

LEGAL BULLETIN

Issue No. 32

L.D.B. v. A.N.H., 2023 BCCA 480

Introduction

This case is notable because it explains when evidence of family violence may be relevant to the payment of spousal support. In this case, the Court of Appeal confirmed the lower court's findings, first in 2014 and then numerous times thereafter, that the respondent's conduct constituted litigation abuse which fell under the definition of family violence in s. 1 of the *Family Law Act* (FLA). What is notable is that the Court of Appeal states that in narrow circumstances, family violence generally, and here, litigation abuse, can be a form of spousal misconduct pursuant to s. 166(a) of the FLA which is relevant when determining spousal support. This is important because ordinarily courts are specifically instructed not to consider spousal misconduct in the determination of spousal support absent two listed exceptions. In the exception concerning payee spouses at s.



166(a), the Court of Appeal stated that family violence can be one such form of spousal misconduct relevant to the determination of spousal support.

Background

This case concerns the appellant LDB who had been subject to years of litigation abuse by the respondent ANH. The respondent had previously been found to be in contempt of court, and had since been declared a vexatious litigant at both the trial

and appellate level. The record shows 13 reported decisions including this appeal; 7 at the BC Court of Appeal and 6 at the BC Supreme Court level.

In this case, LDB was bringing her first appeal in “the long history of these

proceedings”. She appealed the dismissal of her application for a reinstatement of spousal support from the trial decision at ANH v LDG, 2022 BCSC 1591, where she had applied for a reinstatement of spousal support four years after the spousal support order had expired in 2017. She also applied to introduce new and fresh evidence on appeal of increased “litigation violence”, as well as its negative impact on her mental health and ability to work.

The appeal was partially allowed with the remaining errors dismissed. LDB alleged several errors which were grouped by the Court into three grounds. First, she alleged a breach of procedural fairness or reasonable apprehension of bias, which was dismissed by the Court. Second, the Court agreed that the judge below failed to consider LDB’s application to increase monthly amounts payable by ANH for costs and arrears of child support, and remitted this determination back to the trial court.

The third ground of appeal: No material change of circumstances

Of interest is the third ground, beginning at paragraph 98, where the Court declined to find that the trial judge erred in not finding a material change of circumstances sufficient to reinstate spousal support pursuant to s. 167(3) of the FLA. The Court set out that the standard of review on an application to vary a support order is deferential and that absent an error in principle or a material misapprehension of the evidence, the Court would not interfere. They also noted that applications to resume spousal support after expiration of an order are rare, and that they were not aware of any cases which considered s. 167(3).

They found that contrary to LDB’s assertion that the lower court’s decision was an error of law, that the impugned findings were actually findings of fact, and that she was inviting the Court to reweigh the evidence and arrive at a different conclusion, which is not the role of an appellate court.

And so because LDB adduced what Court described as “limited” evidence of a material change of circumstances of ANH’s increased litigation abuse which she argued caused her serious financial and mental hardship which rendered her disabled, the Court deferred to the lower court’s findings that the evidence was insufficient to prove that LDB was unable to work; and that even if the evidence did establish that she was disabled, to the finding that there was no evidence that her condition was materially different from what it was in 2017 when the lower court’s initial order to terminate spousal support was made.

In not finding an error on this third ground, the Court noted that the lower court had evidence of ANH’s litigation abuse constituting family violence and its negative impact on LDB’s mental health, and that the lower court noted that LDB’s health issues had been addressed in previous trial decisions, and so they deferred to the lower

court's finding that the new evidence at trial did not rise to the level of a material change of circumstances years after the termination of support.

The Court also declined LNH's application to adduce fresh and new evidence on appeal in support of this ground, finding that some of the evidence was available to her when she made the application in the first instance to reinstate spousal support; and that the remaining new evidence following the lower court's decision should more appropriately be considered in a variation

application, as the focus of the evidence was on subsequent events rather than on lower court error.

Although error was not found on this third ground, the Court agreed with LDB's submission that the trial judge appeared to minimize the significance of her confirmed diagnoses of PTSD and Generalized Anxiety Disorder by describing them as "emotional difficulties", and commented at paragraph 108 that "[i]t is unfortunate that the judge chose this language to describe L.D.B.'s condition".

Can family violence constitute spousal misconduct relevant to the determination of spousal support?

Though the court found that the trial judge did not err in failing to find a material change of circumstances to resume spousal support pursuant to s. 167(3) of the Act, the Court made some interesting comments and, arguably, findings in the final few paragraphs of the judgement, concerning whether evidence of litigation abuse amounting to family violence can amount to a material change of circumstances sufficient to resume the payment of spousal support after an order has expired. In order to do so, the Court discussed the spousal misconduct provision at s. 166 of the FLA:

Misconduct of spouse

166 In making an order respecting spousal support, the court must not consider any misconduct of a

spouse, except conduct that arbitrarily or unreasonably (a) causes, prolongs or aggravates the need for spousal support, or (b) affects the ability to provide spousal support.

The first comment of note is at paragraph 110, where the Court stated that though error was not found in this case, "...this does not mean that evidence of litigation abuse amounting to family violence can never meet that threshold" necessary to find a material change of circumstances sufficient to resume spousal support.

The Court cited *Leskun v Leskun*, 2006 SCC 25 for the proposition that the emotional consequences of spousal misconduct can be relevant to the factors which must be considered in determining spousal support.

The example given in *Leskun*, cited by the Court at paragraph 111, was if spousal abuse triggered a depression so serious as to make a claimant spouse unemployable, that this spousal abuse would be highly relevant to the factors which must be considered in determining the right to support, its duration and its amount.

The second comment of note is at paragraph 112, where the Court clearly states “[f]amily violence is one form of spousal misconduct”, and when they further explained that litigation harassment can clearly fall within the definition of family violence under the FLA when it is perpetrated to control, intimate or harass the other spouse. In doing so, they noted that litigation abuse can be difficult to detect at the outset of a family proceeding, and at paragraph 113, cited both the Canadian Judicial Council’s “Family Law Handbook for Self-Represented Litigants”, and Rise Women’s Legal Centre’s report

Why Can’t Everyone Just Get Along: How BC’s Family Law System Puts Survivors in Danger by Haley Hrymak and Kim Hawkins (2021) in support; as well as Susan Miller and Nicole Smolter “‘Paper Abuse’: When All Else Fails, Batterers Use Procedural Stalking” (2011) 17:5 *Violence Against Women* 637.

They noted that there was no doubt that ANH’s conduct constituted family violence, and that two lower court decisions found that ANH’s conduct had serious health consequences for LDB. And importantly, for LDB, they took care to note that because they had dismissed LDB’s application to adduce new evidence of ANH’s litigation conduct after the hearing, meant that they had not considered her assertion that ANH’s litigation abuse had increased, thus implying that she had the option to bring an application to bring this new evidence back to the lower court in an attempt to reinstate her spousal support.

Takeaways

To date, this is the first appellate case in BC, and the strongest statement at the BC Supreme Court or BC Court of Appeal level thus far, which clearly states that family violence could fall within the exception at s. 166(a) of when spousal misconduct is relevant to the determination of spousal support, and this family violence could include litigation abuse.

This means that both family violence generally, and more specifically litigation abuse, can be relevant in narrow circumstances when they affect the claimant spouse’s ability to support themselves, by causing, prolonging or aggravating the need for spousal support. This gives claimants who have an abusive spouse another remedy to pursue in court beyond protection and more towards their economic and financial circumstances.

This bulletin was prepared by:

Vandana Sood



Department of Justice
Canada

Ministère de la Justice
Canada