

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)**

BETWEEN:

ASHLEY SUZANNE BARENDREGT

APPELLANT
(Respondent)

-and-

GEOFF BRADLEY GREBLIUNAS

RESPONDENT
(Appellant)

-and-

**OFFICE OF THE CHILDREN'S LAWYER and,
WEST COAST LEAF ASSOCIATION and
RISE WOMEN'S LEGAL CENTRE**

INTERVENERS

**FACTUM OF THE INTERVENERS
WEST COAST LEAF ASSOCIATION and RISE WOMEN'S LEGAL CENTRE**
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW

1. The history of family law is, in many ways, the history of the status of women in Canada.¹ Its evolution reflects the growing recognition of women’s rights and their changing social roles, and it is also bound up in women’s ongoing struggles to achieve substantive equality. West Coast Legal Education Action Fund Association (“West Coast LEAF”) and Rise Women’s Legal Centre (“Rise”) (“the Interveners”) seek to ensure that the development of family law considers its broader social context and removes barriers to the ability of women and others of marginalized genders to enforce their rights after relationship breakdown.
2. This appeal is from an order of the British Columbia Court of Appeal (“BCCA”) reversing a decision of the B.C. Supreme Court in a relocation matter under the *Divorce Act*, R.S.C. 1985 c.3, and the *Family Law Act*, S.B.C. 2011, c.25 (“*FLA*”). The trial judge had made findings akin to family violence: likely emotional abuse, a physical assault and litigation abuse. These findings, together with “less significant” findings about the father’s financial position were the basis for an order that relocation with their mother was in the children’s best interests. The BCCA relied on new evidence of the father’s financial position to overturn the trial judge’s relocation order. In doing so, the BCCA in essence re-weighed and minimized the findings of family violence, including the risk of continuing harm to the mother and children.
3. Family violence is an endemic social problem in Canada which systemically undermines the dignity, safety and equality of women and children. However, it largely takes place behind closed doors and evidence of it is often minimized or dismissed, making it notoriously difficult to address in the legal system. The outcome of this appeal will affect the ability of courts to identify the presence of family violence, protect victims from continuing harm (including through exposure to family violence), and ensure the best interests of children affected by family violence.

¹ *M. v. H.*, [1999] 2 SCR 3, [1999 CanLII 686 \(SCC\)](#), at para. 164: “the history of family law is, in many ways, the history of the gradual emancipation of women from legal impediments to full equality...”

4. This Court recently affirmed that “family law calls for an approach that takes into account the broader social framework in which family dynamics operate.”² The Interveners will outline the social context of family violence against which to understand this appeal, and offer an approach that appeal courts can take in addressing the issues in the appeal.

PART II – STATEMENT OF POINTS IN ISSUE

5. The Interveners take no position on the outcome of this appeal but address the treatment of evidence of family violence as it is engaged by the issues on this appeal.

PART III – STATEMENT OF ARGUMENT

Family Violence under BC’s Family Law Regime

6. Historically, BC’s family law regime did not explicitly address family violence or recognize its significance to the best interests of children. Today, both the *FLA* (enacted in 2013) and the *Divorce Act* (as amended in 2019) promise a robust and evidence-based response to family violence – expansively defined to include physical, sexual, psychological, emotional, and financial abuse within family relationships, as well as a child’s direct or indirect exposure to it³ – in determining parenting arrangements. Judges must consider family violence as a factor in the best interests of the child analysis.⁴

7. The evolution of the statutory scheme in this regard is consistent with the growing recognition of the harm family violence causes children, including through witnessing the abuse of a parent by another. The BC government’s 2010 *White Paper on Family Relations Act Reform* stated with respect to its proposal on the best interests of the child test:

By far, the issue that garnered most attention in the consultations was family violence, which is now proposed as an explicit best interests factor. This addresses an important gap in the current law and recognizes that violence – even if directed exclusively at the spouse – can still be harmful to a child. The proposed new test acknowledges the social problems caused by family violence and sends a clear message that violence is unacceptable.⁵

² *Michel v Graydon*, [2020 SCC 24](#), at para. 88.

³ *FLA*, s. 1, *Divorce Act*, s. 2.

⁴ *FLA*, s. 37(3), *Divorce Act*, s. 16(2).

⁵ British Columbia, Ministry of Attorney General, [White Paper on Family Relations Act Reform: Proposals for a New Family Law Act](#) (Victoria: Ministry of Attorney General, July 2010) at p.44.

8. With respect to family violence under the *Divorce Act* amendments, the Standing Senate Committee on Legal and Constitutional Affairs provided the following interpretive guidance:

The committee notes, as several witnesses have stated, that direct or indirect exposure to family violence is child abuse, causing emotional stress and developmental harm to the child. Spousal violence is not only a matter between spouses; it is a form of family violence. This was acknowledged by the Minister of Justice in his letter to the chair in the following terms: “In the case of a child, any exposure to family violence is family violence in and of itself; that is, exposure to family violence is a form of child abuse.”⁶

9. Despite these progressive legislative reforms, victims of family violence continue to face challenges when seeking protection and appropriate parenting arrangements through the family law system. These challenges must be considered in their social context as outlined below.

Family Violence in its Social Context and Persistent Myths and Stereotypes

10. Family violence is a pervasive and gendered social problem. According to self-reported data, 44% of women in Canada have experienced some form of abuse by an intimate partner in their lifetime. While men in Canada also self-report experiences of abuse at high rates, reports of more severe forms of abuse are concentrated amongst women.⁷ In 2019, 79% of victims of police-reported family violence were women.⁸ Women who experience overlapping inequalities, such as Indigenous women, racialized women, and women with disabilities, experience abuse at higher rates.⁹

11. Family violence has well-documented negative impacts on women. Beyond direct physical injuries or death, family violence can contribute to a range of health problems including depression, anxiety, and/or post-traumatic stress disorders; impaired immune system; cancer;

⁶ Senate, Standing Senate Committee on Legal and Constitutional Affairs, *Observations to the thirty-fourth report of the Standing Senate Committee on Legal and Constitutional Affairs (Bill C-78)* (2019) at p. 3.

⁷ Adam Cotter, “[Intimate partner violence in Canada, 2018: An Overview](#),” Canadian Centre for Justice and Community Safety Statistics, April 26, 2021, at p. 5.

⁸ Shana Conroy, “[Family violence in Canada: A statistical profile, 2019](#),” Canadian Centre for Justice and Community Safety Statistics, March 2, 2021, at p. 29.

⁹ Loanna Heidinger, “[Intimate Partner Violence: Experiences of First Nations, Metis, and Inuit women in Canada, 2018](#),” at p. 3; Laura Savage, “[Intimate Partner Violence: Experiences of women with disabilities in Canada](#)” at p. 3; Adam Cotter, “[Intimate partner violence: Experiences of visible minority women in Canada, 2018](#),” at p. 5; all published by the Canadian Centre for Justice and Community Safety Statistics in 2021.

high blood pressure; heart problems; asthma; gastrointestinal problems; arthritis; insomnia and diabetes.¹⁰ Moreover, it interacts with other social determinants of health, such as poverty and systemic racism, to disproportionately affect the health of women who experience overlapping inequalities.¹¹ In addition to its health effects, family violence undermines women's ability to form social relationships and equally participate in employment and public life.¹²

12. The Legislative Backgrounder to the *Divorce Act* amendments¹³ sets out a summary of the “profound” effects of family violence on children:

Children who are exposed to violence are at risk for emotional and behavioural problems throughout their lifespan, and these impacts are similar to those of direct abuse. Some of these consequences include post-traumatic stress disorder, depression, low educational achievement, difficulties regulating emotions and chronic physical diseases. In Canada in 2014, 51% of parents who reported experiencing spousal violence also reported that their children may have heard or seen assaults on them. About 72% of individuals with children who experienced violence after separation indicated that a child had seen or heard the violence.

13. Despite the impacts of family violence, victims often do not readily disclose their history of abuse to anyone, particularly people they do not know, including lawyers.¹⁴ A victim may feel shame, be afraid she will not be believed or that there will be reprisals by the abuser, be in denial about the seriousness of the abuse, not realize that it has any relevance to her family law case, still care about her partner, or be afraid that disclosing abuse will lead to the involvement of child protection authorities.¹⁵

¹⁰ [The Chief Public Health Officer's Report on the State of Public Health in Canada 2016 - A Focus on Family Violence in Canada](#), [*CPHO Report*] at p. 17.

¹¹ Marika Morris, “[Acting on Violence Against Women is a Blueprint for Health: A brief on the impact of A Blueprint for Canada's National Action Plan on Violence Against Women and Girls on the health of Canadians through the lens of the social determinants of health](#)”, May 2016, at pp. 10-14.

¹² *CPHO Report* at p. 18; Zhang, et al. “[An Estimation of the Economic Impact of Spousal Violence in Canada, 2009](#),” Department of Justice Canada, January 2013, at p. 47 to 60.

¹³ [Legislative Background: An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act \(Bill C-78 in the 42nd Parliament\)](#), at B - Addressing Family Violence.

¹⁴ Cross et al, “[What You Don't Know Can Hurt You: The importance of family violence screening tools for family law practitioners](#),” Department of Justice Canada, February 2018, at pp. 15, 32, 34, and 61.

¹⁵ *Ibid*, at p. 15.

14. Even where women do raise issues of family violence in their family law matter, the adversarial nature of our legal system, as well as myths and stereotypes about family violence, impede the family law system's ability to deal with them adequately. Family violence often takes place behind closed doors and may not leave physical marks (even where physical abuse takes place), meaning that it often does not have corroborating evidence.¹⁶ Further, women may lack the resources to access expert evidence—such as a psychological assessment of their family dynamics—to support their concerns. Even where they do access expert evidence, the expert may not have the specialized expertise to assess for and opine on family violence.¹⁷ Assessing credibility in these circumstances is a difficult and uncertain exercise. Women may need legal support to navigate these more complicated claims, but many cannot afford to hire a lawyer. Even where they are represented, counsel may yet advise them against raising family violence concerns for fear that being disbelieved risks adverse findings against them.¹⁸

15. Myths and stereotypes remain a persistent and pervasive problem in our legal system. The influence of myths and stereotypes about family violence can result in judges (as well as other legal actors) disbelieving or minimizing claims of family violence, as well the impacts of that violence, and giving them little weight in the best interests of the child analysis.

16. Family violence claims must be situated within a history of discriminatory assumptions about women's credibility in court proceedings, especially when they are alleging gender-based violence.¹⁹ The demeanor of women victims of family violence may not accord with male-defined credibility norms and stereotypical conceptions of "battered women." For example, they may present as unstable, highly anxious, angry, or with a flat affect.²⁰ Moreover, the testimony of

¹⁶ Susan Boyd & Ruben Lindy, "[Violence Against Women and the BC Family Law Act: Early Jurisprudence](#)," *Canadian Family Law Quarterly* 35 (2015): 102 ["Boyd and Lindy"], at 15.

¹⁷ The Honourable Donna Martinson & Professor Emerita Margaret Jackson, "[Family Violence and Parenting Assessments: Laws, Skills and Social Context](#)" (Vancouver: FREDA Center for Research on Violence Against Women and Children), at p. 30 to 40.

¹⁸ See discussion in footnote 20 in Linda Neilson, [Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems](#), Department of Justice Canada, 2nd ed, 2013.

¹⁹ Consider, for example, long-standing concerns about the credibility assessments of sexual assault complainants.

²⁰ Haselschwerdt, et al. "Custody Evaluators' Beliefs About Domestic Violence Allegations During Divorce: Feminist and Family Violence Perspectives", *Journal of interpersonal violence*, vol. 26, no. 8, 1694-1719, at p. 1698.

women victims is often assessed through the lens of myths and stereotypes, including the common beliefs that women lie about or exaggerate abuse to gain the upper hand in parenting disputes,²¹ or because of mental health issues.²² Other myths and stereotypes affecting credibility assessments concern the behaviour of an “ideal victim,” including that a real victim would disclose her abuse early, a real victim would disclose her abuse to the police, and a real victim would not stay with or reconcile with an abusive partner.²³ The widespread judicial skepticism of family violence claims does not have empirical support.²⁴ Rather, the evidence shows that most family violence goes unreported.²⁵

17. Even where judges accept women’s evidence of family violence as credible, myths and stereotypes can negatively affect their assessment of the relevance of that violence to the best interests of children. These myths and stereotypes include: violence against a mother does not affect the children and/or has nothing to do with the parenting abilities of abuser (in other words, an abusive spouse can nonetheless be an excellent father); family violence ends when the couple separates; and staying with or reconciling with a partner indicates a lack of severity or fear.²⁶ There is no evidence to support these myths and stereotypes; the opposite is true. As discussed above, direct and indirect exposure to a parent’s abuse can cause serious harm to children. Moreover, perpetrating family violence, particularly coercive controlling violence, is associated with harmful parenting practices including patterns of entitlement, manipulation, projection of responsibility, coercion, control and domination.²⁷ Family violence often starts or increases in severity at separation²⁸ and repeated reconciliation is common in domestic violence dynamics.²⁹

²¹ Linda Neilson, *Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases*, Canadian Legal Information Institute, 2nd ed (2020), [2017 CanLIIDocs 2](#), [*“Responding to Domestic Violence”*], at 4.5.2.

²² Suzanne Zaccour, [“Crazy Women and Hysterical Mothers”](#) Canadian Journal of Family Law, Vol 31, No 1, 57-103, 2018.

²³ The Honourable Donna Martinson & Professor Emerita Margaret Jackson, [“Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases,”](#) 2017, *Canadian Journal of Family Law* 11 [*“Martinson and Jackson 2”*] at p. 34.

²⁴ [Responding to Domestic Violence](#), at 4.5.2.

²⁵ *Ibid.*

²⁶ Martinson and Jackson 2, at 34.

²⁷ [Responding to Domestic Violence](#), at 6.2.5.6, and 11.1.10.

²⁸ *Ibid.*, at 4.5.1, 7.2.2, 7.2.6.

²⁹ *Ibid* at 5.4.3.

18. Myth-based reasoning often interacts with the ongoing influence of the maximum contact principle to undermine the significance of family violence, even though the maximum contact principle was never absolute, was not included in the *FLA*, and was removed from the amended *Divorce Act*. The ongoing privileging of maximum contact over safety has been raised by many anti-violence organizations as a source of concern.³⁰ A review of post-*FLA* decisions in BC confirmed that trial judges tended towards an assumption that shared parenting and responsibility and parenting time were appropriate goals even where abuse was present.³¹

19. Given the social and legal barriers that women victims of family violence face when seeking to protect themselves and their children, relocation cases often takes place against the backdrop of family violence (even where, as in this case, it is not explicitly identified as a reason for the relocation application). A 2012 review of relocation cases for the Department of Justice observed “a substantial body of Canadian jurisprudence where spousal violence was cited by the court as a reason for allowing the move, with the expectation that this will afford the mother and children some protection, and promote the welfare of the children.”³² Moreover, courts were significantly more likely to allow for relocation in cases in which there was a substantiated allegation of abuse than in other cases.³³

The Proper Approach of Appeal Courts to Findings of Family Violence

20. Appeal courts must approach findings of family violence with an acute sensitivity to the social context outlined above. At the appeal level, this includes recognition of the trial judge’s ability to directly observe dynamics of abuse in each party’s demeanor and litigation conduct. While demeanor evidence must be approached with some caution, trial judges may appropriately consider it as part of a holistic and contextual analysis of the whole of the evidence before them, especially where the victim is not ready to disclose the abuse, does not recognize their experiences as abuse, or minimizes their abuse. A history of litigation abuse in the proceeding,

³⁰ See e.g. Briefs on Bill C-78 of [Dr Linda Neilsen](#); the Joint Brief submitted by [Luke’s Place Support and Resource Centre](#), and the [National Association of Women and the Law](#); and the Brief submitted by [West Coast LEAF](#).

³¹ [Boyd and Lindy](#), at pp. 3, 29, and 45.

³² Bala et al, “[A Study of Post-Separation/Divorce Parental Relocation](#),” 2012, Family, Children and Youth Section, Department of Justice Canada [“*A Study of Relocation*”], at 3.3.4.

³³ *Ibid.*

such as the father's filing of a nude photograph of the mother in this case, is appropriately considered by the trial judge in such an analysis.

21. Appeal courts are not immune to myth-based reasoning and should consider the potential influence of such reasoning before dismissing or minimizing trial level findings of family violence. In this case, the BCCA did not engage in such an exercise, with the effect of minimizing the significance of the trial judge's findings of family violence to the mother's need for support and ultimately, to the best interests of the children.

22. First, the BCCA assumed that the issue of family violence was "not a significant concern" to the mother, and not very severe, because the appellant and her counsel "were not significantly concerned about it at trial."³⁴ This ignores not only the instances of violence disclosed during trial, but also the social and legal barriers to women disclosing family violence in family law proceedings discussed previously.

23. Second, the BCCA suggested that because several of the abusive events occurred at or around the time the parties separated, and because adversarial litigation is often associated with acrimony between the parties, the abuse was not likely to continue.³⁵ The Court of Appeal's use of mutualizing language such as "hostility between the parents," to describe family violence of one parent perpetrated against the other misconstrues the trial judge's findings of a pattern of abusive conduct by the father that was present during the relationship, at the time of separation, during the litigation process, and at trial.³⁶ Moreover, as discussed above, it is a common myth that family violence ends at separation, when in fact the opposite is true.³⁷

24. Third, the BCCA commented that there was no evidence of any abuse having taken place in front of the children since separation. This overlooks the harms of their indirect exposure to family violence (despite the explicit recognition of those harms in the *FLA* and *Divorce Act*), as well as the trial judge's specific concerns about the father's "continuing animosity" towards the mother, and the "significant risk" of conflict spilling over and directly impacting the children.³⁸

³⁴ Appeal Reasons, at paras. 71 and 79.

³⁵ Appeal Reasons, at paras. 79, 83 and 79.

³⁶ Trial judgment, at paras. 10 and 41.

³⁷ *Responding to Domestic Violence*, at 4.5.1, 7.2.2, 7.2.6.

³⁸ Trial Judgment, at para. 42.

Moreover, it ignores the correlation, as discussed previously, between the perpetration of family violence and harmful parenting practices.

25. Finally, the BCCA dismissed the mother's need for emotional support, and did not consider this need in the context of her experiences of abuse.³⁹ The reasoning was that, unlike career advancement, educational opportunities and moving in with a new romantic partner, emotional support would not advance Ms. Barendregt's ability to meet the best interests of the children. The desire to access family support is in fact a relatively common primary reason for proposed relocation,⁴⁰ and victims of family violence may be at particular need of strong support networks.

“New” or “Fresh Evidence” in Family Violence Cases

26. Any time an appeal court considers an application to admit “new” or “fresh” evidence, it should ensure that the applicant is not circumventing the appropriate test to obtain an order under s. 47. On an application under the *FLA*, a litigant may seek a variation of a court order if satisfied that, since the making of the order, there has been a change in the needs or circumstances of the child, including because of a change in circumstances of another person.⁴¹ This is the usual manner in which evidence of new evidence – such as changes in a parent's financial position – are considered by the court and weighed against other considerations that relate to the best interest of the child. This test was created by statute and is specifically calibrated to strike an appropriate balance between flexibility and finality in family matters.

27. Where findings of family violence were made at the trial level, an appeal court which considers “fresh” or “new” evidence in one area should ensure that it has equally current and updated evidence on the family violence and the impacts of that violence (including in relation to any implementation of trial orders). The updated evidence on family violence should be admitted as of right. This ensures that the court makes its determination on the basis of all of the current evidence relevant to the best interests of the children, assuming that there may have been other changes since trial, as was the case here. It is important to recall that family violence is more

³⁹ See paras. 67, and 73-75.

⁴⁰ *A Study of Relocation*, at 3.3.3.

⁴¹ [FLA, s. 47.](#)

likely to occur or worsen after separation, and continuing conflicts relating to children increases the opportunity for violence to recur.

PART IV – COSTS AND ORDER SOUGHT

28. Rise and West Coast LEAF do not take a position on the outcome of this appeal. Rise and West Coast LEAF do not seek costs and asks that no costs be ordered against them.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Vancouver, British Columbia this 17th day of November, 2021.



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PART V – TABLE OF AUTHORITIES

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PART VI – LEGISLATION AT ISSUE

LEGISLATION	Paragraph(s)
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