have ongoing concerns about the impact of family violence, abuse and intimidation in this case which, in my view, factor against a 50/50 parenting arrangement during the school year when structure, consistency and stability are most important for Braylen as he enters primary. [119]

The parties had agreed on a 50/50 arrangement for July and August, which would require Ms. Pennell to have ongoing contact and increased communication with Mr. Larkin at least part of the year. Furthermore, the negotiation from day 1 of the trial had resulted in an agreement to seek co-parenting counselling, and the Court takes it upon itself to make this part of the order:

> Specifically, as noted in Schedule "A", they agree that they shall attend co-parenting counselling, where either or both parties attend individually with the same counsellor, or where one party appears in person and the other party appears by phone for a joint session. I therefore order that the parties participate in co-parenting counselling designed to improve communication and co-parenting strategies in Braylen's best interests and leave it to the appropriate professional to direct the specific parameters of any such counselling in accordance with the parties' agreement. [101]

The possible consequences of the Court ordering the counselling, instead of simply leaving it as part of an agreement, is significant. The decision does not provide guidance for determining who the appropriate professional will be, or what it means to accord with the parties' "agreement." The Court places upon Ms. Pennell a legal obligation to participate in counselling or risk being found in breach of a court-order.

[4] *Pennell*, paras. 101-102.

[5] *Barendregt*, paras. 144-146.

For Further Reflection

Pennell is a decision that acknowledges SCC jurisprudence pertaining to family violence, as well as the legislated obligation for lawyers, judges, and parties to strongly consider out-of-court dispute resolutions in family law matters. These two considerations sit uneasily with one another when power imbalances due to family violence and coercive control exist in the history of the relationship. While the judge in this instance did find in favour of Ms. Pennell, both in terms of her credibility and in regard to her being the primary parent and final decision maker, it is striking how much greater emphasis in the decision is placed on out-of-court resolution and agreement than on the overwhelming evidence of intimate partner violence. *Barendregt* equips judges not only to take note of the presence of intimate partner violence, but to give it significant weight in considerations of possible future violence impacting parenting.

The passage from *Barendregt*, incorporated into the decision in *Pennell*, articulates strong reasons for protecting children from the possibility of experiencing violence, or exposure to further violence, at the hands of the perpetrator parent. The SCC notes that children exposed to family violence are at risk of emotional and behavioral problems throughout their lives, that even hearing about family violence can cause harm to children, that proof of even one incident may raise ongoing safety concerns, and that the ability of the perpetrator's willingness and/or capacity to change is a significant consideration.[6] The Court in *Pennell* did not weigh the evidence of violence in the relationship with the specificity of the *Barendregt* lens. The evidence accepted by the judge was that Mr. Larkin minimized his violence and the violence was not limited to one provable incident. No consideration was given to how Mr. Larkin's propensity for violence might impact his future parenting. Inherent in the decision is the assumption that the parties enter into negotiation with equal power in relation to one another, equal capacity to engage in negotiations, and an equal ability to objectively consider their best options and the best options for their child. While it is encouraging that the Court found in favour of Ms. Pennell and did weigh the issue of family violence, it is disappointing that no "procedural safeguards" were even canvassed with counsel prior to the adjournment. It is unknown whether the negotiation process had an adverse impact on Ms. Pennell's well-being.

In this instance, the parties were in a position to hire private counsel of their own choosing. Clients relying on Legal Aid typically must accept whomever they are given, even if the lawyer does not practice a trauma-informed approach to issues of family violence. Indeed, the legislation and SCC jurisprudence both point to the inappropriateness of negotiation in instances of family violence. Nonetheless, Courts continue to prefer to advance a culture of agreement rather than tackling the uncomfortable realities of the impact of family violence on survivors.

[6] *Barendregt*, paras. 143-144 (paraphrase).

This bulletin was prepared by:

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