

**B. CHILD'S NAME CHANGE [§1.34]**

Where a spouse or former spouse applies for a name change under s. 5 of the *Name Act*, the application may include an application to change the names of any minor children in the applicant's guardianship or custody, provided the written consent of all other parents is obtained.

The court will enjoin a custodial parent from using an alias surname for the children of the marriage only if it is in the best interests of the children (*Hoodekoff v. Hoodekoff* 1976 CanLII 1920 (BC SC); *Zumpano v. Zumpano*, 1979 CanLII 3093 (BC SC)).

The court may dispense with the consent of a parent on a child's application to change their name, and will exercise its discretion in favour of the best interests of the child (*Re Keehn* 1976 CanLII 1904 (BC SC)).

For a discussion of how cultural factors may be considered on name change applications for children, see *P. (A.S.) v. J. (N.N.)*, 2015 BCCA 415 at paras. 69 to 85.

For discussion of the procedure to change a name, see chapter 21 (Naming) of the *British Columbia Family Practice Manual*, 4th ed. (CLEBC, 2006–).

**XVI. TORTS IN FAMILY LAW [§1.35]**

In *Frame v. Smith*, 1987 CanLII 74 (SCC), Wilson J. stated in dissenting reasons (at paras. 40 and 42):

The torts of conspiracy, intentional infliction of mental suffering and of unlawful interference with another's relationship should not extend to the family law situation, notwithstanding the fact that the threshold circumstances necessary to them existed. Each of these torts have particularities discouraging their extension into this area but the common denominator was that their extension would not be in the best interests of the children. Little would be achieved towards encouraging the maintenance and development of the relationship between both parents and the children. Rather, their extension into this area of family law would create legal conditions tailor-made for abuse, with the potential for petty and spiteful litigation and for extortionate and vindictive behaviour.

The majority upheld the striking of a husband's claim of "interference with access". It held that no tort action existed, as the legislation created a comprehensive scheme for custody and access issues. In *obiter*, the court stated (at para. 8): "there are grave disadvantages associated with applying [the tort of conspiracy] to circumstances like the present ... Wilson J., in her judgment, has also adequately disposed of the possibility of other existing torts applying to the circumstances of this case".

Courts have relied on *Frame v. Smith* for the principle that, on policy grounds, torts such as conspiracy should not be claimed in family law cases. However, this view may be shifting, as evidenced by the (primarily) Ontario cases discussed at "Tort of Family Violence" in this chapter.

### A. TORT OF FAMILY VIOLENCE [§1.36]

Although not yet recognized in British Columbia, *Abluwallia v. Abluwallia*, 2022 ONSC 1303, supplementary reasons 2022 ONSC 1549 affirmed the tort of family violence to provide a means of compensation for the "true harms and financial barriers" (para. 46) that family violence causes.

To establish a claim for the tort of family violence, the plaintiff must:

plead and prove on a balance of probabilities that a family member engaged in a pattern of conduct that included more than one incident of physical abuse, forcible confinement, sexual abuse, threats, harassment, stalking, failure to provide the necessities of life, psychological abuse, financial abuse, or killing or harming an animal or property.

The pleadings and evidence must particularize the conduct using specific examples. Once liability is established, the nature of family violence, including the circumstances, extent, duration, and specific harm, will be factors considered in assessing damages (paras. 55 to 57).

Damages are premised on compensation for the pattern of violence rather than individual incidents. The harms requiring compensation include (para. 66):

acute and chronic health issues (*i.e.*, soft-tissue injuries, broken bones, chronic pain); mental, psychological, and social problems (*i.e.*, low self-esteem, depression, anxiety, PTSD), underemployment and absenteeism, low career advancement,

substance abuse, self-harm, suicidal ideation, death by suicide, and femicide.

The court found that the father inflicted a 16-year pattern of emotional, mental, and psychological abuse, coupled with an inherent breach of trust and specific incidents of physical assault. It awarded the mother \$150,000 for compensatory, aggravated, and punitive damages.

Although not a tort of family violence case, in *Schuetze v. Pyper*, 2021 BCSC 2209, the court found that the husband had committed the intentional tort of battery and awarded significant personal injury damages. The decision is under appeal. In both *Dhillon v. Gaba*, 2014 BCSC 1474 and *Petrie v. Lindsay*, 2019 BCSC 371, the court heard personal injury claims for spousal assault in the same action as claims for divorce and property division and awarded damages for the assault.

## **B. TORT OF CONSPIRACY [§1.37]**

In *Waters v. Michie*, 2011 BCCA 364, the court upheld the striking of a wife's claim that her former husband and his new spouse conspired to deprive her of child support. The court considered the comments in *Frame v. Smith*, 1987 CanLII 74 (SCC) suggesting the tort of conspiracy should not be extended to the family law context and found (at para. 64) they were not binding but were "authoritative as guidance" in considering an application to strike conspiracy claims. The claim for injury from "frustration of the proper calculation of child support is comprehensively covered by child support legislation, and discloses no reasonable claim" (para. 65). However, in *Leitch v. Novac*, 2020 ONCA 257, leave to appeal refused 2020 CanLII 87108 (SCC), the court recognized the tort of conspiracy in family proceedings, also after considering *Frame v. Smith*. The wife alleged that the husband conspired with his family to divert funds from him and thereby reduce his support obligations; the trial judge dismissed the conspiracy claim. The Court of Appeal held that the trial judge erred and ordered a new trial, reasoning that the tort of conspiracy may be necessary in certain cases (at paras. 44 to 45):

[N]ondisclosure is antithetical to the policy animating the family law regime....

There is a related malady that often works hand-in-hand with nondisclosure. The problem is what I will call "invisible litigants". These are family members or friends of a family law litigant who insert themselves into the litigation process