

## **DIVERSE VOICES CONFERENCE**

**Keynote Address: Friday November 17, 2017**

### **Shared parenting vs the safety of women and children**

#### **SPEAKING NOTES**

A family court system premised on “friendly parenting” that does not understand the prevalence of post-separation violence creates serious challenges for women dealing with ongoing abuse and often results in custody outcomes that force them into close and unsafe – even lethal – contact with their abuser for many years.

Yet an unwritten shared parenting presumption seems to have taken hold in Canada, perhaps because unrepresented litigants do not put needed evidence effectively before the court, perhaps because some judges are looking to resolve these difficult and complicated situations as “win-win” for both parents, perhaps because the family court system is driven by time and resources constraints, perhaps because courts and some of those who work within the court system do not understand the reality and complexity of violence against women.

Whatever the reasons – and I will explore some of them in this address – it is women and children who pay the price; often a high one.

My perspective is based on my work as a family law lawyer representing women who have been subjected to abuse and my work at the systemic level as a community researcher, educator and advocate, working with frontline workers who support women involved with family court after leaving abusive relationships. It reflects the stories and lived experiences of hundreds of women that I have encountered either directly or through their legal support workers.

#### What women deserve

Women who have left abusive partners need and deserve a legal system that is able to adequately assess and address the violence they have experienced in its decision-

making about child custody and access. Outcomes of family court decisions about custody and access should contribute to the safety of women and children, not detract from it. Yet this is not what many women get.

Instead, even women who have left relationships defined by ongoing and severe, controlling, fear-provoking abuse too often leave family court with orders for joint custody, shared time, collaborative decision making or extensive, illiberal and unsupervised access. The environment for such an arrangement simply does not exist in these families, because the abuser is motivated by his need for ongoing power and control and not by concern for what is best for his children. Often, he has not entered the process – either litigation or alternative dispute resolution– in good faith. The mother’s ability to collaborate with her former partner – or, often, to even just communicate with him – will be compromised by her ongoing fear.

#### Post-separation abuse

The violence that happens as a woman leaves her abuser and throughout the court process and beyond can have significant long-term. The initial period of separation, when the violence continues and possibly escalates, is also when separated couples are the most likely to be involved in difficult and contested family court proceedings. Emotional and stressful for any separating couple, these proceedings can take on a deadly tone for families where there has been a history of woman abuse.

Research has well documented that women are at the highest risk of lethality at the point of separation and for the year immediately following. In Ontario, the annual reports of the Domestic Violence Death Review Committee repeatedly identify recent or pending separation as the second highest risk factor for lethality. Its 2012 Annual Report noted that, in all cases reviewed between 2003 and 2012, “72% of the cases involved a couple with an actual or pending separation.”

And, yet, this risk (and reality) of increased abuse often goes unrecognized or acknowledged by the systems to which women turn for support and protection because of an underlying societal attitude that abuse ends at the point of separation.

### Trauma

The combination of past and ongoing abuse leads to trauma for many women, which can create further challenges during family court proceedings. A woman may have difficulty concentrating on her case; listening to and retaining the information and advice her lawyer is providing; accepting strategies that are presented to her. She may appear hard to get along with or unreasonable. She may engage in avoidance behaviours or be unreliable in terms of showing up for appointments or completing paperwork when required. She may appear disengaged or even uncaring about her children or the outcome of her case. She may make decisions that seem counterproductive to her best interests. She may even be hostile to those who are supporting her. All of these behaviours can combine to sabotage a woman in family court, particularly if her abuser – as is common – is charming and gracious to those he encounters, even as he is bullying her throughout the process.

### Family court culture and process

Family court is itself part of the problem. It encourages friendly litigation as well as friendly parenting, both of which can have deadly consequences for women with highly abusive partners. Furthermore, family court tends to focus on encouraging families to “move on,” to put the past behind them, which is very difficult for a woman who is experiencing post-separation abuse and/or trauma.

The focus on early settlement, on compromise by both parties and on alternative dispute resolution – particularly mediation – further exacerbates the challenges for women experiencing ongoing abuse by their former partners. In some cases, it can lead women to concede to arrangements like joint custody or shared parenting because they feel so heavily pressured to do so not just by their abusive former partners, but by those they encounter through the family court process. And when women won't compromise

because of legitimate concerns for the safety of their children as well as their own safety, they are seen as unreasonable, vindictive and perhaps also as trying to alienate their children from their father.

While not said in so many words, and certainly not set out explicitly in the law, there appears to be a culture in many Canadian family courts that “good” parents – parents who put their children’s best interests first – will find a way to parent collaboratively post-separation, regardless of any historical or ongoing abuse. Many women report that subtle and not so subtle hints are dropped by those they encounter through the family court process that they should set their concerns for safety aside in order to put their children first (which is a profound insult to women who are intensely focused on their children’s well-being, often to the detriment of their own). They are told – sometimes even by their own lawyer -- that judges like parents who are prepared to work together to raise their children and are warned that if they do not appear “reasonable” (which seems to mean being receptive to joint custody and/or extensive access with no built-in safeguards) they will suffer the consequence for their failure to cooperate in the form of inappropriate and unsafe custody and access regimes. For women who have escaped severe, controlling abuse and who continue to be impacted by post-separation violence, these messages are unsupportive, at best. This approach denies the realities of the violence that these women have experienced and undermines their attempts to gain the court’s support for long-term safety of themselves and their children.

Women with children who leave abusive partners want to ensure their children are safe. Where they seek sole custody or limited or supervised access, it is because they believe that is what is in the best interests of their children, not because they are seeking revenge against their partner.

### Gender-neutral analysis

Too often, public discourse and policy about violence against women has been based on a so-called gender-neutral analysis which is, more often than not, anything but gender-neutral. Policy analysis that makes this claim, in fact, reflects and reinforces the

status quo and maintains the ongoing inequality of women, with the result that outcomes are often unsuccessful, inadequate or counter-productive even, at times, worsening the problem. Public discourse also originates in what many would call a culture-neutral place, which denies the complex intersectional realities faced by many families. This is particularly apparent when looking at violence experienced by women within the family. Often called domestic or intimate partner violence by those setting and implementing policy and programming, violence within the family is, in fact, highly gendered, is significantly affected by the social location of women and others in the family and would more appropriately be labelled as a form of violence against women.

To make effective and appropriate custody and access decisions in families where violence is present, courts need to abandon the so-called gender-neutral framework and replace it with a framework that identifies the problem correctly. This involves, among other things, putting intimate partner violence against women on a continuum and recognizing heterogeneity in severity, frequency and impact. This can result in better decision-making with respect to possible sanctions for the abuser, determinations about whether parent-child contact is appropriate and, if so, what it should look like, and parenting plans that are healthy for children and parent-child relationships.

When intimate partner violence is looked at in this differential way, it immediately becomes apparent that most victims of the most serious abuse – coercive controlling violence – are women and most perpetrators are men. When family courts group all of these kinds of relationships together, the problem is incorrectly identified, the gendered reality of family violence is missed, and a one-size fits-all approach that focuses on maximum contact between children and both parents regardless of the history of abuse follows, which leaves these particular women and children exposed to ongoing danger.

### Role of men within the family

Those who favour shared parenting make much of the changing role of fathers in Canadian families and of stay-at-home dads who spend at least as much time with the children as do the mums. Those of us who work for women's equality know such men

and hope for continued and meaningful movement towards increased equality in the delineation of family and home responsibilities.

However, in reality, many women struggle on a daily basis to convince their spouses that they do, in fact, have parenting responsibilities, both during the marriage and after separation. Most mothers would welcome increased parental involvement from fathers after separation, on the condition that it does not threaten their children's well-being or security.

Unfortunately, instead of taking on this responsibility, many abusive men renege on even the basic requirements of making their time with the children work smoothly, leaving their former partners to organize and manage their involvement with the children and to ensure that the children have what they need in the way of clothing, books, toys and such when they are in the care of their father.

Women often feel that they are confronted by a court system that assumes any father is a good father and that expects them to prove why and how they are good mothers, that thinks children always fare better when both parents are closely involved in their lives and that wants to believe that both parties are operating in good faith and placing the best interests of their children first.

Coupled with an ongoing lack of understanding of the long-term impact of abuse, including post-separation abuse, on women and their children, the scene is set for outcomes that do not reflect the best interests of the children and that do not keep mothers and children safe rather than outcomes that reflect and acknowledge the reality of specific families and not be based on idealized notions of who does what or on hopes for future change.

#### Lack of legal representation in family court

I could use all of my time this morning to talk about the challenges presented by the rate of unrepresented parties in family court, but I will limit my comments to the most basic. Some lawyers and judges have noted that there is a significant gender difference in why

parties are not represented in family court proceedings, with women more likely to be unrepresented because they do not have enough money to pay for a lawyer and more men to be unrepresented because they want to confront their former partner directly. Both lawyers and judges noted further concerns about a lack of legal representation in cases involving violence. Lawyers observed that when it is the victim who does not have a lawyer, she may be coerced into accepting a settlement that does not adequately protect her or her children. As one judge said, “There is always the fear that this category of self rep is not truly or accurately articulating their position because of fear or intimidation.”

### Protective parenting by mothers

When women raise the issue of abuse or refuse to follow court-ordered access arrangements, parental alienation syndrome (PAS) can become a convenient label for the father to put forward. Once raised, the case becomes refocussed on the mother’s post-separation behaviour and not on the underlying issues in the family that have led to this point. This labelling makes it even more difficult to raise legitimate issues of abuse, violence and control.

Mothers must spend years monitoring access to ensure that the safety and well-being of their children is not jeopardized by the abuser when they are with him. When they have concerns, they have great difficulty finding anyone who will take them seriously. If they deny access because of their concerns, they run the risk that the abuser will take them back to court for breaching the order.

### The relationship between mothers’ and children’s interests

The ability to parent well is rooted in the safety of the parent. An unsafe parent cannot parent as well as a parent who feels safe. This would appear to be self-evident; yet ongoing orders for joint custody and shared parenting place women with abusive ex-partners in unsafe situations; often for many years. Both joint custody and shared parenting require extensive contact, conversation, cooperation and collaboration between the parents. An abuser who is motivated by his need for power and control

rather than the children's best interests can best maintain that power and control by creating fear in his former partner.

Too often, custody and access orders do not take this relationship between the mother's safety and the children's best interests into account or, worse, set up a false dichotomy between the two as though, somehow, protecting the well-being of mothers with abusive former partners is inherently in conflict with ensuring the best interests of their children. Women who raise concerns about their safety in this context may be seen as selfish and, as popular culture tells us so often, there is nothing worse than a selfish mother.

### So what do we do about it?

If the issue of custody and access when family violence is present is to be dealt with more appropriately in Canada's family courts, legislative and policy reform, education for those who have responsibility for implementing and applying the law, increased access to legal representation for family court litigants and changes to family court culture are all needed. Fortunately, there are best practices in all these areas on which future work can be built.

### *Legislation and public policy*

The family violence provisions in British Columbia's *Family Law Act*, although still new, provide some strong promising practices are the most detailed and progressive in Canada. The best interests of the child test speaks directly to family violence and includes consideration of the impact on the child's safety, security or well-being, whether the actions of the person responsible for the family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs and the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members.



The legislation goes even further and stipulates that denial of parental contact time is not wrongful if the parent denying the contact reasonably believes the child might suffer family violence during the contact.

#### *Education for judges and lawyers*

Even with a strong legislative framework, very little information about family violence and the risk of future harm is being provided to the court and, when it is not, judges almost never ask for it, which speaks to the need for both judges and lawyers to be educated about the importance of evidence about family violence and the risk of future harm in custody and access cases. There are some excellent professional education models to build on. The National Judicial Institute has developed a rich four-day seminar for both family and criminal judges on managing domestic violence cases.

Legal Aid Ontario has also undertaken a massive domestic violence training initiative for its staff, with 2,000 duty counsel lawyers, telephone intake workers, summary legal advice lawyers, senior management, policy staff, provincial office staff, community legal clinic staff, per diem family law lawyers and others) participating in a mandatory one-day in-person training session.

#### *Increased access to legal representation*

Without adequate legal representation, survivors of family violence will continue to emerge from the court process with orders that do not reflect their needs or the best interests of their children. To ensure legal representation for all family court litigants will require a massive infusion of funds into the provinces' and territories' legal aid programs, for which all those working in the family court system should be advocating.

#### *Changing the culture of family court*

Family court support worker programs are a promising method of changing the culture of family courts. These programs (e.g., Ontario's Family Court Support Worker Program) place specially trained workers, most of whom work for community-based

violence against women organizations, in each of the province's family court jurisdictions, to provide a wide range of supports to survivors of domestic violence.

Programs like this that place highly trained violence against women specialists in the courts are changing court culture to better understand the dynamics of family violence, as court staff, lawyers and judges begin to refer clients to the workers and ask the workers for their input on family violence cases. Although often under-funded and not yet available in many jurisdictions, court support worker programs offer an exciting promising practice to build on.

By building on and expanding the best practices identified above and others, we can work towards a family court process that hears and, if necessary, requests information on violence within the family to help make the best possible custody and access decision for each family; a family court process where family violence is dealt with openly; where women who have experienced abuse are not afraid to raise and not told not to raise their concerns; where there is an openness to believing those concerns.

When courts are provided with this information, they can consider each case individually, question evidence appropriately and use a range of solutions to ensure children's safety and well-being as well as the safety of their mothers.

Properly educated court personnel will understand a child's best interests in a manner that includes rather than dismisses an understanding of violence within the family and its ongoing impact on the child and the mother.

With a changed culture, courts will be able to accept the gendered reality of violence within the family -- in the majority of cases, women are abused by their male partners -- as well as the gendered reality of parenting in many families, with women taking on the majority of child care responsibilities.

Custody and access decisions, in such a family court process, will still be made based on the evidence in each individual case. However, they will also keep mothers and children safe and reflect what is truly in the best interests of the children.