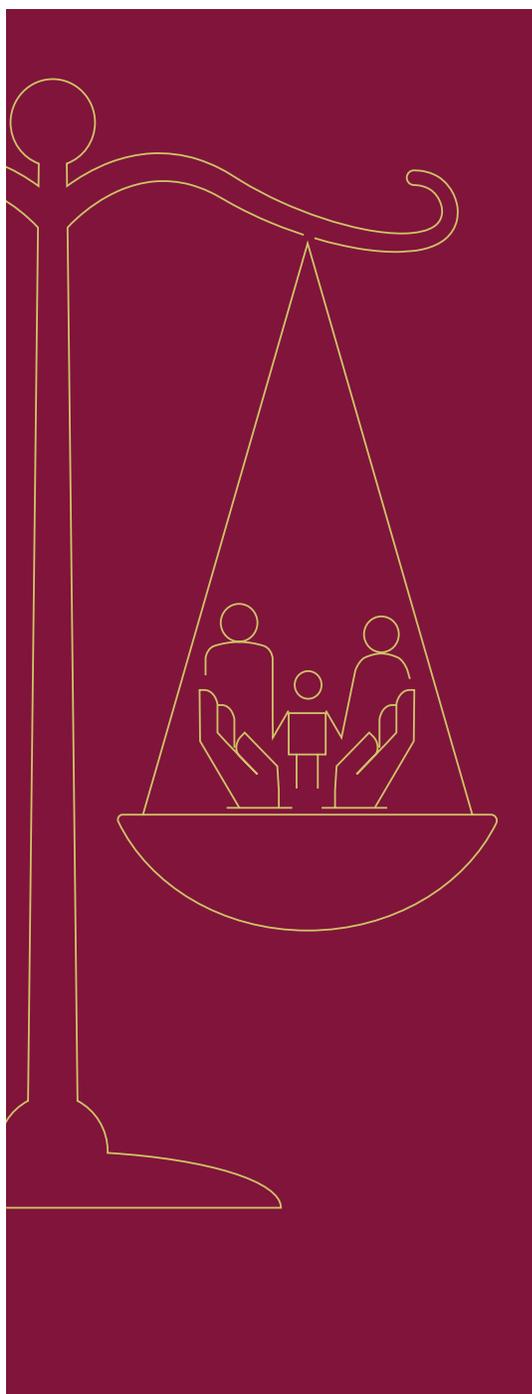

LEGAL BULLETIN

Parental time and Family Law Jurisprudence: A Brief Overview of Recent Jurisprudence



Introduction

This bulletin presents a selection of decisions on various topics involving domestic violence. We've decided to present decisions on a variety of subjects, all of which have in common that they are rare decisions dealing with important issues in domestic violence.

In the first decision, the Court of Appeal suspends the provisional execution of a nesting order in a context of domestic violence. Next, two decisions are presented in which the Superior Court must rule on an application to appoint a lawyer to cross-examine a party. The fourth decision deals with the application of the new article 611 CcQ in the context of conjugal violence. The fifth decision deals with an application for nullity of marriage. Finally, a criminal law decision is presented, in which the defense attempts to use the fact of having consulted a family law lawyer against the plaintiff.

Droit de la famille — 21917, 2021 QCCA 864 (CanLII)

In this decision, the Quebec Court of Appeal is seized of a motion for permission to appeal a safeguard order and a motion to suspend its provisional execution pending appeal. The petitioner alleged that she had been psychologically, physically and sexually abused by the respondent, and questioned the imposition of nesting for the exercise of parental custody time. Nesting consists in keeping the children in the family home, where they reside on a permanent

basis, by requiring each parent to be there when exercising parental time. So, it's the parents who "move" regularly, rather than the children. It implies that each parent has access to the residence, although they are not expected to be there at the same time.

Although this type of request is granted only sparingly, and only exceptionally (para 10), the Court granted the request for permission to appeal, granted permission to appeal and suspended provisional execution of the safeguard order with regard to the

imposition of nesting until the Court's judgment or until a panel of the Court decides otherwise. The safety issue that could arise from the introduction of nesting, the novelty of the question and the balance of inconvenience all weigh in the applicant's favour.

Subsequently, during the proceedings, the respondent waived nesting and undertook not to request it, with the result that the issue will not be dealt with on its merits in a final judgment.

Droit de la famille — 212413, 2021 QCCS 5330 (CanLII)

In the context of divorce proceedings, the plaintiff filed an application for case management to have a lawyer appointed to cross-examine her and the parties' adult child, X, in lieu of a cross-examination conducted by the defendant himself, who was unrepresented. Indeed, the plaintiff and X allege verbal and physical abuse by the defendant during the parties' 18-year marriage, and consequently, the plaintiff and X argue that they would be subjected to intense and inappropriate questioning if the defendant were to cross-examine them directly, and that this would be a stressful and difficult exercise for them.

Notably, considering the condition imposed on the defendant in the context of criminal proceedings not to be in contact with the plaintiff and X, considering that the defendant does not contest the request,

considering the criminal convictions of the gentleman with respect to the plaintiff and X and considering that a cross-examination risks re-victimizing and re-traumatizing the plaintiff, the judge grants the request and designates a lawyer to proceed with the cross-examination of the plaintiff and X in the context of the divorce proceedings.

The appointed lawyer does not represent the defendant and acts only as an intermediary in the cross-examination. The questions will have been prepared in advance by the defendant and he may add to them during the cross-examination. However, the lawyer retains a right of reserve as an officer of the court: if she deems any of the questions prepared by the defendant to be inappropriate, they will be submitted to the court for a decision on whether or not to allow the question.

Droit de la famille — 22620, 2022 QCCS 1437 (CanLII)

In this decision, the Superior Court is seized of a request during the proceedings to appoint a lawyer to cross-examine the defendant by the unrepresented plaintiff. The defendant cites a context of family

violence and fears being subjected to inappropriate, denigrating and victimizing questions from the plaintiff.

The court emphasizes that the mother's request is based on legislative provisions which are not yet in force, i.e. articles of Bill No. 2 having only been adopted in principle. However, the court considers that it is still authorized to make the requested order to the extent that it considers that it appears required. To do this, he must take into account the balance to be struck between the protection to be granted to the witnesses concerned and the right of a party not to be represented by a lawyer and to remain in control of his evidence. Such appointment of counsel requires the party to prepare their questions in advance and in writing, which could limit the possibility of asking follow-up questions on the spot that had not been anticipated.

Although emphasizing that the discretion available to it must be exercised liberally in order to protect vulnerable witnesses,

such as those who allege domestic violence, the court concludes that the defendant did not prove the need to appoint a lawyer. According to the court, the evidence, limited to the sworn statements of the defendant and a lawyer working as a worker in a shelter, does not provide sufficient details as to the nature and context of the alleged violence. The court also rejects the argument according to which the plaintiff could not question the defendant because of a communication ban to which he subscribed to the Court of Quebec in the context of a charge of criminal harassment, since its conditions were amended and provide an exception allowing communication according to the terms and conditions provided by the Superior Court. The court further considers that this accusation is not sufficient in itself to justify the appointment of a lawyer to carry out the cross-examination.

Droit de la famille — 221160, 2022 QCCS 2529 (CanLII)

In this decision, the paternal grandmother asked the Superior Court to obtain access rights to the child. As the father had no access rights and was in custody awaiting trial for domestic violence against a third party, the grandmother had not seen the child for two years. This decision caught our attention because it applies the new article 611 CcQ in a context of domestic violence. Under the old version of article 611 CcQ, parents could not, without serious cause, hinder the child's personal relations with his grandparents. Henceforth, the child's best interests are the sole criterion for determining whether a relationship can be maintained or developed between a child under 10 and his or her grandparents.

In this case, the evidence reveals that the father is a man who is violent towards

women, including the grandmother, and that the grandmother does not take an objective view of her son's actions, minimizing in particular the acts of violence committed against the mother. Moreover, while the grandmother was supposed to supervise the father's access to the child, she showed flexibility in her commitments to the court by leaving the father alone with the child. Secondly, the three-year-old child has no memory of the grandmother, who is a stranger to him. Finally, allowing the grandmother to see the child at this stage would expose the grandmother to greater control and violence from the father, which is neither appropriate for the grandmother nor in the best interests of the child. The court therefore refused to grant access rights to the grandmother.

Droit de la famille — 22734, 2022 QCCS 1718 (CanLII)

In this decision, the court was asked to declare the marriage null and void. The plaintiff alleged that her consent had been vitiated by the defendant's actions and misrepresentations relating to alcohol consumption, criminal history, mental health and violent behaviour, which had resulted in domestic violence against her. For his part, the defendant contested the nullity claim and presented a counterclaim for divorce.

The plaintiff must prove that she was deceived about qualities essential and determinative of her consent to the defendant's person. According to the court, while living together has brought its share of disappointments for the plaintiff, this is not a situation where the defendant knowingly concealed aspects of his character or personality. Despite the short courtship period of six months prior to marriage, the parties explored the issues they

considered important before making their commitment. The court is of the opinion that the plaintiff obtained certain indications, prior to the marriage, that the defendant was consuming alcohol in a manner of which she disapproved. With regard to the defendant's criminal record, the plaintiff was aware of some of these prior to the marriage, whereas the charge of threatening the defendant's ex-wife with death and bodily harm cannot be held against him, as he was acquitted. Furthermore, there was no medical evidence that the defendant was suffering from a mental illness that he should have disclosed. Finally, according to the court, the defendant's manipulation and conjugal violence are not relevant to the analysis, given that they occurred at the end of their life together, and not shortly after the marriage. The request for nullity of the marriage is therefore rejected, and the divorce action is granted.

Larrivée v. R., 2022 QCCS 307 (CanLII)

This is a criminal law decision. The accused is appealing a trial decision finding him guilty of simple assault (art. 266b) C.cr.). The events with which the appellant is charged are alleged to have occurred during two specific and unrelated incidents of domestic violence alleged by Mrs. J. The Tribunal finds that the trial judge's findings on the appellant's credibility are based largely on abundant evidence of propensity and unworthy conduct. In the judge's view, this misuse of evidence constitutes an error of law at the heart of the issue, requiring a new trial, which is ordered.

What catches our attention in this decision is the fact that Ms. J acknowledges having met with a family law lawyer on the day of the

appellant's arrest, and that an introductory application for sole custody of the children was signed in 2019 (para 26). We denounce the fact that this element was used against the plaintiff by the defense. In paragraph 51, it is stated that during the pleadings "the defense argues that the plaintiff consulted a family lawyer on the day of her complaint to the police. She would have had a motive to lie, namely to take revenge on the accused who had broken up her family" (emphasis added).

According to the defence, the fact of having consulted a family law lawyer can be used against a complainant in criminal proceedings concerning alleged assaults in the context of domestic violence.

Although this element does not seem to have been retained by the judge, it should be inadmissible to invoke a meeting with a family lawyer as proof of a lack of credibility or even bad faith on the part of the complainant. On the contrary, it should reinforce her credibility. The argument put forward by the defense is disturbing: exercising one's rights in this way should in no way be judged negatively within the judicial system. Although this element does

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