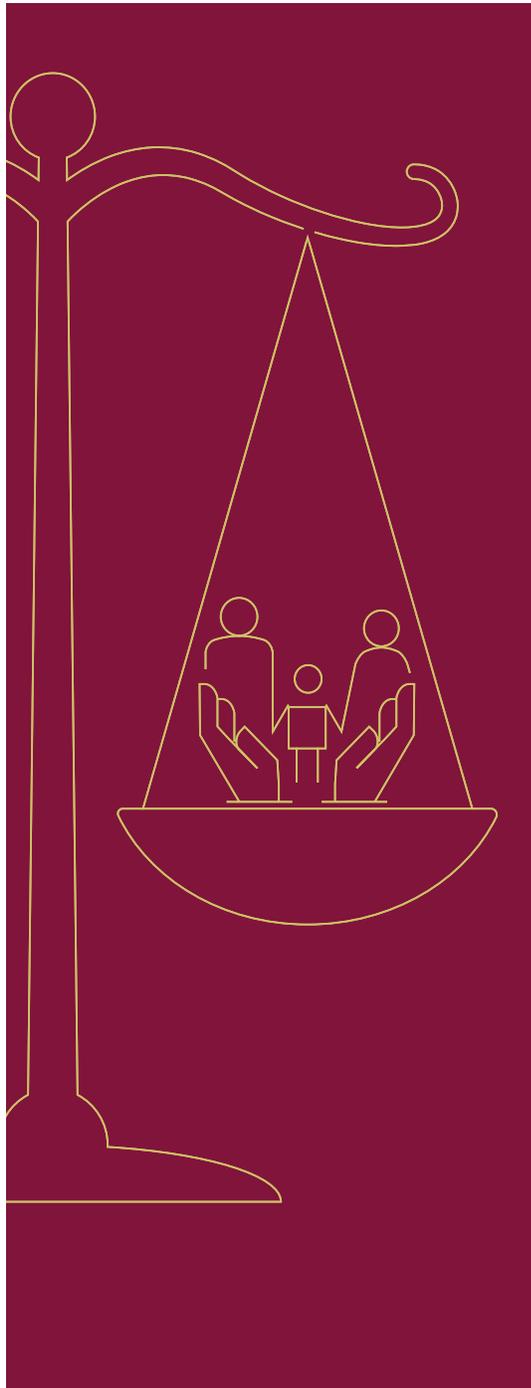

LEGAL BULLETIN

Parenting time, relocation, reunification therapy, and cooperative decision-making: *El Khatib v. Noun*, 2023 ONSC 1667



Introduction

As with all cases involving parenting time and decision-making of children under the *Divorce Act*, the judge considered the specific best interest factors of the *Divorce Act* to determine the best interests of the children involved in this case.

As there were numerous concerns involving the children at issue, the judge was required to consider these factors and the interplay with requests for parenting time, relocation, reunification therapy, and cooperative decision-making.

Numerous other issues were dealt with, including prospective child support, spousal support, and the treatment of Mahr (i.e. a contractual dowry to be paid by the husband to his wife in the event of divorce or death in Muslim culture) for family property equalization purposes; however, the sole focus of this brief will be on the interplay between family violence and parenting.

Background

This case deals with a mother and children exposed to longstanding family violence at the hands of the father.¹ The father was not present during the children's upbringing as he was often travelling.²

Despite the father's significant absence in the children's lives, at trial the father sought to have primary parenting and decision-making for the children, as well as to be able to relocate to the United Arab Emirates (UAE), where he had recently accepted a job offer.³ The parties were Canadian immigrants, having been married in Lebanon.⁴

¹ *El Khatib v. Noun*, 2023 ONSC 1667, at para 26.

² *Ibid* at paras 21, 25.

³ *Ibid* at para 9.

⁴ *Ibid* at para 1.

The father's position towards the mother was that she had villainized him to the children and alienated them against him.⁵

The mother's position was that she has been the primary caregiver to the children for their entire life, and that it would be in their best interest for her to remain the primary caregiver of the children.⁶ The mother was also of the position that the children were estranged from the father due to family violence and his regular absence from their lives.⁷

Prior to the trial of this matter, there was a consent order entered into at a case conference, which gave the mother temporary sole decision-making and parenting time, with supervised parenting time to the father through a supervision service.⁸

Analysis of the Issues:

Parenting time & children's best interests

Following the parties' separation there was evidence that the children suffered tremendously as a result of family violence and had numerous physical symptoms of trauma, including stomach pain, shortness of breath, trouble sleeping, and trouble focusing.⁹ The children's psychologists and social worker testified at the trial, and clinical notes were entered as evidence.¹⁰ The testimony of the trauma therapist was that both children suffered from post-traumatic stress disorder (PTSD) and Separation Anxiety Disorder.¹¹

The mother deposed that the children suffered physical abuse at the hands of the father, such as hitting, grabbing, pinching, yelling, forcefully shaving a child's hair, forcible confinement, and witnessing the father abuse the mother. This alleged abuse was corroborated in the evidence presented by the therapists.¹²

The father made little attempt to see or speak to the children following separation. Additionally, he chose to relocate to Vancouver without telling the children, and without seeing them for 10 months. He also made the choice to return to Lebanon for five months instead of going to Ontario where the children were.¹³

Although the father deposed that he was an involved parent, at cross examination he admitted to not being the active caregiver during the relationship, as well as not making seeing the children a priority following separation. He also admitted that the mother had made efforts to facilitate the children seeing him.¹⁴ There was also evidence presented that the mother was the parent who continued to make efforts to facilitate time with their father.¹⁵

The father was not able to present evidence that demonstrated that the mother interfered with attempts to see the children, nor evidence that she behaved in a controlling or jealous manner, as he

⁵ *Ibid* at paras 7, 22.

⁶ *Ibid* at paras 20, 25.

⁷ *Ibid* at para 24.

⁸ *Ibid* at para 32.

⁹ *Ibid* at para 41.

¹⁰ *Ibid* at para 26.

¹¹ *Ibid* at para 55.

¹² *Ibid* at para 26.

¹³ *Ibid* at para 30.

¹⁴ *Ibid* at para 37.

¹⁵ *Ibid* at paras 31-33.

alleged.¹⁶ The judge also observed that instead of trying to understand why the children resisted time with the father, he took the approach that the mother was to blame and had poisoned the children against him.¹⁷ The ability for the abusive parent to demonstrate accountability is an important factor in considering the appropriateness of reunification therapy.¹⁸

With this evidence before him, the judge applied the best interests analysis, citing the recent decision of *Barendregt v. Grebliunas*, 2022 SCC 22, and that judge’s comments on the relevance of family violence and parenting determinations. Notably, he reiterated the consideration, now recognized within the *Divorce Act*, that findings of family violence are critical considerations in the best interest analysis.¹⁹ The judge also highlighted that family violence can have a range of behaviours and frequency, and given that family violence often happens behind closed doors, it is notoriously difficult to prove. Therefore, proof of one instance is enough to raise safety concerns.²⁰

Ultimately, the judge found that the children’s resistance towards seeing the father was “rooted in their perceived and lived experiences of having living with their father, having been physically disciplined and/or emotionally abused.”²¹

The judge found the mother’s evidence of family violence, which was supported by the testimony of the children’s therapists and psychologists, was credible and very concerning.²² The judge found that it was in the best interests of the children for the mother to continue to provide primary care and sole decision-making for the children.²³

Relocation

The judge found that the father had not presented a plan of relocation that was in the children’s best interests. Not only would he be uprooting them from their school, neighbourhood, caregivers, and activities, but he did not present the court with a plan for their care when in the UAE, and had not looked into school options or replacement doctors, dentists, therapists, etc.²⁴

His plan also showed little insight into the children’s trauma and instead tried to justify their

resistance by accusing the mother of alienating behaviour.²⁵ This demonstrated to the judge that he did not see the role that he played in the children’s estrangement.²⁶ The judge found the father’s behaviour to show an inability to put the children’s best interests first.²⁷

The judge found that the father’s plan of relocation was not going to meet the physical and emotional needs of the children and denied his request.²⁸

¹⁶ *Ibid* at paras 38-39.

¹⁷ *Ibid* at para 69.

¹⁸ Jaffe, P., Scott, K., Heslop, L., & Hooda, S., “Sober second thoughts about the benefits and limitations of reunification therapy” at 8.

¹⁹ *El Khatib v. Noun*, *supra* note 1 at paras 70-73.

²⁰ *Ibid* at para 72.

²¹ *Ibid* at para 41.

²² *Ibid* at paras 73-74.

²³ *Ibid* at paras 75-83.

²⁴ *Ibid* at para 66.

²⁵ *Ibid* at para 69.

²⁶ *Ibid* at para 67.

²⁷ *Ibid* at para 69.

²⁸ *Ibid* at para 77.

Reunification

The parties had previously agreed to obtain a therapist, Ms. Barkin, to conduct reunification therapy between the children and the father.²⁹

However, the evidence presented was that the children began experiencing severe anxiety upon finding out they would be doing reunification therapy with the father. Their family doctor referred the children to a therapist to address this anxiety.³⁰

At the first reunification session, the children resisted engaging with Ms. Barkin, and refused to get out of the car. This led to Ms. Barkin calling one of the children “rude” within earshot of the child, which she admitted to doing at trial.³¹

Both children’s therapists, engaged to address the trauma and anxiety of the children, testified at trial that the children expressed fears of being kidnaped by their father, being retraumatized by being forced to be with the father, being alone with their father, concern that the psychologists would be in contact with their father, as well as recounting several instances of violence towards them or their mother.³²

One therapist stated that if reunification did occur it would have to be done in a very careful way and, as a first step, it was important that the child learn coping strategies to live with their heightened states of anxiety and perceived threat.³³

It was also emphasized at trial that Ms. Barkin, the individual engaged to conduct reunification therapy, was not qualified as an expert in reunification therapy.³⁴ The mother and therapists testified that the children felt she was forcing them to see the father and that their behaviour should be punished.³⁵ Ms. Barkin admitted at trial that she had not given due consideration to the abuse the children had experienced, nor was she aware of the father’s extensive absence, his lack of involvement in parenting, or the mother’s efforts to facilitate a relationship with the father. She had arbitrarily formed an opinion that the mother was the uncooperative parent.³⁶ Due to this, the judge found that her conclusions were incomplete and based on inaccurate information and gave little weight to her evidence in trial.³⁷

Ms. Barkin also admitted that if the children had experienced family violence, reunification therapy would not be an appropriate path as it gives rise to potential of re-traumatization. The judge decided that it would not be in the best interests for the children to continue with reunification, and the first step would be for the children to continue therapy to build coping mechanisms that would help with their stress and anxiety.³⁸

²⁹ *Ibid* at para 46.

³⁰ *Ibid* at para 47.

³¹ *Ibid* at para 48.

³² *Ibid* at para 49-58.

³³ *Ibid* at para 56 and 65.

³⁴ *Ibid* at para 59.

³⁵ *Ibid* at para 69.

³⁶ *Ibid* at para 61-62.

³⁷ *Ibid* at para 62-63.

³⁸ *Ibid* at para 64-65.

Reasonableness of joint decision-making in light of family violence

The judge also made pertinent observations on the reasonableness of expecting parties to make cooperative decisions about the children where there has been a history of family violence.

The judge noted that while the mother had shown a willingness to consult with the father, the father had either refused to participate or diminished her concerns.³⁹

The father also made little attempt to make decisions about the children following the separation. The judge also noted that the mother had made good decisions following the separation and was able to put the best interests of the children first (for instance, enrolling them in therapy, following the recommendations of physicians, and finding educational supports for the children).⁴⁰

The judge stated that effective co-parenting cannot occur if there is an environment of verbal abuse or intimidation, as this would lead to a former spouse continuing to experience “bullying in the name of shared parenting.”⁴¹

The judge commented on other cases that had dealt with the issue of family violence and cooperative decision-making and reiterated that, in instances of family violence, joint decision-making can give rise to hostilities and power struggles.⁴² As well, the judge noted the pattern of control, as the perpetrator of family violence will seek an order of joint decision-making as a strategy to continue to assert control over a former spouse; these individuals, often pursuing joint decision-making as a method to continue to inappropriately control the other parent, are often overly litigious, and place the needs of the child as secondary.⁴³ Litigation abuse is recognized as a form of family violence. In these instances, the abusive parent will use the court system to continue to abuse the victim. For instance, the abusive parent may make allegations against the surviving parent, or use techniques to delay court proceedings.⁴⁴

In this case, the judge’s finding was that joint or shared decision-making would not be appropriate given the history of family violence, mistrust, and hostility between the parents. The judge awarded the mother with sole decision-making authority.⁴⁵

Takeaways

This case is useful as it covers a range of issues that can come up in parenting cases. The judge addresses these issues alongside the reality of family violence and emphasizes how important it is not to minimize the reasons behind resistance to contact with an abusive parent, as well as a need to ensure an outcome that considers the best interests of the children at the forefront. Further, this case demonstrates the potential for erroneous opinions by therapists or counselors that are not properly trained or experienced in treating children in cases of reunification therapy.

This case stresses the need for lawyers to avoid pushing for scenarios that, while may be common in practice, such as the idea of joint decision-making, are not always appropriate in the circumstances. For instance, this case stresses the need to consider the appropriateness of joint decision-making

³⁹ *Ibid* at para 78.

⁴⁰ *Ibid* at para 79.

⁴¹ *Ibid*.

⁴² *Ibid* at para 81.

⁴³ *Ibid* at para 82.

⁴⁴ *Supra* note 18 at 7.

⁴⁵ *El Khatib v. Noun*, *supra* note 1 at para 83.

in cases of family violence and provides useful commentary on how continued abuse can occur if parents are forced to continue to engage in decision-making. This stresses a need to resist jumping to conclusions and to take a fact-specific approach, that aims to uncover the root of resistance by the surviving parent and potential for continued abuse by the abusive parent, when analyzing what actions are appropriate in each case.

This also applies to alienation and reunification therapy. For instance, the individual hired to conduct reunification therapy in this case appeared quick to blame the mother and suggest that she was uncooperative or engaging in behaviours to poison the children's opinion of their father. However, the evidence demonstrated that this was an inaccurate assumption, and the real factors that needed to be of the focus was looking into the children's symptoms and information provided by the therapists. Given the violence, there were alternative strategies and steps that needed to be taken to assist the children in their healing. This case shows the potential for disastrous results when a therapist lacks training in family violence. This concern about lack of expertise as well as uniformity to how reunification therapy is carried out is a recurring concern, and often intervention is carried out by therapists who lack expertise in trauma, and do not have specialized training in family violence, divorce issues, alienation or estrangement.⁴⁶ Reunification therapy can be problematic for several reasons. For instance, it runs the risk that a child can be retraumatized. There is also the concern that reunification sometimes involves forcing the treatment on a child without their consent.⁴⁷ This is not only problematic because it undermines a child's right to consent, it also "silences their voice in the courtroom."⁴⁸ Of further concern is the ethical considerations for the therapists engaged to perform the therapy, who may run the risk of violating the professional code of conduct when overriding a child's consent.⁴⁹ These concerns are acknowledged by the judge in this case who emphasizes in their decision that both children had a high level of anxiety due to their experiences of family violence. Due to this history and the children's perception of the high level of threat, the judge states that it is critical that the children do not have their trauma intensified by reuniting the father with the children.⁵⁰

Accusing the survivor parent of alienation is also a common tactic used by the abuser to portray the survivor parent as vengeful.⁵¹ This tactic is another way in which the abuser can manipulate the justice system to their advantage, as it creates a further obstacle for the surviving parent, having to prove that their actions are for the protection and best interests of the child. With this tactic in mind, another concern is the risk that unrepresented surviving parents may be bogged down the legalities of the proceedings, especially when there are certain assumptions or arguments presented, such as the ideas of joint decision-making, or parenting time, for them to overcome.

⁴⁶ *Supra* note 18 at 9.

⁴⁷ *Ibid* at 2.

⁴⁸ *Ibid* at 3.

⁴⁹ *Ibid* at 3.

⁵⁰ *El Khatib v. Noun*, *supra* note 1 at 84.

⁵¹ *Supra* note 18 at 9.

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