

# JP Boyd on Family Law: the Blog

by



*This blog provides updates on important developments in family law in British Columbia and news about changes to the legislation, court procedures and court rules applicable to family law cases and is curated by [Collaborative Divorce Vancouver](#)*

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## Litigation Conduct may Constitute "Family Violence" under the Family Law Act

In the recently-released decision in [M.W.B. v. A.R.B.](#), the [Supreme Court](#) has characterized a party's approach to the litigation with her husband as "family violence" within the meaning of s. 1 of the *Family Law Act*, and taken the violence into account, as the court must when family violence is present, in assessing the best interests of the parties' child under s. 37 of the act. To properly understand the court's reasoning you must read the decision itself. I will try, however, to provide the highlights.

The issues before the court involved applications by each party brought about a year and a half after the trial decision. It is clear from the decision that the parties had been engaged in an extraordinary degree of conflict long before trial. (Although costs are unreliably awarded in family law cases, they will be awarded where the court wishes to signal its disapproval of a party's conduct. In this case, the trial resulted in the husband being awarded costs, special costs *and* a penalty under s. 92 of the old *Family Relations Act* for the wife's failure to make property disclosure of her finances!) This continued after trial, largely, it would seem, manifested in the wife's obstructionist attitude toward carrying out her obligations from the trial judgment. The court summarized the wife's conduct as follows:

[7] Pointing to the Respondent's obstructive and grossly negligent conduct leading up to the January 2013 sale of the parties' jointly owned commercial property, the Claimant seeks financial compensation or a further reapportionment under s. 66(2)(c) of the FRA. Her conduct has caused the parties to suffer a large loss of equity in the jointly owned family asset...

[10] The high-conflict divorce trial took place about two and a half years ago ... in August 2011. The parties represented themselves. The orders made following the trial were aimed at stabilizing the parties' finances, reducing conflict, regularizing parental access and, overall, to help the parties move forward. Those objectives were not realized as the Respondent's conduct worsened the parties' financial circumstances and conflict continued.

[11] Following trial, the parties engaged the Court in four additional proceedings, all driven by the Respondent's refusal to settle orders and costs in a reasonable way, her interference with the Claimant's access and her obstruction of the sale of the commercial property.

[12] The resulting litigation-related stress generated by the Respondent has caused the Claimant time, trouble and expense that in turn have contributed to a significant medical issue.

The rest of the rather lengthy decision expands on each of these concerns in much more detail. In any event, the primary issue before the court, was the husband's application to have the primary residence of one the parties' two children transferred to him, which would result in the child's relocation from the eastern side of the province to live with him on the western side of the province.

In analyzing this aspect of the application, the court first commented that the trial had

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been held when the *Family Relations Act* was in force, that by the time of the hearing, the old act had been repealed and replaced by the *Family Law Act* and that it was the new act which therefore applied to the application.

The court then observed that under s. 37 of the new act, the best interests of the children are the *only* factor to be taken into account and that "this principle applies to all existing child custody questions." The judge further observed that s. 37 requires a consideration of family violence, and that where family violence is present, the court must consider the additional factors set out at s. 38. This is where things get interesting.

First, the court reviewed the definition of family violence at s. 1 of the act. These are the parts of the definition which the court considered to be the most relevant to the case, as emphasized by the judge:

(d) psychological or emotional abuse of a family member, including

(i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,

(ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy, ...

(iv) intentional damage to property, and

(e) in the case of a child, direct or indirect exposure to family violence;

Second, applying these factors to the facts of the case, the court reached the following conclusions:

[199] I find the [wife's] litigation conduct, related both to the selling of the commercial property and to parenting arrangements, considered in their totality, is a form of emotional abuse and harassment that constitute a form of family violence.

[200] The [wife's] conduct and needless litigation has forced the [husband] to incur litigation expenses, damaging his financial well-being and health. This hindered his capacity to preserve parenting time with the children. Litigation has used up much of his emotional and financial resources. ...

[204] The best interests of children suffer when abusive oppositional behaviour and litigation fomented by one parent's conduct harms the health and financial well-being of the other parent. This in turn harms the children's economic safety and security.

[205] Further, the [wife's] reckless and oppositional behaviour connected with the commercial property has damaged the children's safety, and economic security. It effectively deprived them of receiving any benefit from sale of the property, endangered the [husband's] capacity to support the children and consumed money the [husband] could have used for a greater number of parent time visits. The [wife] knew her delaying and oppositional conduct harmed the [husband's] capacity to pay the cost of access visits.

[206] If a parent's abusive conduct harms the well-being of the other parent to the extent they may have to go on stress leave, this negatively impacts the child's economic security. ...

[208] The Respondent knew or ought to have known the impact her conduct was having on the Claimant's financial situation; the Claimant made it clear to her. From this, I infer the Respondent is prepared to let her anger at the Claimant influence her to act in a way that indirectly harms the best interests of the children. I find the Claimant will not conduct himself in that way; the litigation history proves otherwise.

[209] In summary, I find that the Respondent has directed violence at the Claimant that has indirectly harmed the children's psychological and emotional well-being and economic security. ...

Finally, the court analyzed each of the s. 37 factors in detail to reach the ultimate decision that the child should move and live with the husband:

[260] As matters stand, having considered and now applying s. 37 of the [*Family Law Act*], ss. 8 - 11 of the [*Divorce Act*], the authorities, and all the evidence, I find that an order varying the custody order to designate the

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