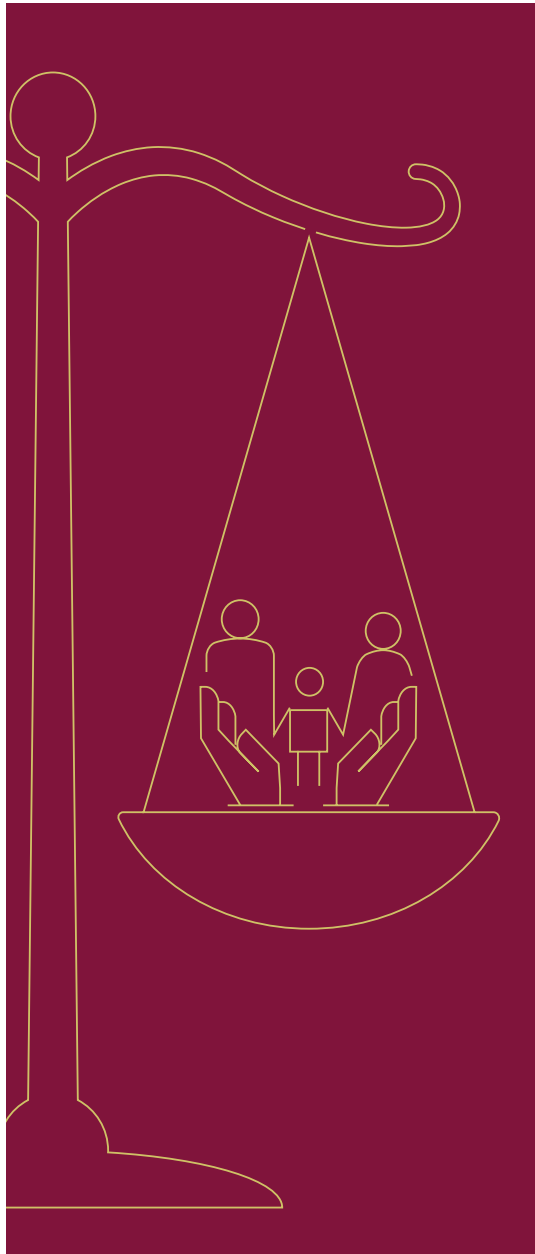

LEGAL BULLETIN

The Overlap Between Family and Criminal Law Cases: Bidgood-Lund v Marston [2022 ONSC 2357](#)



Introduction

In Ontario, it is now settled law that the statutory definition of family violence can capture conduct that does not give rise to criminal charges. Yet, it is not always clear how family judges should treat criminal charges.

In this case, the Divisional Court of the Ontario Superior Court of Justice, which hears the appeals of some family law cases, held that the motion judge made several errors in how he treated the father's criminal charges. This case highlights the importance of understanding differences and similarities between family and criminal law and how criminal charges can influence family proceedings

Past Proceedings

In this case, the mother appealed a temporary order requiring her to return the parties' three children to Canada. On December 8, 2020, the mother and children fled their home after the father's pattern of abuse culminated in his disclosure that he was purchasing a gun.¹ The mother contacted the police and the Children's Aid Society ("CAS") to inform them of the father's intent to purchase a gun and her plans to leave the country.² As a result, the father was arrested on December 10, 2020, and was charged with uttering threats and assault against the mother relating to the December 8 interaction. The mother and the children left Ontario on December 12, 2020, and eventually settled at the maternal grandparents' home in England.³

¹ *Bidgood-Lund v Marston*, 2022 ONSC 2357 at para 1.

² *Ibid* at paras 1, 30.

³ *Ibid* at para 2.

Once the mother and children left Ontario, the mother commenced family law proceedings in Ontario under the *Divorce Act*.⁴ She began her Application in April 2021, but the father was not served with the materials until October 2021. The father brought an urgent motion in December 2021, seeking the return of the children to Ontario.⁵

The urgent motion was heard on January 7, 2022. The motion judge made a temporary order that

the children shall be returned to Ontario pending a further court order.⁶ The mother appealed the decision to the Divisional Court where she was granted a stay pending appeal. This means the motion judge's temporary order would not take effect until the appeal was heard and a judgment was rendered. The three-judge panel of the Division Court ultimately set aside the temporary order and held that the mother and the children may remain in England.

The Parties' Relationship and Allegations of Family Violence

The parties were married in 2012 and have three children together.⁷ The children were 9, 6, and 2 at the time of the appeal. The mother was a stay-at-home mom and home-schooled the children.⁸

The relationship between the parties was marked by extensive family violence.⁹ The mother provided evidence that the father was "sexually, physically, emotionally, and verbally abusive throughout the marriage, was abusive to the children, particularly the two older children, and that the Father threatened to harm her and the children."¹⁰

The mother recounted instances where the father engaged in family violence to establish a pattern of coercion and control. He had stepped on the middle child's head and pulled his hair during a November 2020 incident. The father also smashed her phone, erased all her contacts, and deleted the app she used to call her family abroad. He was financially controlling and wanted the mother to sign a "financial policy" that she was not allowed to own anything in her name nor act unilaterally with respect to property.¹¹

Notably, the mother's affidavit stated that when she questioned the father about purchases he made at a pet store, the father told her that "he had purchased a dog toy for my mouth, a dog toy for [her] genitals, chains for binding [her] legs, and a collar."¹²

The mother also recounted times the father said he wanted to leave marks on her body, strike her until she was bruised, and terrorize her ex-boyfriend and his family.¹³ The mother alleged that the father also spoke in detail about "rape, murder, attack, drugging, and theft" and said that sexual violence helped him feel compassion and pity towards the mother which helped him forgive her "wrongs."¹⁴

The mother alleged the father had become "increasingly erratic and violent" and "became fixated on righting the Mother's past 'wrongs', and talking about 'retribution and punishment.'"¹⁵ She noted that in the first week of December 2020, the father was making various threats about harming her and other individuals. He told her that if she "stepped out of line [they] were all in grave danger." She alleged he made several threats that "he would do everything in his power to ruin [their] lives."¹⁶

⁴ RSC 1985, c 3 (2nd Supp).

⁵ *Bidgood-Lund v Marston*, *supra* note 1 at para 3.

⁶ *Ibid* at paras 4-6.

⁷ *Ibid* at para 7

⁸ *Ibid*.

⁹ *Ibid* at para 10.

¹⁰ *Ibid*.

¹¹ *Ibid* at paras 10-11.

¹² *Ibid* at para 13.

¹³ *Ibid*.

¹⁴ *Ibid*.

¹⁵ *Ibid* at para 12.

¹⁶ *Ibid* at para 13.

The mother provided email and text message evidence of the father’s abusive behaviour. In the messages, the father “made repeated threats and demands, and included violent, domineering and militaristic language.”¹⁷ The father explained that he had sent the messages in jealousy, that they were taken out of context, or were a joke.¹⁸

The mother’s evidence was that much of the abuse had been experienced or witnessed by the children.¹⁹ As a result, the children developed night terrors and bed wetting. One of the children re-enacted the father’s violent outbursts with their toys.²⁰ These allegations supported the mother’s position that it would be dangerous for her to return to Ontario with the children at this time.

Events After Separation and the Criminal Charges

On December 8, 2020, when the father expressed his intent to obtain a gun, the mother took the children and left the home. She contacted the police, CAS, Victim Services, and the Victim Witness Assistance Program.²¹ She told the agencies that her family lived overseas, and she planned to take the children abroad to stay with them.²² None of the agencies discouraged her. While the mother did not obtain a court order permitting her to take the children out of Ontario, the Court held it was unclear whether she knew she would need one.²³

On December 10, 2020, the father was charged with uttering threats and assault against the mother and was prohibited from contacting her and the children. On December 12, 2020, the mother left Ontario. On February 5, 2021, the father was charged with a further 17 criminal offences which occurred between 2016 and 2020, all of which involved violence against the mother and one of the children.²⁴

Result at the Divisional Court

The appeal was heard by three-judge panel of Justice Sachs, Justice Blackhouse, and Justice Matheson. After setting out the above-noted backgrounds facts, the judges went on to summarize the applicable law. Since the parties were married, the *Divorce Act* applied to their case.

1) The Legislation

The Court is empowered to make orders about parenting time (formerly “access”) and decision-making responsibility (former “custody”) under section 16.1(1) of the *Divorce Act*. These orders may authorize or prohibit the relocation of a child.²⁵ In making such a parenting order, the

legislation says that the court must give primary consideration to the best interests of the child test, including the best interests factors outlined in section 16(3) of the Act.²⁶ One of these factors is the effect of family violence on the parties’ ability to care for and meet the needs of the child.²⁷ Another factor pertains to any criminal proceeding order, condition, or measure that is relevant to the safety, security, and well-being of the child.²⁸

¹⁷ *Ibid* at para 14.

¹⁸ *Ibid* at paras 16, 21.

¹⁹ *Ibid* at paras 9, 22, 29.

²⁰ *Ibid* at para 29.

²¹ *Ibid* at para 30.

²² *Ibid*.

²³ *Ibid*.

²⁴ *Ibid* at para 2.

²⁵ *Divorce Act*, *supra* note 4 at s 16(7).

²⁶ *Ibid* at 16(2).

²⁷ *Ibid* at s 16(3)(j)(i).

²⁸ *Ibid* at s 16(3)(k).

Section 2 of the Divorce Act defines family violence as “any conduct, whether or not the conduct constitutes a criminal offence... that is violent or threatening or constitutes a pattern of coercing and controlling behaviour or that causes that other family member to fear for their own safety or for that of another...”²⁹ Section 2 explicitly states in the case of a child, family violence includes the direct or indirect exposure to such conduct. The provision also sets out several types of abuse that count as family violence.

Notably, section 16(4) of the *Divorce Act* sets out the factors the court must take into account when considering the impact of family violence and making a parenting plan.

II) The Errors of the Motion Judge

The judges of the Divisional Court held that the temporary order of the motion judge requiring the mother to return the children to Canada should be set aside. There were three main reasons for this decision.

First, the Divisional Court found that the motion judge erred by only focusing on the criminal charges.³⁰ The motion judge said the father was innocent of the charges until proven guilty, but the Divisional Court stated this wrongly imports the presumption of innocence into family law, which is directly related to the criminal burden of proof beyond a reasonable doubt.³¹ This standard of proof has no application in family law, where the burden of proof is on a balance of probabilities. Under family law, a judge only needs to be satisfied that, on a balance of probabilities, the father had assaulted and threatened the mother. This is a lower standard than proof beyond a reasonable doubt.

Moreover, the motion judge failed to consider the other evidence of family violence and relied only on the criminal charges.³² However, the *Divorce Act* clearly states that family violence encompasses conduct that may not be considered criminal, including conduct that is “psychologically abusive, financially abusive or that involves the destruction of property.”³³ The Divisional Court held that the mother’s allegations included conduct that met all of these criteria.

The second error of the motion judge was his conclusion that there was no objective evidence to support the mother’s family violence allegations.³⁴ The Divisional Court found that the emails and text messages from the father to the mother was objective evidence of family violence.³⁵ The three-judge panel characterized the exchanges as “**evidence of a controlling and psychologically abusive relationship.**”³⁶ Moreover, the judges state that the father’s purchase of a gun, in the context of the mother’s allegations and the admission from the father, was objective evidence that the allegations are true.³⁷

Lastly, the Divisional Court held that the motion judge erred by failing to consider the impact of the family violence on the children.³⁸ While the judge referenced the best interests of the children, he failed to consider that the children’s wellbeing had improved since moving to England, the mother had no social supports in Canada, and the father had not provided any financial support for the children.³⁹

²⁹ *Ibid* at s 2.

³⁰ *Bidgood-Lund v Marston*, *supra* note 1 at paras 66-67, 72-74.

³¹ *Ibid* at paras 72-73.

³² *Ibid* at para 74.

³³ *Ibid*.

³⁴ *Ibid* at para 75.

³⁵ *Ibid*.

³⁶ *Ibid* at para 77.

³⁷ *Ibid* at para 78.

³⁸ *Ibid* at para 79.

³⁹ *Ibid* at para 81.

The Divisional Court was critical that **“the motion judge may not have taken account of the lived reality of the experience of a victim of domestic violence** when the Mother made her decision to leave Canada and join her family.”⁴⁰ However, Divisional Court judges agreed with

the motion judge that the mother had made some missteps by removing the children from the country without authorization.⁴¹ Yet, the judges were cognizant that the primary focus cannot be on the mother’s missteps, but must be on the best interests of the children.⁴²

Takeaways

In the family law context, family violence is not limited to criminal conduct. Judges must focus on all evidence of family violence, not just evidence that supports specific criminal charges.

As noted by the Divisional Court, **“family violence is usually something that occurs in private, and it can often be difficult to have confirmatory evidence that it did occur.”**⁴³ The Court added that **“[e]ven if there is no objective evidence, judges must make some attempt to analyze the evidence of family violence without dismissing it out of hand as merely unsupported allegations.”**⁴⁴

Moreover, as this case highlights, the standard of proof for establishing family violence in the family law context is lower than in the criminal law context. In criminal proceedings, family violence must be proven beyond a reasonable doubt. In family law proceedings, family violence must be proven on a balance of probabilities, meaning survivors must show there is greater than a 50% chance that their allegations are true.

Lastly, criminal charges or a criminal conviction is not necessary for a judge to make a finding of family violence.

⁴⁰ *Ibid* at para 84.

⁴¹ *Ibid* at para 87.

⁴² *Ibid*.

⁴³ *Ibid* at para 90.

⁴⁴ *Ibid*.

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