

LEGAL BULLETIN

# Issue No. 19

Getting Evidence Before Family Law Judges: *Fernandes v Fernandes*, 2023 ONSC 564

## Introduction

The Court must decide parenting disputes based on the evidence before them. But what happens when the evidence is brought by self-represented litigants who may not have knowledge of the court's procedure?

When two parties who had been litigating their case for more than seven years came before Justice Smith, the judge remarked on the judicial responsibility to afford “special graces” to the parties, who were self-represented and bringing their own evidence. This case provides a helpful overview of the types of evidence that come before the court in family matters and what factors the court considers in determining if evidence is credible.



## Background

The parties were married in June 2005 and separated in February 2014. The parties have two children together: Reilly and Jordan, who were sixteen and fourteen at the time of the trial, respectively.<sup>1</sup> Reilly danced competitively at the dance studio owned by the mother while Jordan played competitive hockey.<sup>2</sup>

After the parties separated, they signed a separation agreement that provided for joint decision-making responsibility (formerly “custody”).<sup>3</sup> The agreement also determined that the children would have primary residence with the mother but spend two out of every three weekends with their father.<sup>4</sup> These arrangements were subsequently changed a number of times. In December 2021, the father attempted to unilaterally revert to the terms of the separation agreement.<sup>5</sup>

The parties attended court multiple times in December 2021 and February 2022 to try to resolve the parenting issues.<sup>6</sup> In April 2022, Justice Smith made a temporary order setting out a new parenting schedule that would apply until the parenting issues could be resolved at trial. This temporary order was required on account of the father's mental instability.<sup>7</sup> Justice Smith presided over the trial. The trial was conducted over several days in April and September 2022. At the end of the trial, Justice Smith issued a decision in which the mother was granted sole decision-making responsibility and primary residence of the children. The father was granted parenting time with the children on alternate weekends.

<sup>1</sup> *Fernandes v Fernandes*, 2023 ONSC 564 at para 34.

<sup>2</sup> *Ibid* at paras 48-49.

<sup>3</sup> *Ibid* at para 35.

<sup>4</sup> *Ibid*.

<sup>5</sup> *Ibid* at para 45.

<sup>6</sup> *Ibid* at para 46.

<sup>7</sup> *Ibid* at para 47.

## Getting Evidence Before the Family Court

### I) Establishing Credibility

The trial decision begins with an assessment of the parties' credibility.<sup>8</sup> The Court noted that the relationship between the parties was highly toxic.<sup>9</sup> The mother alleged that the father was abusive throughout the marriage and had continued to try to control her post-separation.<sup>10</sup> The father made similar accusations against the mother, but also alleged that the mother was controlling of the children, contrary to their best interests.<sup>11</sup>

Justice Smith found that the father was the principal source of "abusive, irrational, and toxic behaviours" and that he was "ungovernable."<sup>12</sup> Moreover, the Court stressed that the father had been "deceptive, impulsive, self-aggrandizing and unreliable" in addition to being "demonstrably deceptive with [the] Mother, with the OCL Clinician, with the children, and with the Court."<sup>13</sup>

These findings were based, in part, on the father's litigation approach: he aimed to intimidate the mother and unnecessarily prolong the trial.<sup>14</sup> The father attempted to tarnish the mother's reputation in the eyes of the court, he called excessive and unnecessary witnesses, and he was impulsive.<sup>15</sup> Justice Smith noted that the father was volatile and that "[h]is goal appear[ed] to be to maintain complete control over the process of communication" between the parties. Moreover, the father **"admitted that he will only comply with Court Orders that meet his assessment of the children's best interests."**<sup>16</sup>

As a result, the Court found that where there was a discrepancy between the father's evidence and the evidence offered by any other witness(es), the Court preferred the evidence of the other witness.<sup>17</sup>

### II) Evidence of the Parties

Much of the evidence presented at trial came from the testimony of the parties or their witnesses. There

were two types of witness evidence introduced: (1) participant expert evidence; and (2) personal witnesses evidence.

#### Type 1: Participant Experts

Participant experts are typically someone with a specialized expertise, such as a teacher or doctor, that has experience dealing with the family outside of the litigation process.<sup>18</sup> This means that these witnesses were not retained by the parties for the purposes of conducting an examination or authoring a report to be used at trial.

In this case, there were five participant experts. The experts included: (1) the family's physician, Dr Reaume; (2) the children's privately-retained legal consultant, Ms. Klodner; (3) an OCL Clinician, Ms. Dyszuk; (4) Jordan's teacher, Mr. Zarudny; and (5) Jordan's counsellor, Ms. Hurwitz.<sup>19</sup>

The judge assessed the witnesses' credibility. This included assessing their qualifications and experience.<sup>20</sup> The Court found the witnesses to be credible based on multiple factors. For Ms. Hurwitz, the Court gave her testimony significant weight because she presented as candid and forthright, was qualified and experienced, and had "clear recollections of her interactions with the parties and with Jordan."<sup>21</sup> For Mr. Zarudny, the Court commented that the combination of his experience as Jordan's teacher and his straightforward evidence were helpful.<sup>22</sup> The Court similarly commented that Ms. Klodner's experience representing children gave her "unassailable" credibility<sup>23</sup> and that Dr. Reaume's neutral medical services and "unique" position having interacted with both parents on an ongoing basis formed his credibility.<sup>24</sup>

However, the Court placed no weight on the evidence of Ms. Dyszuk.<sup>25</sup> Ms. Dyszuk authored a clinical report about the family for the Office of the Children's

<sup>8</sup> *Ibid* at paras 51-58.

<sup>9</sup> *Ibid* at para 52.

<sup>10</sup> *Ibid*.

<sup>11</sup> *Ibid*.

<sup>12</sup> *Ibid* at para 54.

<sup>13</sup> *Ibid*.

<sup>14</sup> *Ibid* at para 55.

<sup>15</sup> *Ibid* at paras 55-56.

<sup>16</sup> *Ibid* at para 57.

<sup>17</sup> *Ibid* at para 58.

<sup>18</sup> See Heather Colman, "Participant vs Litigation Experts: Do You Know Who is in Your Corner?" (31 October 2021), online (blog): *Ontario Trial Lawyers Association Blog* <<https://otlablog.com/participant-vs-litigation-experts-do-you-know-who-is-in-your-corner/>>; *Westerhof v Gee Estate*, 2015 ONCA 206 at paras 60-64.

<sup>19</sup> *Fernandes v Fernandes*, *supra* note 1 at para 59.

<sup>20</sup> *Ibid* at paras 60-64.

<sup>21</sup> *Ibid* at para 60.

<sup>22</sup> *Ibid* at para 64.

<sup>23</sup> *Ibid* at para 61.

<sup>24</sup> *Ibid* at para 63.

<sup>25</sup> *Ibid* at para 62.

Lawyer.<sup>26</sup> However, through the course of her testimony, it became clear that the report was based on misinformation provided to her by the father.<sup>27</sup> Moreover, the report was dated (it was authored in 2016) and the factual circumstances had since changed.<sup>28</sup> The Court stressed that it would not rely on the report mainly because it was dated.

### Type 2: Personal Witnesses

The mother also called four personal witnesses. Personal witnesses are not parties to the litigation nor are they experts.<sup>29</sup> The personal witnesses included the maternal grandparents, the maternal uncle, and the maternal stepmother.<sup>30</sup> The Court noted that all witnesses were “calm and measured” and did not show any hostility towards the father, despite their past experiences with him.<sup>31</sup> The Court accepted the witnesses as credible and took into account their inherent alignment with the mother.

Of the personal witnesses, the maternal stepmother was the only one to relay comments from the children.<sup>32</sup> The Court noted that children’s out-of-court statements made to witnesses is hearsay, which

## Assessing the Evidence

The judge considered the evidence of the parties to determine what arrangement would be in the children’s best interests. This included an assessment of the family violence allegations brought by the parties. Overall, the evidence showed the mother had greater insight in meeting the children’s needs.<sup>38</sup>

The parties agreed that Reilly was old enough to determine what time she would spend with each parent and that she had generally followed any agreements between her parents or set out by the Court. Jordan’s situation was different because he had been diagnosed with an eating disorder that caused disagreement between his parents. Moreover, the Court found that the father “used Jordan’s activities as an excuse to control and hamper Jordan’s contact with his maternal family, using them to limit Jordan’s attendance at special events.”<sup>39</sup> The witness testimony

is generally inadmissible as evidence. However, there is a “principled exception” to this rule as it applies to children which can allow hearsay evidence to become part of the record.<sup>33</sup> The exception exists because the Court is alive to the need to minimize the negative impact of the litigation process on children, which “regularly requires the presentation of evidence that would otherwise be excluded as inadmissible hearsay.”<sup>34</sup> In deciding whether to admit such evidence, the Court assesses whether it is necessary and reliable.<sup>35</sup>

The Court decided that **the negative impact of having children testify in family litigation renders the presentation of children’s evidence through hearsay statements of other witnesses “reasonably necessary” in almost all cases.**<sup>36</sup> Then, the credibility of the witness relaying the children’s statements must be assessed on a case-by-case basis. Recall that the Court held that the personal witnesses were credible. It therefore accepted the hearsay evidence provided by the mother’s personal witnesses.<sup>37</sup>

helped the Court understand Jordan’s views and preferences. Jordan wished to continue the week-about schedule and have his maternal family attend more of his sports games, which they had stopped doing because of the father’s violent outbursts at the games.<sup>40</sup>

The Court then assessed the allegations of family violence. The Court held that while there was toxicity during the marriage, the situation worsened during separation.<sup>41</sup> For example, the father would not sign the separation agreement until the mother submitted to sexual intercourse with him.<sup>42</sup> This initiated a “pattern of coercive control over [the] mother.”<sup>43</sup>

The father threatened the mother’s life because he believed that she was exposing the children to COVID-19. This resulted in criminal charges and a

<sup>26</sup> *Ibid* at para 59.

<sup>27</sup> *Ibid* at para 62.

<sup>28</sup> *Ibid*.

<sup>29</sup> *Ibid* at para 65.

<sup>30</sup> *Ibid*.

<sup>31</sup> *Ibid* at para 66.

<sup>32</sup> *Ibid*.

<sup>33</sup> *Ibid* at para 67.

<sup>34</sup> *Ibid*.

<sup>35</sup> *Ibid*.

<sup>36</sup> *Ibid* at para 69.

<sup>37</sup> *Ibid* at para 70.

<sup>38</sup> *Ibid* at para 84.

<sup>39</sup> *Ibid* at para 91.

<sup>40</sup> *Ibid* at para 96.

<sup>41</sup> *Ibid* at para 113.

<sup>42</sup> *Ibid*.

<sup>43</sup> *Ibid*.

one-year peace bond.<sup>44</sup> The Court also found that the father had “used derogatory and abusive language toward [the] mother and maternal grandmother, including asking [the] mother sexualized questions in [the] trial,” which “suggests an element of misogyny that is concerning to this Court.”<sup>45</sup>

The Court “had no difficulty concluding that [the]

father’s ongoing attempts to psychologically and emotionally abuse [the] mother threaten[ed] the wellbeing of both children, and particularly Jordan.”<sup>46</sup> As a result, the Court made a finding of family violence. Moreover, the Court held that the abuse had continued “to date with high frequency and consistency and [that] this [violence was] toward the higher end of the spectrum.”<sup>47</sup>

## The Court’s Conclusions on Parenting Issues

Justice Smith finds that joint decision-making responsibility would not be appropriate considering the father’s ongoing patterns of coercive control.<sup>48</sup> As such, the Court ordered that the mother have sole decision-making authority with respect to the children.<sup>49</sup>

In light of the family violence, the Court held that Reilly was old enough and capable of managing her affairs and the time she spent in her father’s care<sup>50</sup> but

Jordan was not.<sup>51</sup> Justice Smith stated that Jordan was at serious risk of psychological harm as a result of the father’s behaviours.<sup>52</sup> The judge even stated that she would have seriously considered ordering supervised parenting time between the father and Jordan until Jordan’s mental health stabilized, but this request had not been put before the Court.<sup>53</sup> Accordingly, the Court ordered that the children spend every other weekend with their father.<sup>54</sup>

## Takeaways

Because the Court was reluctant to have children testify (especially in a high-conflict case), it was willing to make an exception to the rule against hearsay and accept participant and litigation expert testimony about statements made by the children. This allowed the Court to ascertain the children’s views and preferences and assess what arrangement would be in their best interests. This case also exemplifies how the Court must use the evidence before it to consider the best interests of each individual child children.

Moreover, this case discusses the importance of recognizing that even where acts of family violence occur privately between parents, it can have a serious spillover effect on children. The Court’s Conclusions on Parenting Issues Justice Smith finds that joint decision-making responsibility would not be appropriate considering the father’s ongoing patterns of coercive control. As such, the Court ordered that the mother have sole decision-making authority with respect to the children.

<sup>44</sup> *Ibid* at para 114.

<sup>45</sup> *Ibid* at para 115.

<sup>46</sup> *Ibid*.

<sup>47</sup> *Ibid*.

<sup>48</sup> *Ibid* at para 117.

<sup>49</sup> *Ibid* at para 120.

<sup>50</sup> *Ibid* at para 119.

<sup>51</sup> *Ibid* at para 120.

<sup>52</sup> *Ibid*.

<sup>53</sup> *Ibid*.

<sup>54</sup> *Ibid*.

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