WOMAN ABUSE COUNCIL OF TORONTO
Annual General Meeting Keynote
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Crafting effective solutions for women leaving abusive relationships: a look at family and criminal law

Introduction

Currently, women who leave abusive relationships face many barriers to achieving successful outcomes, whether they are involved in family or criminal court or both.

We need to find ways to craft effective solutions to these barriers. I am going to talk to you tonight about one barrier – the ongoing use of shared parenting or joint custody orders in custody cases involving VAW – and one possible solution – increased use of restorative justice in criminal cases.

Shared parenting

The concepts of shared parenting and joint/shared custody arise frequently in family court cases, even cases involving violence against women. These concepts are premised on "friendly parenting," which does not understand the reality of ongoing post-separation violence and the serious challenges it creates for the safety of women and their children, who are forced into close and unsafe – even lethal -- contact with their abuser for many years.

So, why, when it is so obvious to those of us working with women that shared parenting and joint custody don't work in cases involving woman abuse, do courts seem to think that it does?

Well, there are a number of reasons, and I am going to look briefly at some of them tonight.

Lack of an intersectional, feminist analysis of violence within families

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 claims to be gender neutral, 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.

Nowhere is this more obvious than when looking at the issue of violence within the

family. Often called domestic violence by those setting and implementing policy and programming, violence within the family is, in fact, highly gendered, and would more appropriately be labelled as a form of violence against women.

If we continue to misidentify the key underlying issues of a social problem, our solutions will be wrong. The issue of custody and access in families where there has been violence against women is one example of this.

We need, rather than using a so-called gender neutral framework for our discussions about custody and access to use an intersectional feminist analysis. This would allow us to understand violence within families as existing on a continuum, much as has been described by Michael Johnson, with couples who engage in mean, disrespectful treatment of one another but where no one gets physically hurt and where neither partner is in fear of the other at one end (to use Johnson's term – situational couple violence) and with other couples where there is a high risk of serious physical injury and where one partner lives in fear of the other at the other end (these are what Johnson calls relationships of coercive controlling violence). Somewhere between the two sit situations of violent resistance, which are couples where the victim of coercive controlling violence engages in resistant or self-defensive actions that may involve physical force or violence.

If we look at family violence this way, the numbers show us clearly that while women may be as likely as men to engage in situational couple violence, it is almost exclusively men who engage in coerce controlling violence and, not surprisingly, more often women who engage in violent resistance.

The mistake the family court often makes is to group all of these kinds of bad relationships together and provide a one size fits all response when, in fact, each kind of relationship requires a different response.

An intersectional, feminist framework would look at the gendered reality of violence in families as well as at cultural issues that shape both the experience of abuse and the limits to opportunities for victims to leave abusive relationships.

The role of the men's/fathers' rights movement in shaping the discourse on custody and access in Canada and in disappearing women's equality rights and interests

We don't have time this evening for a review of the history of the so-called fathers' rights movement in Canada, but it is important to understand that this movement has done a great deal of harm in convincing the general public as well as family court professionals that all children would benefit from laws that make shared parenting/custody automatic.

These men have developed a powerful lobby over the past 20+ years. They have mounted an emotional media campaign and have argued that family court discriminate against fathers by systematically granting custody to mothers. They contend that the family court system is biased in favour of mothers and have positioned themselves as the victims in that system.

While not as vociferous as it was in the late 90s and early 2000s, the fathers'/men's rights lobby continues to have an impact on the development of public policy and on the environment and culture of family law and family court.

Lack of understanding of dynamic of VAW post-separation violence

One of the most serious and troubling issues for many women who have left an abusive relationship when they are dealing with the family court system is the misapprehension held by many professionals in that system that the abuse ends at the time of separation. In fact, as we well know, the violence that women experience in the process of leaving their abuser, throughout the court process and beyond has significant long-term consequences as serious as death.

The tactics of abuse are different and the locations where the abuse takes place are different – of course, because the abuser no longer has access to her in the privacy of the family home – but what women experience is an unrelenting focus that often goes well beyond what happened during the relationship.

Because post-separation abuse is poorly understood, when women report their concerns they often find that they are not taken seriously or that they are seen as attempting to circumvent the legal system. And, as I noted above, the abuser or others may even make an allegation of parental alienation against the mother.

Idealized notions of families/fathers

Much is made by those who favour shared parenting 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 – I have some in my very own family -- and hope for continued and meaningful movement towards increased equality for family and home responsibilities between the sexes.

However, family court outcomes need to reflect and acknowledge reality and not individual exceptions or hopes for future change. Custody decisions must take account of the fact that women continue to hold most of the responsibility for child rearing and general household management and tasks in most Canadian families, both before and after separation. While there is no doubt that fathers

spend more time with their children now than, say, when I was growing up, even in 2006, only 11% of fathers were participating in the paid parental leave program under the Employment Insurance Act.

Public policy with respect to custody and access must promote women's equality within the family and in society at large.

In principle, the concept that both parents have ongoing responsibilities towards their children is unquestionably a good one. Many women struggle on a daily basis to convince their spouses that they do in fact have parenting responsibilities with respect to their children, both during the marriage and after separation or divorce.

Most mothers would welcome increased parental involvement from fathers after a divorce, on the condition that it does not threaten their children's well-being or security. However, 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 many women to ensure that their children have what they need in the way of clothing, books, toys and such when they are in the care of their father.

Lack of understanding of the relationship between mothers' safety and the best interests of the child test

The ability to parent well is rooted in the safety of the parent. An unsafe parent cannot parent as well as a safe parent. This would appear to be self-evident; yet ongoing orders for joint custody and shared parenting by definition 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 is motivated by his need for power and control rather than the children's best interests, and he 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 are often seen as selfish, and we know there is nothing worse than a selfish mother.

Family court 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. For a woman whose former partner continues to abuse her after they separate, there is no clear delineation between before and after; women in this situation can only “move on” when the systemic response acknowledges the ongoing safety issues and puts measures in place to limit them.

The focus on early settlement, on compromise by both parties, on ADR, further exacerbate the challenges for women experiencing ongoing abuse by their former partners and, in some cases, lead women to concede to arrangements like joint custody or even 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.

Let’s just remember that most 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.

Lack of legal representation in family court

No single issue arises more often as a serious concern among women experiencing violence and frontline violence against women service providers than the lack of access to legal representation in family court.

While recent LAO initiatives to increase access to legal representation in VAW cases are important and positive, the fact is that more than 50% of women are dealing with their family court case without a lawyer. When their partner is abusive and possibly unrepresented as well, this creates a perfect storm of a situation.

Conclusion

Shared parenting is a wonderful concept. It can work in families where violence is not a factor, where both parents have strong communication skills and where they are both able to put the interests of their children ahead of their own feelings of hurt or disappointment at the end of the relationship. But even in those situations, shared parenting takes a lot of work. And, even in those situations, it is not the approach that works for all children.

Almost by definition, the environment required to make shared parenting even a possibility does not exist for women leaving abusive partners and their children:

- the abuser is motivated by his need for ongoing power and control, not by concern for what is best for his children
- the abuser does not enter the process – either litigation or ADR – operating 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. After all, 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 requires parents to be able to communicate effectively, trust one another and present a common face to the children

In reality, a shared parenting regime in the context of violence against women means:

- mothers are trapped in an ongoing relationship with their abuser rather than being free to move on to a life free from violence
- mothers remain exposed to the threat and reality of ongoing physical violence,
- children become tools of their father in his ongoing quest to intimidate and harass their mother
- children continue to be exposed to the abuse of their mother by their father

In no-one's world is this in the best interests of anyone, particularly children.

Restorative Justice

Feminists working in the VAW movement – including me and probably at least some of you – have long been resistant to the concept of using restorative justice as a response to woman abuse. We have had many, good reasons for this – it can be seen to minimize the seriousness of what has happened, the "consequences" to the offender seem less severe, it requires the woman to engage with her abuser, and so on.

However, I want to challenge us tonight to reconsider restorative justice. After all, it is not as though the criminal system is working.

Overarching questions we need to ask ourselves about the present criminal response to VAW are:

- does it hold abusers accountable in any real way
- does it give abusers a real opportunity to change
- does it give women autonomy

- does it keep women safe

I think we all know the answer to all those questions is no.

We need to look at alternatives that are built on reality:

- Women don't want their partners charged
- Women stay in or return to partners
- Women get charged when they shouldn't
- criminal process long and expensive
- no indication that men learn new behaviours through criminalization
- racialized issues
- class issues

I think restorative justice done properly can offer us some options that the law and order response of criminal law cannot.

Leigh Goodmark, an American feminist lawyer working in the area of VAW, speaks positively about restorative justice. She described the present criminal vs potential restorative justice response to VAW in an interesting way when she spoke at the National DV Conference in Toronto last spring:

- equalizing the harm analogy

As she says, restorative justice would never work in every case. There are some situations where the only way to ensure safety for victims and others is to incarcerate perpetrators. These include many of the headline abusers of women – Paul Bernardo, Russell Williams and the like – but also some who don't make the headlines – partners of some of your clients, for instance.

But for many other situations, restorative justice offers the opportunity to repair harms rather than punish crimes. It creates the possibility of change for people who have done bad things. It can allow those to whom harm has been done the chance to drive what happens, to have their experience validated, to heal and move on. When done properly, it ensures abuser accountability and victim safety. And, it has the potential to encompass a much broader range of VAW than the criminal law currently does.

As Leigh Goodmark has written:

"Restorative justice honours the humanity of both the person subjected to abuse and her partner and prioritizes change over punishment as the goal of intervention. RJ

refuses to damn those who abuse, expressing disapproval of the act but hope for and trust in the person who commits it and is willing to try to change, unless and until that person proves unworthy of hope and trust. Without such an approach, people who abuse may curtail some of their violence to avoid further criminal involvement, but they are unlikely to fundamentally change their behaviour towards their partners."

What would it take to do it well? Here are a few thoughts:

1. It has to be led and developed by feminists using an intersectional gendered analysis and understanding of VAW
2. It has to be voluntary on the part of the woman
3. It has to meet the woman's needs
4. It has to keep the woman safe
5. Forgiveness by the woman of the abuser cannot be a requirement
6. It has to be public
7. Outcomes have send a strong anti-abuse message to communities; in other words, it can't look like the abuser is "getting away with it"

Has restorative justice ever worked well in VAW cases? Of course, some would say no and some would say yes. Let's look at two scenarios:

1. US DV model of woman talking to an abuser who is not her partner.
2. Dalhousie story:

- The RJ process allowed the university to look at the broader issue of misogyny and sexism and not just the incident that made the headlines, while also holding those specific men accountable. Imagine what could happen in a community-based RJ process about a DV case. The individual would be held accountable but the larger community could talk about issues that create a climate where abuse thrives and could discuss ways forward to address those issues.
- The women involved in the Dal RJ process said it allowed them to speak for themselves instead of being spoken about and for. We all know how often women involved as victim/witnesses in the criminal process feel silenced – despite the best efforts of often well-intentioned players in that system. Perhaps with RJ, women would be able to reclaim their voices, decide how to tell their stories, become re-empowered.

Listen to these excerpts from the Participants' Statement that forms part of the Dalhousie RJ Report and try to think of these words in the context of DV:

These uncomfortable, difficult and complicated conversations have required us to delve deeper into societal and cultural issues of sexism, homophobia, and discrimination and how they erode the foundations of supportive and healthy communities. We did not create this issues, but we have come to understand our parts in perpetuating and tolerating them within our relationships and community.

We [the women] were clear from the beginning that we were not looking to have our classmates expelled as 13 angry men who understood no more than they did the day the posts were uncovered. Nor did we want simply to forgive and forget.

The men began making apologies in December and through the restorative process we have accepted those apologies. More than that, though, we have seen the men learn why they are sorry and what that requires of them.

We learned that saying sorry is too easy. Being sorry, we have come to see, is much harder.

We are now moving forward through a next steps initiative. This initiative builds on the outcomes from restorative justice to identify priorities and to focus on positive cultural changes within our faculty.

Conclusion

RJ offers much food for thought. It would never replace a criminal response, but surely it is worth exploring as a possible approach in some situations.

Legal responses to VAW remain, at best, inadequate. At worst, they perpetuate the abuse and leave women and children exposed ongoing risk of harm, including lethal harm. Tonight we have looked at just two aspects of the legal response . . .