KITCHENER WATERLOO DART CONFERENCE

Keynote Address

October 30, 2017

It Shouldn't be This Hard: Family Law and Violence Against Women

Introduction

- What are your roles?
    - Lawyer
    - Police officer
    - Counsellor
    - Probation
    - Crown
    - CAS
    - Parent coordinator
    - Mediator
    - Survivor
    - Member of the community

I have divided my presentation for today into four main sections.

Between now and the break, I am going to talk about the context of violence against women and family court, post-separation abuse, trauma, legal bullying and the culture of family court.

After the break, we will take a look at the issue of custody and access specifically.

Finally, I will present some best practices to help us move forward in improving the family court response in cases involving violence against women.

And then we will have time for discussion. I think it is too hard in a group this size to take questions as I go, so be patient – I have built in 30 minutes for questions and discussion at the end. If you are afraid you will forget a question, jot it down when you think of it.

First, though, I want to share one woman's experience, told in her words.

One woman's story

I'd done the hard work over many months of reaching the place where I could make the decision to take my child and leave. My decisions about when and how to leave were based on my ability to cope with a full time job, a very active child, making my exit plans in secret, and the oppressiveness of my husband's psychological abuse. To make sure he wouldn't find out about my plans, I didn't tell a soul. I planned to leave in mid-August that same year.

In late June I first contacted the lawyer who was recommended to me. I asked to meet with her right away, I really wanted and needed to start learning about the legal process, about what to expect. I needed to gain a measure of relief at this point, some clarity in the world of unknowns I was facing every day now.

My lawyer, however, suggested that meeting a couple of weeks before my planned leave date was sufficient. I remember feeling very vulnerable during those intervening weeks – the legal part of leaving was the biggest unknown for me.

So I carried on, slowly and secretly removing as many important papers from the house as I could safely do, getting through one agonizing day after another. But I had hope. After all, I had a lawyer who was going to be looking out for the best interests of my child and me. Surely things would be okay once I got to court.

I met with my lawyer some 15 days before my planned date of leaving. By now, I was battle-weary and mentally exhausted with the stress and worry of every day in a house which was anything but a home. Yet, I was ready to learn what I had to do within the law, what my next steps were. In these meetings, we discussed the history of my marriage and the reasons I had for leaving, most especially my concerns over my husband's mental stability. We talked about supervised access.

My affidavit asked for sole custody of our child and that his access be supervised until such time as it could be seen how my husband would respond to our departure from the home. After all, he had uttered time and time again that he wasn't going to let me leave with our child, and that I wasn't going to take our child from him.

My plan to leave mid-August had to be abandoned when, during the first week of August, my husband's behaviour worsened dramatically, becoming even more erratic and unpredictable. I was terrified and I could see our child was now becoming stressed. My phone calls were monitored; my car and house keys were taken from me. He insisted on driving me to work and picking me up. I knew we had to get out of there right away, we couldn't wait another day for the original plan to unfold. There was a palpable feeling of evil in the house; I had such a feeling of impending doom.

We did escape that Friday night after work, even though my husband pursued my brother's truck and tried to force us to pull off the road. However, we made it to the local shelter with my husband still in pursuit. They had been alerted that I was on the way but being pursued so they contacted the police to attend at the shelter.

In the parking lot of the shelter, my husband pushed and shoved me with force, but I was able to move past him and into the shelter. The police arrived sometime after.

(One week later, this woman was in family court to sort out interim custody and access arrangements for her child. Both she and her husband had lawyers, but there was still a lot of direct contact between the two of them. Her husband agreed that she should have sole custody, but he would not agree to supervised access. The woman's lawyer strongly encouraged her to drop this demand so she would look reasonable. As the woman says:

The pressure to acquiesce, to conform and agree to the access arrangements that were being hashed out between the two lawyers was by now enormous. Any hope I had was consumed by the day's events and I felt defeated.

I was presented with a hand-scribbled access order to sign and felt I had no choice but to sign it. The order came with police enforcement which did little to ease my mind. My fears over my husband were still present, still real.

I was ordered to present our child for his first access visit the very next morning (Saturday). I had no car (my husband had taken my keys and the car remained at the marital house) and so a friend brought us to the exchange point.

My husband drove away with my child and that was the last time I saw them. My child was brutally murdered that day by his father. He wanted to take everything from me, and did. He made good on his threat to not let me leave with our child. And the court decision let that happen.

Context and post-separation abuse

Context:

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 many of us who provide family court support to women leaving abusive relationships observe that family court systems in Canada do not understand the ongoing impact of intimate partner abuse on women, many of whom are dealing with post-separation abuse, with the result that custody and access outcomes too often force women and children into unsafe – even lethal – contact with their abuser for many years.

My perspective is based on my work as a family law lawyer representing women who have experienced 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.

Certainly, there are differences in the potency, pervasiveness, perpetration, pattern and impact of the abuse that many women experience in their intimate relationships. There are incidents of violence that are relatively minor and that don't provoke fear. Violence in relationships is sometimes mutually perpetrated or occurs as an isolated incident. On the other hand, some violence is severe, injurious and controlling with pervasive impacts on the lives of victims. These different typologies or patterns of violence have different implications for custody and access.

Historic and/or ongoing experiences of severe, controlling, fear-provoking abuse should preclude the possibility of shared parenting. The environment for such an arrangement simply does not exist because the abuser is motivated by his need for ongoing power and control, not by concern for what is best for his children, and does not enter 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.

Parenting is about much more than getting kids to and from soccer practice. It involves decision-making about difficult issues, managing children through crises, negotiating with adolescents and teenagers who are testing the limits of their independence, and so on; all of which require parents to be able to communicate effectively, trust one another and present at least a somewhat common face to the children. In a situation of ongoing abuse, all of these points of contact are potential locations for abuse. Mothers are trapped in an ongoing relationship with their abuser, exposed to the threat and reality of

ongoing physical and emotional violence, rather than being free to move onto a life free from violence. Children become tools of their father in his ongoing quest to intimidate and harass their mother and continue to be exposed to the abuse of their mother by their father. The abuser may get what he wants – ongoing contact with and power over his former partner – but at the expense of everyone else in the family.

Post-separation violence

The violence that happens as a woman leaves her abuser and throughout the court process and beyond can have significant long-term consequences almost as serious as death. 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.

Post-separation abuse is often not anticipated by the woman, who may have taken months or even years to plan her escape. To now be confronted with ongoing abuse is

just too much – women become traumatized, which I will talk about in a few minutes, and some even return to their abuser, so they are dealing with a pattern of abuse they recognize and have learned how to manage.

Of course, the violence and abuse change when a couple separates because, most of the time, they no longer live under the same roof. However, changes in location and tactics do not mean the abuse is necessarily less harmful or dangerous.

Post-separation abuse often moves into the workplace in situations where the woman is employed outside the home. The abuser may enter the workplace to threaten or harm her or her coworkers or may interrupt her ability to work by phoning, texting or stalking her while she is at or going to or from work. Women working in isolated settings – alone in a retail store or as a cleaner in a hotel or doing shift work and relying on public transit to get to and from work, for instance – are especially vulnerable to ongoing abuse by their former partner.

An abuser may show up at family events even after separation, thrusting her family into the midst of the situation and possibly isolating her from her family if she is worried about their safety.

Or, he may interfere with his former partner's social life by showing up when she is out with friends and engaging in other behaviours that serve to isolate her from others.

Children are an obvious means through which an abuser can continue to harass and intimidate his partner after separation. He may show up unnecessarily at their school or activities, be highly emotional in front of them, talk inappropriately with them about the family court case or be verbally abusive to her in front of them. He may use manipulation, threats or bribery to try to get them to "take his side" or to turn them against their mother.

Unfortunately, interventions by police and child welfare agencies are often focused on the abuse children witness prior to the parents' separation. Separation is seen by many as the end of the violence or, minimally, as removing the immediate risk to the children. There is an expectation that, at this point, mothers can and should protect their children from exposure to further violence and that any exposure to ongoing violence is a failure on the part of the mother. And yet, when some mothers take steps to provide that protection for their children, they are accused of alienating the children from their father. If custody and access proceedings are underway, women's actions to protect their children may be seen by the court – with the encouragement of the abuser – as attempts to advantage their position in the case.

Stalking plays a large role in post-separation abuse. Just as partners know one another's friends and social activities, so do they know one another's daily habits and routines. An abuser can harass his former partner by showing up as she engages in her daily routines or he can engage in electronic stalking, either of which can leave a woman feeling as though she is never free from the gaze and control of her former partner. Imagine how frightening it is for a woman to discover her ex-partner in the vegetable aisle at her grocery store or next to her in a class at her gym or sliding into the row behind her and the kids at a movie theatre!

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. Her affect may be flattened, with the result that she appears disengaged or even uncaring about her children or the outcome of her case. She may make decisions that seem counterproductive to her best interests, simply because she cannot bear for

the case to continue on and on. 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 and she appears to be unreasonable, suspicious, withdrawn and/or hostile.

Some of the more common reactions to trauma for abuse survivors are:

- Re-experiencing the abuse, which includes spontaneous memories of the traumatic event, recurrent dreams related to it, flashbacks or other intense or prolonged psychological distress. A woman has little ability to control these reactions, which can make it difficult for her to function from day-to-day. She may have difficulty sleeping as well as concentrating, digesting and processing information because her nervous system is overwhelmed. Cognitive function and processing can be significantly affected. She may forget appointments or tasks you have asked her to do.
- Avoidance, in which a woman attempts to avoid distressing thoughts, feelings and body sensations or external reminders of the event. She may do this by trying to avoid anything that reminds her of the abuse. Telling her story to you will likely re-traumatize her, so she may try to avoid talking about it with you. Avoidance can manifest itself in missed appointments, the use of alcohol or substances, self-injurious behaviour, intentionally putting herself in unsafe situations, isolating herself, suicidal ideation etc.
- Negative thoughts and feelings, which could include self-blame, depression, loss of self-worth, estrangement from others, mistrust, shame, anger, fear, diminished interest in activities that may have once been pleasurable, an inability to recall significant aspects of event(s), and feeling like she does not have a future.
- Hyperarousal, which is marked by hypervigilance in which the nervous system is on high alert sometimes even long after the trauma has passed. In the hyper alert state, a woman may anticipate and mistakenly react to cues in her environment, thinking she is unsafe when she is safe and vice versa. A woman may be aggressive, quick to anger, have an overactive startle response, appear to fidget, be wary and watchful or have difficulty falling or staying asleep. In this

state, she may have flashbacks or nightmares that could affect her ability to make appropriate choices. She might struggle with understanding and interpreting her emotions.

- Hypo-arousal, which is when a woman's nervous system is shutdown in a "feign death" response to a constant threat in the environment. Her nervous system plays dead because other coping strategies have failed. She may have a flat affect and appear calm when she is not. Hypo-arousal can sometimes cause memory loss. A woman may describe paralysis, even numbness or a feeling of being separate from her body. She may have a sensation of delayed motor functioning. She may be confused and have difficulty concentrating. This can diminish her ability to sense emotions and experience emotional reactions to significant events. Also, cognitive processing can be a challenge as the ability to think clearly is impaired which can hinder appropriate assessment of dangerous situations.

Legal bullying

When an abuser uses the family law and court processes as a strategy to try to maintain his power and control over his former partner, it is called legal bullying. There are few protections in the family court process to stop him. Those that do exist are not always used by lawyers and judges, with the result that the process itself can be seen to encourage bullying.

Commonly, a legal bully may choose to represent himself in order to maintain a high level of contact with his former partner. Delaying the process by failing to file documents in a timely manner, refusing to follow court orders, bringing the woman back to court repeatedly on motions that have no chance of success, and making malicious reports about her to systems such as child protection and social assistance are some other common and effective tactics used by an abuser – none of which is barred by the family court process.

His overarching goal, which he often achieves, is to maintain his control over his partner, to intimidate her, to prevent her from moving on with her life and/or to wear her down to the point she agrees to return to him or to accept an inappropriate settlement.

As one woman described her experience:

[T]hat's what they [the abusers] do and they bully and they bully and they bully until you will break.

A woman's advocate had this to say:

It keeps coming back to the fact that, if the person who is abusing the system is not being held accountable, there are so many loopholes in the system that allow him to get away with it.

The very nature of family law makes it difficult to deal with legal bullying. There are many legitimate reasons to return to court over time to deal with changes in the circumstances of the family that could mean a variation to custody, access or support is in order. Because family law is so open-ended, it is easy for an abuser to find ways to manipulate the system and the process.

The culture of family court

When we look at what works and what doesn't for women and children fleeing abuse, we can't just look at the law (although we will look at it in a few minutes). We have to also look at the culture of the family court, including the way the process works, if we are to understand where there are barriers.

<u>Friendly parenting in family court</u>

The focus of the family court is on "friendly parenting." Women leaving abusive relationships often start from a position of having to convince judges and others involved in the family court process (court staff, mediators, duty counsel, parenting

coordinators, those conducting safety assessments and even women's own lawyers) that shared parenting (collaborative arrangements in which both parents are significantly and actively involved in raising their children) should not be the automatic or default arrangement.

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 and American 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.

Impact of a so-called gender-neutral framework

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.

It is also worth noting that 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 of the 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.

Idealized notions of families/fathers

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.

The concept that both parents have ongoing responsibilities towards their children is unquestionably a good one. However, 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.

Family court outcomes need to 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. At the same time, judges must recognize that men who engage in

abusive behaviour are very good at making promises to change, whether that is with respect to abuse or to their parenting. Judges need to consider detailed evidence about the family's past history rather than accepting at face value untested promises about the future.

Family court process

Family court is itself part of the problem. As one woman put it:

[You] walk into the family court and you feel strangled and you hit a brick wall and someone is stepping on your throat.[1]

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.

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

[1] Luke's Place, March 2008. Ibid. Focus group participant describing her experience with family court process.

believe that is what is in the best interests of their children, not because they are seeking revenge against their partner.

Lack of legal representation in family court

Then the judge says you have to call a motion. For the love of God, if I have to call another motion, I might as well bring my sleeping bag . . . what motion do I bring, what motion do I need for abuse, what motion do I need for this and that and the other thing? Like, honestly, I'll be on their doorstep forever.

I looked him [the judge] right in the eyes and said I'm not a lawyer. I'm not duty counsel. I'm not him. I am me and I don't understand this. I don't understand your language . . . Your Honour, but with all respect to you, have you ever tried to go and file information and tried to get information from the family information centre?

They [the women] are being asked to participate in a system that they don't understand and that ultimately works against them because they don't understand.

The number of litigants in family court who do not have lawyers has reached a critical state, with between 50 and 80% of family court cases now involving at least one party who is unrepresented. As some lawyers and judges have noted, 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."

The consequences of being unrepresented for women whose partners are abusive are significant. If their partner is also unrepresented or chooses to self-represent, there will have to be direct contact between the parties, which creates concerns for the woman's physical and emotional safety. Without a lawyer, she may not present important and relevant evidence or argue points of law, may not know she can call expert witnesses or have the financial resources to pay for them or may not know that she can bring an *ex parte* motion in very serious situations. She may enter mediation and, without a lawyer to review any agreements reached in this process, she has no guarantee that the outcome upholds her legal rights or that it will keep her and her children safe.

It is more likely a woman may concede on important legal issues because she does not have access to a lawyer to assist her in making these decisions or because she is exhausted from managing the legal process and her former partner's ongoing bullying. The legal issues are more complex and the appropriate solutions more nuanced in cases involving woman abuse. Access to generic legal information, no matter how good, is not good enough for women in this situation, yet it is all that many have.

Also important is the fact that even when a woman has a lawyer, that lawyer may have limited understanding of the unique issues presented by cases involving violence against women and, as a result, may provide inadequate representation. One of the dangers of lawyers without the necessary knowledge handling these cases is that they do not understand the importance of the abuse in custody and access cases and so do not gather the evidence needed to raise the issue. In fact, in some cases, lawyers actually discourage their clients from raising allegations of abuse in their pleadings. This creates a "siphoning effect" in which information about abuse and poor parenting is omitted at each stage of the legal process, starting with lawyer-client interviews and ending during the presentation of evidence in court. The result, of course, is that much of this important evidence is missing by the time decisions are being made.

Alternative dispute resolution

The ongoing focus on alternative dispute resolution (ADR), mediation in particular, compounds difficulties, as many women worry that they will be seen as uncooperative if they decline to participate.

In some family law cases, mediation can be better than going to court. Participants can have more control over their cases and the final settlement, and mediation can be faster, cheaper, and more private than a court case.

However, it is not appropriate for all kinds of disputes. In particular, it may not be appropriate if the woman's partner was abusive or violent, or tries to bully or scare her. If one partner has more power than the other (whether because of abuse, level of education, self-confidence, familiarity with Canadian laws, or ability to speak English), mediation does not necessarily offer all of the protections that may be available in a court proceeding.

Mediation is only likely to be successful if both participants can listen, be honest in their communications, and are willing to compromise in order to reach an agreement that is acceptable to both of them. It is not likely to be successful for a woman who has left an abusive partner, because he can use the process to continue to manipulate, intimidate, and control her to get what he wants.

By its very nature, ADR assumes the people have a relatively equal ability to negotiate about important issues. If a woman is threatened or intimidated by her abusive partner, she may be coerced into making agreements that do not ensure safety and freedom from control for herself and her children. Women often hope that this process will help them resolve issues with an abusive and controlling spouse more quickly and may reduce their demands in the hope of reaching an easier settlement, only to find that the abuser continues to exert control and make more demands. This can replicate the dynamics of abuse, and severely disadvantage the woman and her children.

The woman may still be experiencing threats and may still fear for her own safety and her children's safety, given past abuse, and/or ongoing abusive behaviour and threats of abuse. When a woman has been previously raped or assaulted, it can be very difficult for her to speak up about her needs or her fears in front of the abuser in the mediation process. Even in shuttle mediation (where the mediator meets with the parties in separate rooms and goes back and forth), if her reports or requests are communicated to the abuser, she may be placed at risk of further abuse or harassment.

BREAK 15 minutes

Custody and access

As I am sure you all know, custody and access is almost always the most important issue for women with children who are leaving an abusive relationship and, despite considerable progress in the areas of law reform and case law, it remains highly problematic for women with children who leave abusive partners.

In Ontario, decisions about custody and access are made using what is called the best interests of the child test, which is set out in section 24 of the *Children's Law Reform Act.* There are a number of factors the court is required to consider, including the child's views and preferences, the child's emotional ties to anyone seeking custody and access, stability, the status quo, parenting plans presented by each parent and the ability of each person applying for custody of or access to the child to act as a parent.

In a related section, the legislation says that when the court assesses the ability of each person to act as a parent, it is to consider whether the person has at any time committed violence or abuse against his or her spouse; a parent of the child to whom the application relates; a member of the person's household; or any child.

Acts of self defence or to protect another person – presumably a child – are not to be considered acts of violence or abuse.

Unlike some other jurisdictions, Canada has no formal presumption in favour of joint custody or shared parenting. Nonetheless, women often experience their custody case as though they have to justify their reluctance to co-parent with an abuser. Frontline workers report that the women they support through family court routinely feel pressured to accept a joint custody/shared parenting outcome even in the face of documented, serious, and ongoing post-separation abuse by their former partner.

Problematic as the issue of woman abuse is in custody deliberations, it is even more so in access determinations, because courts almost always want fathers to spend time with their kids, even when this may put the mother's safety in jeopardy or when the parents are unable to communicate effectively because of a power imbalance.

The focus on the right of the abuser to have contact and the onus on the woman to prove continuing and or additional harm appears to be grounded less in concerns about the welfare of children than in concerns about so-called parental rights. Once partner abuse (and or irresponsible parenting) is established, the onus ought to be on the parent with primary responsibility for the abuse or irresponsible parenting to demonstrate how they can ensure that contact will be safe and beneficial for the children.

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.

It is not uncommon for an abuser to use his access time as a means to continue to control and intimidate the woman. He may use a number of tactics: peppering the children with questions about their mother, her friends and her activities; speaking badly about the mother to the children; trying to bribe or intimidate the children into living with him; engaging in verbal, emotional, or physical abuse towards the mother during access exchanges; failing to return the children on time; threatening not to return the children; making false allegations about the mother to various systems such as child protection; taking the mother back to court repeatedly for no good reason, and so on.[2]

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.

[2] Ibid, p. 53 – 57.

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.

Best practices

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* are the most detailed and progressive in Canada. The best interests of the child test (*Family Law Act* SBC 2011C.25, section 37(2)) speaks directly to family violence and section 38 details the nine factors to be considered when assessing the impact of family violence. These include a consideration of the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member, 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 need 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 (section 62). This legislation should be used as a guide to all provinces and territories as well as to the federal government in making reforms to family law legislation.

A recent review of the early jurisprudence under this new legislation raises some concerns that it is not always being interpreted in the spirit in which it was written, but it does provide a formal legislative structure within which violence within the family can be considered properly in custody and access cases.

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.

A number of provincial family mediation associations offer domestic violence training to mediators. And, the Office of the Children's Lawyer in Canada and child protection agencies are working to increase awareness on the part of those doing work for them.

Luke's Place, which provides family court legal services and supports to women leaving abusive relationships, has developed an online course for family lawyers wanting to

learn more about violence against women, and the lawyers get professional development credits for taking it.

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.

In the meantime, there are some promising practices in this area.

One example is work by Legal Aid Ontario (LAO), which has changed the financial eligibility criteria for its certificate program to allow clients who have experienced or are experiencing domestic violence to qualify at a higher income level than other clients. LAO provides up to 6 hours of free independent legal advice to parties engaged in mediation who qualify financially (using the same relaxed eligibility test). The domestic violence awareness training described above has increased the awareness of those determining who can get a legal aid certificate with the result that fewer survivors of domestic violence are being turned down.

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. Not a replacement for legal representation, Family Court Support Workers are able to assist their clients navigate the court system, help them gather evidence of the abuse they have experienced, prepare them for and debrief with them after meetings with duty counsel and court appearances, assist with safety planning and provide emotional

support as well as refer them to other court and community resources as appropriate and available.

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.