

CHILDREN EXPOSED TO DOMESTIC VIOLENCE: REDUCING HARM AND PREVENTING TRAGEDIES

September 20, 2013

PANEL: Collaboration with the Justice System: Key strategies for risk management and protecting children and adult victims

Strategies to address the policy and practice gaps between criminal and family courts

Background:

Before I can talk about strategies to address gaps between criminal and family court, I need to take just a couple of minutes to identify what I think those gaps are.

First and foremost, women do not understand the fact that they are entering two distinct systems if they are involved in both family and criminal court. They may be unwilling participants in the criminal process – they may not want their partner charged or they may have been charged themselves. As a result, they may be resistant or even hostile to that process. This affects their ability to give effective testimony, which affects the sympathy of the court, which affects outcomes like bail. Bail affects ongoing or new arrangements for the children.

Second, women (like all normal people) see their experience wholistically. They have to “go to court.” They have to “give evidence.” They see “the” courtroom; not a family court courtroom and a criminal court courtroom. They see “the” judge – not a family court judge and a criminal court judge. They assume (who wouldn’t) that the information they provide in one process is shared with the other process. They assume (again, who wouldn’t) that the approach taken by both systems is similar; that the goals are the same, etc.

Imagine the surprise that lies in store for these women as they discover how wrong they are!

They will find out, among other things:

- Criminal court is about the guilt or acquittal of the accused, not about them or their children
- Family court wants to help the family move forward post-separation and is only minimally concerned with the wrong-doings of either parent
- The standards of proof are different
- Unless she has been charged, the woman is not a party in criminal court, whereas she is in family court. As a result, she does not have access to legal aid

or legal representation in criminal court, and the Crown Attorney is NOT her lawyer

- There are no “punishments” in family court as there are in criminal court
- The outcomes in the two courts can conflict
- The two systems do not communicate.

The impact of all of this on a woman who is navigating both systems is immense. She may be confused about what information has been provided to which court, what role she is supposed to play, the roles of others such as judges, lawyers and the Crown, and she may be frustrated by orders from two courts that conflict with one another. Her abuser may use the criminal proceedings to slow down the family court proceedings or may try to “bargain” with her between the two. For example, he may try to persuade her to recant her statement in criminal court in exchange for a “promise” from him that he will not pursue custody of the children in family court.

The result can be that the risk of ongoing harm for both the woman and the children remains high.

Strategies:

Criminal court:

- Bail safety programs: While not available in all court jurisdictions, this program has proven very helpful in cases of woman abuse. The primary focus is to gather information at the bail stage that can contribute to the safety of the victim through an appropriate outcome at the bail hearing.
- Domestic violence training for JPs similar to that developed by the National Judicial Institute for judges should be made available so they understand the unique dynamics involved in VAW cases and can take those into account when making bail-related decisions
- Use of not-for-profit bail programs as in Toronto needs to be more carefully regulated to ensure they have DV training and understand the unique issues to be considered in those cases
- Should be a requirement that JPs have as part of the evidence in a bail hearing any outstanding family court documents or orders related to custody, access or restraining orders
- Justice on Target initiatives
- Privacy rights of the accused notwithstanding, and I am the first to say how important those rights are, we must find a way that information can be shared in a fulsome and timely manner between the two courts. It is too easy for an abuser to manipulate both systems to his advantage, and this can be made easier when no information is shared between the two

- When a breach of a family court restraining order is brought into the criminal system – which should be starting to happen now that a breach is a chargeable criminal offence – it needs to be treated as seriously as any other criminal charge and not dismissed or treated lightly because it is seen as a “family court matter.”

Family court:

- Proper understanding of the reality of post-separation violence and the impact this has on children’s emotional and physical safety as well as the safety of women and their ability to engage effectively with the court system
- Aggressive use of new restraining order provisions
- Effective management of legal bullying, including:
 - Case management
 - Use of Family Law Rules and Courts of Justice Act to shut down legal bullying
- Less emphasis on ADR
- Effective use of the best interests of the child test provisions relating to family violence:
 - Proper standard of proof
 - Understanding that children’s best interests cannot be ensured when their primary caregiver is unsafe and/or fearful
- **Legal representation for all parties in family court!!**