

The intersection of criminal and family law

By AdvocateDaily.com Staff



When serious allegations of assault, sexual assault or threatening are made in the midst of a separation or divorce, it can be a difficult obstacle for the accused to overcome when custody and access are at stake, says Toronto criminal lawyer [Jacob Stilman](#).

“Most criminal defence practitioners have likely encountered situations where these kinds of complaints arise in the context of a matrimonial breakdown, and there is certainly going to be a concern,” says Stilman, a partner with [Lo Greco Stilman LLP](#).

“Any lawyer would turn their mind to whether these are fabrications designed to gain some sort of advantage in terms of getting the spouse out of the house, because if there’s going to be an allegation of sexual or physical violence or threatening, that’s going to happen for sure,” he tells AdvocateDaily.com.

“Or, if things have progressed further along in the family law matter, there’s always the concern that this is being used as a tool to gain a more significant advantage in proceedings around custody and access considerations.”

Stilman says in the past few months he’s received two files where it seems the allegations could have been made to influence the ongoing family law proceedings.

“In a case where someone alleges sexual violence but would gain a clear advantage in a custody situation where there are small children, it’s a pretty easy claim to make — and it’s even more concerning when the claims are historic in nature, as opposed to being current,” he says.

While the lack of physical and corroborative evidence can be an advantage for an accused when faced with an allegation that’s weeks or months old, “the opportunity to demonstrate one’s innocence is also lost,” Stilman says.

“Despite the burden of proof being what it is, if you have something that could have clearly demonstrated innocence or an event did not occur or did not occur the way it’s being alleged — and you have to contend with this allegation months after the fact — that’s a significant disadvantage, especially in today’s climate where there’s more attention being paid to complaints of sexual violence.”

A conviction for sexual violence will likely lead to a prison sentence, which will bring a claim for custody or access to an end, Stilman says.

“What court is going to grant joint custody to a convicted felon with a record for sexual violence, true or not? And if you throw into the mix the potential for allegations of child sexual abuse, that’s obviously a career-ender in so many respects,” he adds.

“That’s the worst nightmare for many cases. I think most of us in the field have certainly dealt with cases where one parent influences an impressionable child to come forward with stories of abuse that simply are not true.”

When one party in a matrimonial dispute files an application that alleges abuse or sexual violence, the family court makes an assessment using the standard of a balance of probabilities, not the criminal burden of proof, Stilman explains, adding that because family courts rely to a great extent on the paper application and affidavits, there isn’t a great deal of cross-examination.

“What’s a family court judge to do when faced with an interim application for exclusive custody or restrictions placed on one partner to have only supervised access with the child? The judge on a certain level is going to be taking these allegations at face value and not really have the opportunity to scrutinize them in terms of a true credibility assessment,” he says.

Stilman says bringing forward such allegations “is an extremely effective device in a family court setting because judges are going to err on the side of caution” when making decisions on custody and access. And even if an accused is eventually acquitted of the charge, a family court judge “isn’t really bound by an acquittal because it doesn’t mean factual innocence. It means the Crown hasn’t proven the case beyond a reasonable doubt,” he says.

“Any defence lawyer will tell you that the cases that keep you up at night are the ones where you really believe in the factual innocence of your client.”