

LEGAL BULLETIN

ISSUE NO. 27

Introduction

This bulletin reviews three court decisions in family law. The first decision focuses on the scope of a parenting plan evaluation and a counter-evaluation in a child custody case. As for the other two decisions, they deal with the modulation of parental rights and the interests of the child in a context of family violence. In fact, in these last two decisions, the Court attested to the existence of situations of family violence; however, it did not reach the same result. In the second-to-last decision, the Court ruled in favour of shared custody, while in the other decision, it decided to maintain the right of custody of the mother as a victim of family violence, and to confirm the father's right of access. This difference in the outcomes of the decisions discussed here is justified by the impact of family violence on the best interests of the child.



Droit de la famille — 232032, 2023 QCCS 4551 (CanLII)

In this decision, the plaintiff requested that a counter-evaluation would be authorized in a child custody case. Since 2022, she has had the right of custody to the child, while Monsieur has had rights of access. The plaintiff questioned the defendant's child-rearing capacity, alleging that she had been a victim of family, financial and judicial violence.

In turn, the defendant claimed that the plaintiff's allegations were unfounded. He maintained that she was making them in order to gain an advantage in the dispute over the custody of their son and to remove him from his life.

In his report, the parenting plan evaluator mentioned that there have been violent events between the parties, emphasizing that it is difficult to assert that they formed part of the defendant's coercive control over the plaintiff. He rejected the father's argument

of parental alienation and confirmed the existence of certain inappropriate behaviours on the part of the father. Nevertheless, the extent of these behaviors could not call into question his child-rearing capacity. Therefore, the parenting plan evaluator recommended the possible introduction of shared parenting time between the parties.

In making its decision, the Court ruled respectively on family violence and the interests of the child, parenting plan evaluation in family disputes and the appropriateness of a counter-evaluation.

First, the Court cited articles 33 C.C.Q and 16 (33) of the *Divorce Act*, which require to take into account situations of family violence when determining a child's best interests. Secondly it affirmed the importance of investigations in family disputes, but pointed out that such parenting plan evaluation

are not mandatory. Lastly, it argued that in the present case, there was no need to order a counter-evaluation, as the parenting plan evaluation in question was relevant. As a result, custody of the child had to be decided without further delay.

In this decision, the Court did not confirm the judicial violence alleged by the plaintiff. However, it made an important comment on the scope of the parenting

plan evaluation. While the latter is provided for in articles 242 para. 2 and 425 et seq. of the *Quebec Code of Civil Procedure*, it is by no means mandatory in a case where allegations of family violence are made by one of the parties. What is more, in the event that a parenting plan evaluation is accepted, it is in no way binding on the judge, who can either draw inspiration from it or depart from it.

Droit de la famille — 2390, 2023 QCCA 90 (CanLII)

In this decision, the appellant was appealing a Superior Court judgment ordering joint custody of the parties' two daughters, aged 20 months and 6 and a half years, respectively. She believed that the Court had erred in its analysis of the requirements of the children's best interests in light of the family violence that she had allegedly suffered, and accused the Court of failing to give sufficient reasons for its decision. That said, the appellant considered that the family violence she suffered should have led the judge to grant her custody of her daughters and allow limited access to the father.

In rendering its decision, the Court of Appeal did not fail to point out that the Supreme Court had stated that [Translation] "the reasons for a judgment must be sufficient, both factually and legally". However, this in no way obliges the trial judge to recount the facts in great detail.

In the present case, the Court maintained that the trial court could have given more reasons for its decision, as the appellant wished, but it did not find any reviewable error insofar as the elements mentioned by the judge were sufficient for making an informed decision.

The trial judge recognized the family violence suffered by the appellant. However, the violence did not amount to family violence that could prevent the establishment of joint custody. Consequently, shared custody between the parties was in the best interests of the children.

Following the analysis of this decision, it is worth highlighting an essential point raised by the Court. A finding of family violence against one of the parties does not necessarily preclude shared custody between the parents

Droit de la famille — 231136, 2023 QCCS 2662 (CanLII)

In this decision, custody of the two-year-old child was held by the mother, and the father had a right of access. This situation was contested by the father, and resulted in a dispute between the parties.

The plaintiff, who claimed to be a victim of domestic violence, did not object to the preservation of the relationship between the child and the father. However, she questioned his parenting skills, denounced the negative impact of the father's living

environment on the child and asked for the payment of child support.

The father, as defendant, contested the parenting plan evaluation report recommending continued custody of the child with the mother, and requested shared custody. He denied being the perpetrator of family violence against the mother and considered himself to be the victim. He asked to be reimbursed for various expenses.

The father's allegation ran counter to the parenting plan evaluation report which stated that family violence was engendered by both parties.

In rendering its decision, the Court recognized the family violence and incitement to anger perpetrated by the defendant. It awarded custody of the child to the mother, ordered the father to pay child support and required both parents to seek professional help

to develop their parenting skills.

This decision is in line with the prioritization of the child's best interests over shared parental custody. Indeed, joint custody can be refused when its implementation is likely to be detrimental to a child's well-being. This is the case, for example, in situations of family violence, as shown by this decision.

This bulletin was prepared by:

Wago Irène-Raïssa Zohoré and Dominique Bernier



Western

Centre for Research & Education on
Violence Against Women & Children



Department of Justice
Canada

Ministère de la Justice
Canada