When Law Does Not Equal Justice: Family law and violence against women

Promoting Access to Justice for Survivors (PATHS) Conference – Keynote Address

Monday November 9, 9:00 – 10:00 a.m.

Good morning! I am really happy to be with all of you today, and thank PATHS for all the work it took to turn this in-person conference into an online event. Having just done something similar in Ontario, I know it is not easy. Much as I would have liked to have seen all of you in person, I appreciate that technology allows us to gather at least electronically.

What a crazy nine months it has been! A friend and colleague recently sent me a definition for a new word, that certainly sums up how I have been feeling.

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Coronacoaster: noun: the ups and downs of a pandemic. One day you're loving your bubble, doing work outs, baking banana bread and going for walks and the next you're crying, drinking gin for breakfast and missing people you don't even like."

I imagine some of you can relate to that.

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More seriously, as all of us have seen in our work, the public health pandemic has led to increased levels of violence against women – the shadow pandemic – as well as to new challenges for women in and leaving abusive relationships.

While I am not going to focus specifically on the pandemic in my talk this morning, I want to acknowledge its impact on pretty much every aspect of the work we do and on the women we serve: an impact that has yet to be recognized by governments focused almost entirely on managing the corona virus pandemic even when some of those policies and procotols have a significant and negative impact on the shadow pandemic of violence against women.

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I am going to talk for about 45 minutes, after which we will have time for some questions. You will type them into the app, and then JoAnne and Crystal will read them out so we can all hear them and I will do my best to answer them.

First, let's look at some of the ways the family law system does not address gender-based violence within the family appropriately. After that, I will talk about some recent improvements, which can serve as models for ongoing work to improve the system's response to families dealing with violence issues.

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(Just a quick word about language: as I will talk about a bit later, recent changes to the federal *Divorce Act* and to some provincial family law legislation replaces the words custody and access with the term parenting time, so I am using that new language in my talk this morning.)

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 parenting arrangements. Outcomes of family court decisions 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, liberal and unsupervised access. The environment for such an arrangement to work well and safely for everyone 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.

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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 parenting 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. When intimate partner violence is looked at in this differential way, it immediately becomes apparent that most survivors 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.

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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 parenting outcomes that force them into close and unsafe – even lethal – contact with their abuser for many years.

Yet an unwritten shared parenting presumption has existed in Canada for many years, 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 this morning – it is women and children who pay the price; often a high one. And, while we are beginning to see some improvements to the written laws, how well those changes will translate into better outcomes for women and children remains to be seen.

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The violence that happens as a woman leaves her abuser and throughout the court process and beyond can have significant long-term impacts. Research across Canada has well documented that women are at the highest risk of lethality from the time their partner perceives they are planning to leave, through the point of separation and for the year immediately following.

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.

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The combination of past and ongoing abuse leads to trauma for many women, which can create further challenges during family court proceedings. Whether she has difficulty concentrating on her case; listening to and retaining information; accepting strategies that are presented to her; being agreeable (because there is nothing worse than a disagreeable woman); getting to appointments or completing paperwork on time, she will be viewed in a negative light, particularly if her abuser – as is common – is charming and gracious to those he encounters, even as he is bullying her throughout the process.

Until lawyers and court process itself brings a trauma-informed approach to working with survivors of gender-based violence within the family, women will continue to be seriously disadvantaged – whatever family law process they are using.

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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 shared parenting time or decision-making 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 shared parenting time 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 parenting 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 parenting orders that do not require them to collaborate with their abuser, 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.

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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 partner that they do, in fact, have parenting responsibilities, both during the relationships 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 <u>always</u> 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.

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This is a huge problem and, like everything else I am talking about this morning, it is a gendered problem: women are more likely to be unrepresented in family court proceedings because they do not have enough money to pay for a lawyer, whereas men are more likely to choose to represent themselves because they want to confront their former partner directly. 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."

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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 their children's time with their father to ensure that their safety and well-being is not jeopardized by the abuser. When they have concerns, they have great difficulty being taken seriously. If they deny time because of their concerns, they run the risk that the abuser will take them back to court for breaching the order.

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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 shared parenting place women with abusive ex-partners in unsafe situations; often for many years. Shared parenting or decision-making requires 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, parenting 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.

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Okay, that's enough dreary news. There is some good news to report.

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In 2019, the federal government passed Bill C-78, which made significant changes to the *Divorce Act,* most of them related to how post-separation parenting decisions are made.

The *Divorce Act*, as the name indicates, is the law that governs people seeking a divorce, which means they have to have been married. It applies to everyone in Canada and addresses most of the issues that can arise when a marriage ends: arrangements for children, child and spousal support, property division and divorce. It does not have the authority to grant restraining/protection orders.

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Provinces and territories also have family laws that govern the above issues, other than divorce and that also can grant restraining or protection orders as well as orders for exclusive possession of the matrimonial home. These laws apply to anyone who lives in that province or territory, including married people if they are not seeking a divorce.

The other thing to know in order to understand the importance of the *Divorce Act* changes is that all decisions related to children's care, whether made using federal or provincial/territorial laws, are made using what is called the best interests of the child test.

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The recent changes to the *Divorce Act,* which come into effect on March 1, 2021 include:

- Change in language from custody and access to parenting time/decision-making responsibility
- A list of factors that courts must consider when applying the best interests of the child test; the present *Divorce Act* simply says courts must apply the test but does not provide any criteria
- Inclusion of a family violence in the list of BIC factors
- A detailed and expansive definition of family violence that includes:
  - Coercive control
  - Fear
  - Pattern of behaviour
  - Non-physical kinds of abuse
  - No requirement that the behaviour constitute a criminal offence for it to be considered family violence
- A strong list of factors for the court to consider when determining whether there has been family violence

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The changes to the *Divorce Act* are not perfect, but they are significantly positive. If you are interested in learning more about the new provisions, I have provided a link to a webinar on this topic. I have also provided you with a link to a Brief endorsed by many women's equality organization that was submitted during the Bill C-78 process that contains a number of recommendations (none of which were adopted) that would have made the legislation even stronger.

So, now we have a much-improved *Divorce Act*, but what about people who aren't married. Well, some provinces have family laws that are very similar to the revised DA. Others, including Saskatchewan and Ontario, are in the process of revising provincial law – the *Children's Law Act/Children's Law Reform Act* – so they align with the *Divorce Act.* Hopefully, all provinces and territories will follow suit, so women have access to an equal family law regime regardless of whether or not they are married to the father of their children and where they live in Canada.

It's a good beginning, but more is needed. Here are a few examples of work we still need to do.

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Work we still need to do

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As you well know, not all women disclose the history of abuse when they meet with a lawyer. Luke's Place conducted research for the federal Department of Justice in 2018 into the value of screening tools and concluded, based on a review of 86 screening tools in use in a number of jurisdictions around the world, that when a standardized screening tools is used universally (ie by all lawyers with all clients), accurate disclosures of family violence increase.

This means the lawyer has the information they need to do their job: they are aware of safety issues, they know what processes may be appropriate (or not) for their client, and they know what legal outcomes to recommend to their client. The client can feel more confident and comfortable in her working relationship with her lawyer.

The federal government is now working on the development of a family violence identification tool and training and resources for family law lawyers to support use of that tool that should be available sometime in 2021.

That research also clearly established that, for screening tools to work well, those who use them must be trained, which takes us to the next area for more work.

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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 parenting 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.

In Saskatchewan, PATHS has developed a two-day training for lawyers to increase their understanding and awareness of family violence.

These are all good models that can be built on to increase the capacity of those who apply and interpret laws relating to children.

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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.

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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.

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One thing I have learned from the pandemic is that when there is a big enough public crisis, systems can make changes quickly.

At this point, we have no way of knowing how long we will be living as we are now or what will come next. Certainly, the huge increase in COVID-19 cases in the early fall is an indication that we may not be returning to life as we knew it any time soon.

It does seem clear, though, that courts have taken to remote operations like a duck to water and will likely move ahead to make their pandemic practices permanent. While there is no doubt that there are some benefits to this, I worry that moving too quickly to online proceedings may create new challenges and safety concerns for women fleeing abuse. If all filings and hearings become virtual, there will be access to justice issues for folks in rural and remote communities, people who are not confident using computers or who don't have reliable internet access, people who don't speak English or French.

While there are certainly safety issues for women when attending court in person, at least there are other people, often including court security, at hand. A woman whose partner is stalking her electronically or has placed spyware on her computer will be very vulnerable if everything relating to her family law case – discussions with her lawyer, court documents, hearings, etc. – is taking place through that computer.

I am also concerned about how long families can manage without supervised access services operating, with only cases the court deems "urgent" being dealt with in a timely manner, with the current focus on parents finding ways to work out their differences on their own. These are all situations rife with opportunity for an abuser who is determined to ensure that his former partner knows that he is still in charge.

While it may be too early to know exactly where we are heading with respect to life in and after a pandemic of this seriousness, it is not too late to know that we need to ensure that the voices and needs of survivors of gender-based violence are heard at every policy table at every level of government.

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The family law situation of women and children fleeing abuse is bleak.

But, as has been the case with every aspect of gender-based violence, when those of us with lived experience of abuse, with experience and expertise working inside the systems that so oppress and harm women and their children, and with passion and belief that change is possible, then that change happens.

I believe we have that passion, belief and expertise: we use it every day in our work, whether that is providing frontline support to women and their kids, managing shelters and other safe spaces for women and kids or working for change at the systemic level. Collectively, we are a force to be reckoned with.

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 come to understand the gendered reality of violence within the family as well as of parenting in many families.

Parenting 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.

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Questions?