

LearningNetwork Brief 01

IT SHOULDN'T BE THIS HARD: Family law, family court and violence against women and children

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Pamela Cross is a feminist lawyer who works as a consultant in the area of women's equality, violence against women and the law. Her present work is primarily in the area of legal training and education. Working with Luke's Place Support and Resource Centre for Women, she leads the provincial training initiative for Family Court Support Workers. She is also a member of the teaching faculty with the National Judicial Institute and provides online legal training to community frontline workers with Springtide Resources. Pamela has just completed a project with the Law Commission of Ontario developing a framework for teaching about violence against women in law schools.

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IT SHOULDN'T BE THIS HARD: Family law, family court and violence against women

Women who leave abusive partners and turn to family law and family court face many challenges. In our work at Luke's Place Support and Resource Centre for Women and Children, we believe that these challenges must be understood from a feminist intersectional perspective if we are to find solutions to them. Our frontline work and systemic research have led us to identify the following as some of the key challenges facing women in family court and requiring a gender-based, intersectional analysis as the framework for discussing solutions.

Key challenges

Lack of adequate legal representation

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.

Largely because of a lack of funding for legal aid certificates in family law, more than 50% of women entering the family court process do so without a lawyer. Even for those who manage to qualify financially, there is no guarantee that the legal issue they are dealing with will meet LAO's criteria or that they will be able to find a lawyer who will accept their certificate.

Of particular concern to women who have left abusive partners and who are unrepresented is the phenomenon of the abuser who chooses to self-represent so he can engage in legal bullying: using the court system itself as the weapon in his ongoing intimidation and harassment of his partner.

Custody and access

Despite considerable progress in the areas of law reform and case law, custody and access remain highly problematic for women with children who leave abusive partners.

Women often experience their custody case as though they have to justify their reluctance to co-parent with an abuser. Frontline workers report that many of 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.

Ontario's requirement for judges to consider family violence as part of the best interests of the child test has created an important and potentially effective tool to ensure that proper consideration is given to this issue. However, many judges, lawyers and other professionals continue to underestimate the impact of woman abuse on children, with the result that joint custody orders or orders permitting extensive, unsupervised access are not uncommon, even in cases involving woman abuse.

Where the access order is liberal and unsupervised, many mothers must spend years monitoring access to ensure that the well-being of their children is not jeopardized by the abuser. 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.

Women also worry about unsupervised exchanges of the children for access. Since these unsupervised exchanges

often take place at her home or his, there are generally no witnesses other than the children, which makes this an ideal opportunity for her abuser to engage in physical or psychological violence.

Family court process

Family court process can be as problematic as the law for women leaving abusive relationships. A process that encourages friendly litigation as well as friendly parenting has deadly consequences for women whose partners are persistently abusive.

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.

Family court processes do not adequately acknowledge the unique needs of women who have been abused. As a result, processes themselves place women at risk, court orders often do not address the very real safety issues for women and children, and the enforcement (or lack thereof) of those orders further perpetuates the problem.

Post-separation violence

One of the most serious and troubling issues for many women who have left an abusive relationship is the misapprehension held by many professionals in the family court system that the abuse ends at the time of separation. In fact, post-separation violence – any tactics used by an abuser that stop a woman from leaving, retaliate for her departure or force her return – can have

significant long-term consequences and can even result in 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. These proceedings can take on a deadly tone for families where there has been a history of woman abuse.

The ongoing fear created by post-separation violence leads to trauma, which can create challenges for a woman who is involved with family court proceedings. Her coping systems may sabotage her, 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.

Many women fear that they will not be believed because the abusive partner can be very charming and convincing. Abusive men threaten that they will obtain custody of the children if the woman does not give up her financial rights. This can be a deadly combination for women, who may assume their partner’s version of events will be given more credibility than their own, and who will do anything to make sure they maintain custody of their children.

Mediation

The ongoing focus on mediation compounds difficulties, as many women worry that they will be seen as uncooperative if they decline to participate.

Mediation is often not appropriate if the woman’s partner was abusive or violent. If one partner has more power than the other, 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.

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.

The diversity of women and families
Women enter the family court process from a wide and diverse range of circumstances. Women may leave an abusive relationship at any age, from very young to very old. They live in rural communities, small towns, and large urban centres. They speak many languages and, for many, English is not one of them. Women live with a variety of abilities, disabilities, strengths, challenges. They have different skin colours and different legal statuses in Canada. Some women are part of cultures that live with the history of Canada's genocide of Aboriginal peoples. Some women come from deeply religious communities. Some women come from cultures with very different definitions of family, gender roles and violence which can affect the kinds of violence they experience and the societal and legal responses to those kinds of violence. Many women are poor, while others are financially comfortable or even wealthy.

This reality is poorly understood by the law and the legal systems and processes, with the result that legal solutions are often of the one-size-fits-all variety. These solutions are seldom appropriate and are often set aside, ignored, or breached by the parties,

leaving women and children once again at risk of ongoing violence and abuse.

The legal issues facing women who have been abused are also diverse. For many women, family law is but one of the legal issues she must deal with. It is not uncommon for a woman to also be dealing with immigration and refugee, child protection and or criminal law at the same time as she is moving through the family court process. Each of these systems alone is complicated to negotiate for a woman who is experiencing ongoing fear of violence from her abuser and whose abuser may be attempting to sabotage her efforts to move on. In combination, they can become overwhelming.

Addressing the challenges

Working collaboratively within the VAW sector and across sectors, using an intersectional feminist analysis of the issues, we can overcome these challenges and make family law and family court a safe place for women and their children to find appropriate and effective resolutions to their family law disputes that allow them to move on to lives free from violence.

For a more detailed exploration and analysis of the issues described briefly above and for recommended strategies for change, please read our complete research paper, which can be found at www.lukesplace.ca